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# Religious v. Secular Ideologies and Sex Education: A Response to Professors Cahn and Carbone

Vivian E. Hamilton

*William & Mary Law School*, [vhamilton@wm.edu](mailto:vhamilton@wm.edu)

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# RELIGIOUS V. SECULAR IDEOLOGIES AND SEX EDUCATION: A RESPONSE TO PROFESSORS CAHN AND CARBONE

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Vivian E. Hamilton\*

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## INTRODUCTION

*Deep Purple: Religious Shades of Family Law* is part of an important project in which Professors Naomi Cahn and June Carbone expose and explain the diverging ideologies underlying some of the country's thorniest contemporary social issues—those involving families, young people, and sex.<sup>1</sup> In *Deep Purple*, Professors Cahn and Carbone focus on religion's influence on public debate and public policy. They implicitly embrace legal secularism<sup>2</sup> and denounce religiously grounded social policy and public discourse. They offer a persuasive critique of abstinence-only sexual education, which they view as an example of a misguided policy rooted in religious ideology. And they demon-

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\* Associate Professor of Law, College of William and Mary, Marshall-Wythe School of Law. J.D., Harvard Law School, B.A., Yale College. My most sincere thanks to Naomi Cahn for participating in the conference, to Naomi Cahn and June Carbone both for their thought-provoking contribution to this Symposium Issue, and to the members of the WEST VIRGINIA LAW REVIEW, for their excellent work in coordinating, editing, and shepherding the Issue to publication.

<sup>1</sup> 110 W. VA. L. REV. 459 (2007) [hereinafter *Deep Purple*]; Naomi Cahn & June Carbone, *Red Families v. Blue Families*, available at <http://ssrn.com/abstract=1008544> (August 16, 2007) [hereinafter *Red Families*]. In their larger project, Professors Cahn and Carbone explore the relationship between religion, moral values, and law. They examine how the distinct ideological commitments of the “red states” (those that voted for George W. Bush in the presidential election of 2004) and the “blue states” (those states that voted for John Kerry in 2004) play out in the regulation of families, sex, and sexuality. *Id.* at 6-7.

<sup>2</sup> “Legal secularism” is a term used by Noah Feldman to describe the belief that there ought to be strict separation between government and religion. NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM – AND WHAT WE SHOULD DO ABOUT IT* 182-85 (2005).

strate that policymakers' and citizens' continued commitment to abstinence-only education—despite evidence of its ineffectiveness—reveals the shortcomings of a religiously based approach.<sup>3</sup>

Part I of this Essay briefly summarizes Cahn and Carbone's article and suggests that it raises, but doesn't fully resolve, two questions. Part II discusses the first: is there any place for religiously grounded advocacy or decision-making in public life? Cahn and Carbone answer no, but the question is a complex one that has prompted much scholarly debate. Part III addresses the second: which way forward? Cahn and Carbone begin to sketch possible approaches; this Essay examines them and suggests another (admittedly prosaic) alternative—a more patient reliance on the workings of both federalism and the political process.<sup>4</sup>

### I. *DEEP PURPLE*—AND THE QUESTIONS IT RAISES

*Deep Purple* begins by exploring the ideological rift that increasingly divides the country. It canvases interdisciplinary research that gives insight on how and why the worldviews of the religiously devout / traditionalists / political conservatives differ dramatically from those of the less devout / modernists / political liberals.<sup>5</sup> This research sheds light on both cultural and biological underpinnings of various individual orientations (e.g., conservative and liberal, devout and less observant) and provides a fuller understanding of these divergent perspectives.<sup>6</sup> It helps to explain why the arguments of one group are frequently inaccessible or irrelevant to the other.<sup>7</sup> Cahn and Carbone argue that religiously grounded advocacy, which tends to proceed in absolutist terms, is especially difficult to approach when all participants do not share the same

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<sup>3</sup> See *infra* notes 54-68 and accompanying text.

<sup>4</sup> Cahn and Carbone discuss the development of different systems of family law and the polarization of family policy among the states in *Red Families*. They note that, "[i]f each system proceeded on its own terms, within political and legal units that shared a common cultural framework, we would predict continued evolution, but not necessarily irreconcilable conflicts . . ." *Red Families*, *supra* note 1, at 60-61. Their article then considers the role of the judiciary in managing the "intrusion of polarized political discourse into core issues of family law." *Id.* at 61. They do not, however, address the possibilities for legislatively driven law reform and thus do not seem to hold out much hope for such reform.

<sup>5</sup> *Deep Purple*, *supra* note 1, at 465-72.

<sup>6</sup> *Id.* Recent research, for example, not only documents the relationship between regular church attendance and political affiliation, but also suggests that heritable genetic factors may make some individuals more likely to identify with conservative or liberal political attitudes. See, e.g., *id.* at 465-68; Pew Forum on Religion & Public Life Surveys, *Religion and the 2006 Elections*, available at <http://pewforum.org/docs/index.php?DocID=174> (last visited October 3, 2007) (chronicling church attendance and party affiliation in 2002, 2004, and 2006 elections); John R. Alford, Carolyn L. Funk, & John R. Hibbing, *Are Political Orientations Genetically Transmitted?*, 99 AM. POL. SCI. REV. 153, 158-61 (2005) (concluding that genetics has a stronger influence on ideology than does environment).

<sup>7</sup> *Deep Purple*, *supra* note 1, at 469-71.

background ideology.<sup>8</sup> They conclude that advancing religious justifications for policies renders public discourse unproductive at best.

Cahn and Carbone describe different positions likely to be staked out by individuals of distinct orientations on various social policies (immigration, the death penalty, etc.).<sup>9</sup> They note that varying orientations—especially devout and secular—tend to correspond with different political allegiances. For example, evangelical Christians comprised fifty-one percent of voters in states that voted Republican in 2004, but only twenty-two percent of voters in states that voted Democratic.<sup>10</sup>

Cahn and Carbone choose teen sexual education as a specific policy through which to develop their analysis. They examine the research evaluating the relative effectiveness of abstinence-only education (which tends to be favored by the deeply religious) versus comprehensive sexual education programs. This research is striking; a growing number of studies have shown comprehensive education to be effective at reducing teen pregnancy and sexually transmitted disease, whereas abstinence-only education generally is not.<sup>11</sup>

Finally, Cahn and Carbone highlight the difficulty of finding middle ground on what is essentially an “either-or” issue (i.e., a sexual education program will teach either abstinence-only, or abstinence-plus-more).<sup>12</sup> This, along with the challenges of productive public discourse between starkly different groups, highlights the intransigence associated with the issue. The unequal outcomes of abstinence-only versus comprehensive sexual education and the corresponding implications for the future of the nation’s young people bring home its importance.

In considering all of this, *Deep Purple* begins to wrestle with two difficult and controversial questions—one more theoretical, the other more pragmatic. First, is there any place for religiously informed political decision-making or religious discourse in public life? Professors Cahn and Carbone implicitly endorse the view that religion is a matter of private conviction to be kept separate from politics and public policy. Others argue, however, that divorcing religion from public life may be neither feasible nor altogether desirable, and that some middle ground is more appropriate.<sup>13</sup>

Second, given the seemingly dim prospects for productive discourse or political compromise on the issue of teen sexual education, which way forward

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<sup>8</sup> *Id.* at 465-67.

<sup>9</sup> *Id.* at 467-71.

<sup>10</sup> *Id.* at 472. The families of red and blue states also differ: families in red states tend to be more religious, to be poorer, to marry and bear children earlier, and to divorce at rates higher than those in blue states. *Id.* at 479-82.

<sup>11</sup> See *infra* notes 55-57 and accompanying text.

<sup>12</sup> *Deep Purple*, *supra* note 1, at 493-94.

<sup>13</sup> See generally KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995). Others still argue that religion fully belongs, in all of its glory, in public discourse. See, e.g., Michael Walzer, *Drawing the Line: Religion and Politics*, 1999 UTAH L. REV. 619 (1999).

appears most promising? Professors Cahn and Carbone resist solutions that call for compromising on the issue, as it is one that has far-reaching consequences for the future of the nation's young people.<sup>14</sup> But it is possible that what is called for is not compromise at all, but patience. Educating the citizenry about teen sexual education programs may lead to increased pressure on federal legislators to change national policy. Similarly, states may experiment with different programs and policies, and—in time—uniformity of practice may naturally emerge as effective programs are copied and ineffective programs abandoned. Taking this approach risks more teen births and sexually transmitted diseases in the short term, but rushing to impose a more uniform (albeit “better”) policy requiring comprehensive sex education risks political reactions whose consequences might reverberate over the longer term. This Essay considers these questions in turn.

## II. RELIGION, DISCOURSE, AND POLICY

Cahn and Carbone suggest that religious individuals whose faith dominates their identity may be so committed to their religious institutions that they are less able to form commitments to other institutions important to democratic participation.<sup>15</sup> In other words, for the deeply devout, allegiance to religious institutions may overshadow allegiance to political institutions, and their religious identity supersedes (or perhaps entirely dictates) their political identity. Religious ideology, not independent judgment, governs their social beliefs and practices—and their voting decisions.<sup>16</sup> While they do not say so explicitly, Cahn and Carbone suggest that, because of this, too much religion is itself undemocratic.

Cahn and Carbone do not suggest that, for these reasons, the deeply religious ought not participate in public life. What they do seem to emphasize (and to regret) is that while religion may have the power to encourage responsible and compassionate life choices, it can also polarize, creating deep, seemingly unbridgeable divides between adherents and non-adherents.

Cahn and Carbone argue that religiously grounded argument in public discourse is not just polarizing, but unproductive.<sup>17</sup> Religious adherents who advance religious bases for public policy “state a conclusion in terms of an appeal to authority that brooks no discussion or dissent.”<sup>18</sup> In other words, religiously based argument claims absolute moral authority and access to some basic truth denied to (or rejected by) non-believers (or those who believe in a different way). Religious arguments, moreover, may be inaccessible—indeed unintelli-

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<sup>14</sup> *Deep Purple*, *supra* note 1, at 494, 498.

<sup>15</sup> *Id.* at 497.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 495.

<sup>18</sup> *Id.*

gible—to those who do not share the same or similar religious comprehensive worldview. Instead of persuading (or even informing) listeners, then, this sort of speech instead risks alienating them and stopping all conversation.<sup>19</sup> It is this argument, related to but distinct from the first, to which I will turn.

Whether religion belongs in public discourse has been a hotly-contested issue. Constitutional scholars and political theorists have weighed in, and many have rejected bright-line or too-facile conclusions. Furthermore, arguments that Cahn and Carbone criticize as detrimental to public discourse are deemed by others to be evidence of an inclusive and well-functioning liberal democracy.

But Cahn and Carbone find broad support for their position among commentators. Constitutional scholar Bill Marshall, for instance, has stated that “religion and religious conviction are purely private matters that have no role or place in the nation's political process.”<sup>20</sup> And John Rawls argued that all citizens deserve to have policies explained to them in terms broadly understandable by the public at large:

[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational . . . [T]he ideal of citizenship [thus] imposes . . . the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason.<sup>21</sup>

Rawls and other scholars have thus argued that citizens and lawmakers engaged in public discussion and deliberation should employ “public reason”—reasons and modes of argument that are generally accessible to the public at large. These include “(a) the general features of all reason, such as rules of inference and evidence, and (b) generally shared beliefs, common-sense reasoning, and the noncontroversial methods of science.”<sup>22</sup>

Public reasons therefore exclude advocacy premised on comprehensive religious doctrine or philosophical moral theory.<sup>23</sup> Examples of nonpublic reasons include arguments based on utilitarian principles (considering pleasure and pain to be the only values relevant to decision-making) or those premised on religious belief in a sacred text authoritatively interpreted by church leaders as

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<sup>19</sup> GREENAWALT, *supra* note 13, at 157.

<sup>20</sup> William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 844 (1993).

<sup>21</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 217 (1993).

<sup>22</sup> Lawrence B. Solum, *Novel Public Reasons*, 29 LOY. L.A. L.REV. 1459 (1996).

<sup>23</sup> *Id.*

the source of binding moral obligation.<sup>24</sup> Professor Lawrence Solum notes that both the utilitarian and the theological premises are nonpublic reasons (despite the former being secular and the latter religious) “because neither can be accepted as a reasonable ground for action by the public at large, which is understood as the body of citizens who are in full possession of the powers of human reason and who nevertheless believe in a variety of reasonable comprehensive doctrines.”<sup>25</sup>

Those who embrace the ideal of public reason urge its adoption as a ground rule for public advocacy and lawmaking, but they do not go so far as to suggest imposing legal restrictions on public debate (nor do Professors Cahn or Carbone).<sup>26</sup> Instead, the theory of public reason is an ideal of democratic citizenship grounded in political morality.<sup>27</sup> It is primarily “a counsel of self-restraint.”<sup>28</sup>

The debate around teen sexual education convincingly illustrates the way in which advocacy premised on a religious comprehensive view can hamper public debate. Cahn and Carbone present those who currently advocate comprehensive sexual education as committed to that position because it is supported by social facts. But these advocates might embrace abstinence-only programs if new facts came to light—if, for example, empirical data showed that abstinence-only was effective.<sup>29</sup> But because the empirical data shows that abstinence-only does not work, their position is that we need to abandon it in favor of a comprehensive program. Such a program furthers the ultimate goal of reducing teen pregnancy and sexually transmitted disease.

But to those who favor abstinence-only education, the empirical data is irrelevant. Their justification for this position is grounded in a morality based on traditional Christian teachings: premarital abstinence is itself part of a moral life. To them, comprehensive sexual education is analogous to instructing one’s children not to skateboard, but then providing them with a helmet so that they may more safely engage in the prohibited behavior. And they reject sending this type of inconsistent message to teens. They view the ultimate goal of the policy as reducing teen sex and ensuring the unity of sex, procreation, and marriage.<sup>30</sup>

Religious adherents’ emphasis on moral justifications stymies those who tend to reach policy decisions by considering empirical or social facts.

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> RAWLS, *supra* note 21, at 215-16; Solum, *supra* note 22, at 1466.

<sup>27</sup> RAWLS, *supra* note 21, at 216; Solum, *supra* note 22, at 1466.

<sup>28</sup> Kent Greenawalt, *Natural Law and Public Reasons*, 47 VILL. L. REV. 531, 534 (2002).

<sup>29</sup> *Deep Purple*, *supra* note 1, at 484-85, 491.

<sup>30</sup> Cahn and Carbone note that “absolutist approaches place an emphasis on consistency. If non-marital sex is wrong, then the ineffectiveness of the programs in delaying sexuality does not itself justify a shift to programs that appear to sanction non-marital sexuality by providing greater access to contraception.” *Id.* at 486.

And neither is able to make headway in their attempts to persuade, nor are they able to locate common ground. Cahn and Carbone's example persuasively pinpoints the political impasses and fruitless dialogue that may result from religiously grounded advocacy or justifications for policy. But does that necessarily mean that religion should be excised from public discourse?

Some who advocate the ideal of public reason nonetheless limit its scope; others reject the ideal altogether. For instance, Professor Kent Greenawalt suggests that citizens acting in a non-public capacity may make judgments on whatever grounds they find persuasive and need not exercise self-restraint in their advocacy.<sup>31</sup> But the public role of legislators imposes upon them obligations different from those of private citizens, circumscribing their behavior—but only to a degree. Greenawalt allows that legislators, as the voice of their constituents, ought to be able to take into account their constituents' religiously grounded convictions when making political determinations.<sup>32</sup> He also allows that it may be appropriate for legislators to give weight to their own comprehensive views.<sup>33</sup> Because of their roles as public actors, however, legislators ought to be able to give public reasons for their political positions (even those largely based on their own or their constituents' religious comprehensive views), for the reasons discussed earlier.<sup>34</sup> Greenawalt acknowledges that this may result in some discrepancies between legislators' actual bases for judgment and the bases on which they advocate in public discourse.<sup>35</sup> He reasons, however, that it is not necessary for public advocacy to reflect all bases of decision. And sometimes it is indeed proper for legislators to publicly acknowledge the religious or other comprehensive grounds that have influenced a determination.<sup>36</sup> He concludes that "[o]n specific issues, it may be appropriate for legislators to declare that they are affected by underlying religious grounds, but they should make their arguments in other terms."<sup>37</sup>

Rawls also limits the scope of the ideal of public reason. He restricts his consideration of the situations in which public reason ought to apply to cases involving "constitutional essentials" or "questions of basic justice."<sup>38</sup> He does not explicitly consider whether it ought to also apply to "lesser" policy questions.

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<sup>31</sup> GREENAWALT, *supra* note 13, at 160.

<sup>32</sup> *Id.* at 161. At the same time, Professor Greenawalt suggests that legislators should weigh more heavily constituent positions grounded in public reason given that it is preferable to base decisions on such reasons. *Id.*

<sup>33</sup> *Id.* at 162.

<sup>34</sup> *Id.* at 162-64.

<sup>35</sup> *Id.* at 163-64.

<sup>36</sup> *Id.* at 158, 163.

<sup>37</sup> *Id.* at 158.

<sup>38</sup> RAWLS, *supra* note 21, at 214.

Other scholars, of course, resist altogether the ideal of public reason and the notion that it imposes duties of self-restraint. They argue that liberal democracy should not seek to limit the means by which citizens reach judgments between competing policies, and freedom should include the right to advocate on religious grounds. Political philosopher Michael Walzer suggests that public reason is itself undemocratic, as "there is in fact no way of excluding absolutist convictions and passions without excluding the people who hold them. So it is better to welcome their expression and hope that the pressure of democratic argument will ensure that absolutism is not the last word."<sup>39</sup> He argues that democratic politics can—and ought to—permit religious and ideological groups to mobilize whatever passion they can.<sup>40</sup> The important distinction, he claims, is not between religious and secular advocacy, but instead between advocacy and state-sponsored coercion. What ought to be "separated is probably not best described as religion and politics. We [instead] separate religion from state power . . . ."<sup>41</sup> While democratic ideals demand that advocacy—including religiously based advocacy—be free and open to all, "coercion belongs only to the state and has to be denied to ecclesiastical authorities and charismatic religious leaders . . . ."<sup>42</sup>

Irrespective of their positions on the ideal of public reason, there is broad consensus among scholars that religious ideology ought not be the sole justification for any policy. Walzer draws a line between religious advocacy or influence and religious coercion. He relies on constitutional limits to prevent, for example, powerful religious groups from publicly imposing religious catechism.<sup>43</sup> Along similar lines, Greenawalt argues that even if a religious comprehensive view is the predominant reason for legislation in a legislator's own mind, it is important that the same position also be supportable by public reason.<sup>44</sup>

Allowing that religious advocacy will continue to exist in the public square and that religious views will continue to influence policy, we are left to consider the constitutional safeguard against excessive government entanglement in religion. Establishment Clause jurisprudence is murky, and identifying its precise contours is well beyond the scope of this Essay. Yet it requires, if not an impregnable wall between church and state,<sup>45</sup> at least that government "minimize the extent to which it either encourages or discourages religious be-

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<sup>39</sup> Walzer, *supra* note 13, at 637.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 635.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> GREENAWALT, *supra* note 13, at 161-64.

<sup>45</sup> Modern Establishment Clause jurisprudence began with the Supreme Court's ruling in *Everson v. Board of Education*, 330 U.S. 1 (1947). In *Everson*, the Court articulated a separationist paradigm for Establishment Clause jurisprudence: "[T]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." *Id.* at 18.

lief or disbelief, practice or nonpractice, observance or nonobservance.”<sup>46</sup> Even for those who favor an approach that is more accommodating of religion’s role in society, “the Establishment Clause . . . at a minimum . . . guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”<sup>47</sup>

If anything is clear, it is that religion alone, or the desire to advance religion or religious ideology, cannot justify social policy. Yet, as will be discussed in Part III, Cahn and Carbone make a strong argument that abstinence-only education does nothing more than give effect to religiously derived ideology. Nonetheless, it is rare that those who advocate a certain policy (even one stemming primarily from religious conviction) will be unable to demonstrate some non-religious or non-moral justifications for it.<sup>48</sup> Indeed, the Supreme Court found that abstinence-only education furthered secular purposes and upheld the Adolescent Family Life Act (“AFLA”), which includes funding for programs aimed at preventing teen sexual activity.<sup>49</sup> Chief Justice Rehnquist, writing for the majority in the five-to-four decision, found that the law “was motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy and parenthood.”<sup>50</sup> (The Court’s conclusion becomes more questionable when viewed in light of the empirical data that has since emerged.)<sup>51</sup>

<sup>46</sup> Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990).

<sup>47</sup> *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). Constitutional scholar Steven Gey warns, however, that with recent changes in the Supreme Court (i.e., the confirmations of Justices Roberts and Alito),

[w]e may be on the cusp of a root-and-branch change in Establishment Clause jurisprudence, which will fundamentally alter the landscape of church/state relations and produce a constitutional regime that specifically permits the government to endorse the views of the religious majority and use government programs to advance the majority’s sectarian goals.

Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 1 (2006).

<sup>48</sup> A state statute criminalizing adult, consensual, private, same-sex sodomy was a recent and relatively unusual exception. The Supreme Court, in *Lawrence v. Texas*, 539 U.S. 558 (2003), found that only moral justifications could explain the prohibition, rendering it impermissible under the Fourteenth Amendment.

<sup>49</sup> *Bowen v. Kendrick*, 487 U.S. 589 (1988). AFLA explicitly permits states to award grants to both religious and nonreligious organizations. Adolescent Family Life Act, 42 U.S.C. §§ 300z(a)(1)-300z(a)(10) (2000). The Court held that the law treated religious and secular groups equally, and noted that the First Amendment allows religious institutions to participate in publicly sponsored social programs. *Id.* at 609. Welfare reform legislation passed by Congress in 1996 also provides funding to programs containing abstinence-only messages aimed at recipients of public assistance. See generally, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 912, 110 Stat. 2105 (1996); 42 U.S.C. § 710(b)(2) (1998).

<sup>50</sup> *Bowen*, 487 U.S. at 602. Justice Blackmun wrote a strongly worded dissent, joined by Justices Brennan, Marshall, and Stevens. He concluded that the Act subsidized religious teaching and advanced religion, arguing that “[g]overnment funds are paying for religious organizations to

But Cahn and Carbone argue that constitutional considerations constitute only one aspect of the issue, and not the most important. They suggest that the larger issue is the intertwining of cultural and religious views that, while not shared by a majority of Americans, are nonetheless embodied in policy.<sup>52</sup> Their argument thus raises a second question. Assuming that we are operating within the realm of the constitutionally permissible but that current policy is nonetheless objectionable, what practical strategies are most likely to work? The next Part examines Cahn and Carbone's approach to this question and suggests another possible approach.

### III. ABSTINENCE-ONLY VS. COMPREHENSIVE SEX EDUCATION: WHICH WAY FORWARD?

A growing body of research strongly suggests that comprehensive sexual education is more effective than abstinence-only education at preventing teen pregnancy and sexually transmitted disease. Comprehensive sexual education programs (which can include teaching the benefits of abstinence) are more effective at reducing teen pregnancy and sexually transmitted diseases, and no less effective than abstinence-only programs at discouraging early sexual activity.<sup>53</sup>

Yet abstinence-only education comports with many religions' (especially fundamentalist denominations') general condemnation of nonmarital sex,<sup>54</sup> and Cahn and Carbone note that those who are deeply religious are more likely to support abstinence-only sexual education than those who are not. Recent studies, however, demonstrate that abstinence-only education is not only less effective than comprehensive sexual education, but altogether ineffective.<sup>55</sup> A 2007 Congressionally-authorized study and recent studies by the American Psychological Association and the Center for Disease Control all concluded that abstinence-only programs have limited or no effect on the rate of teen sexual

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teach and counsel impressionable adolescents on a highly sensitive subject of considerable religious significance." *Id.* at 635 (Blackmun, J., dissenting).

<sup>51</sup> See *infra* notes 55-57 and accompanying text.

<sup>52</sup> *Deep Purple*, *supra* note 1, at 491.

<sup>53</sup> *Id.* at 485-86.

<sup>54</sup> *Id.* at 477. Cahn and Carbone note that most religions embrace the unity of sex, procreation, and marriage.

<sup>55</sup> *Id.* at 484-85. The authors discuss various studies, including an April 2007 review of federally funded abstinence programs authorized by Congress, a 2005 report issued by the American Psychological Association, and a 2002 study conducted by the Center for Disease Control. These studies found abstinence-only programs to have limited or no effectiveness at reducing teen sexual activity. See *id.* at 484-86. Moreover, abstinence-only education appears to be correlated to reduced use of birth control and increased risk of sexually transmitted diseases. *Id.*

activity.<sup>56</sup> Instead, abstinence-only programs correlate with lower rates of teen contraceptive use and increased risk of sexually transmitted diseases.<sup>57</sup>

The case against abstinence-only education is a convincing one. Given its ineffectiveness, it becomes difficult to imagine non-religious reasons for its continued support. Indeed, this had led some commentators to find more support for the argument that publicly funded abstinence-only education programs serve only to advance a religious viewpoint and, thus, violate the First Amendment's Establishment Clause.<sup>58</sup> But for our purposes, we assume no forthcoming change in constitutional doctrine. And Cahn and Carbone do not make a constitutional argument; instead, they argue that abstinence-only education represents nothing more than a religious viewpoint, does nothing to improve the lives of adolescents, and is contrary to the preferences of an overwhelming majority of Americans.

Yet given that those who do support abstinence-only programs appear unlikely to waver in their support anytime soon, what might be done? Cahn and Carbone reject any solution involving compromising on the substantive issue: "Compromise, which might involve teaching . . . only the abstinence education component [of sex education, is] concession."<sup>59</sup>

They imagine, instead, that we might seek "potential points of convergence." They suggest the possibility of "using the language of faith to support the need for comprehensive sex education," or "comprehensive sex education advocated by faith communities."<sup>60</sup> In short, they consider adapting rhetoric in order to make comprehensive sex education more acceptable to those who currently oppose it. Thus, they surmise that "[c]ompromising on language—using the language of faith—to advocate [comprehensive sexual education] policies may provide leverage . . . [But c]ompromising on the law—allowing abstinence only education because it is at least a form of sex education—serves no one."<sup>61</sup> They perceive no real room for compromise. And there are, of course, genuine questions about whether reframing the debate can result in widespread convergence or induce abstinence-only adherents to cross over to the comprehensive sexual education side. (It is also noteworthy that Cahn and Carbone envision introducing religion back into the discussion, albeit in a different way; this suggests that there may indeed be some value to a dialogue that goes beyond public reason, at least in a context where one side is already communicating in this fashion.)

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<sup>56</sup> *Id.* at 485.

<sup>57</sup> *Id.* at 485-86.

<sup>58</sup> See, e.g., James McGrath, *Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional*, 38 U.S.F. L. REV. 665 (2004); Julie Jones, *Money, Sex, and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education*, 35 CREIGHTON L. REV. 1075 (2002).

<sup>59</sup> *Deep Purple*, *supra* note 1, at 494.

<sup>60</sup> *Id.* at 492.

<sup>61</sup> *Id.* at 498.

Given the binary nature of this issue (abstinence vs. more-than-just-abstinence), the strongly held views on either side, and the resulting impasse, it may be necessary to ask whether, from a policymaking perspective, there is any way to bridge the gap. But is national consensus really necessary? The central importance of this issue to the future of young people makes many impatient for reversal of what appears to be improvident policy. And from that perspective, it is hard to accept that change sometimes happens much more slowly than we would like.

But slow doesn't mean static. The most promising option may simply be one to which Cahn and Carbone refer but do not develop:<sup>62</sup> defer to the workings of the political process generally and our system of federalism in particular.

Federal legislation currently supports abstinence education.<sup>63</sup> Even if the majority of citizens favoring comprehensive sexual education are not sufficiently mobilized to have that legislation changed or invalidated today, they should receive information that (1) public monies are going to supporting abstinence-only education on a national scale; and (2) abstinence-only education is ineffective. If the political process works as it should, they will then pressure their representatives to withdraw support for the legislation, and failing that, they may vote those representatives out of office (or at least note strikes against them).

What Professors Cahn and Carbone chronicle might be, in one sense, a perfect example of horizontal federalism in action. Different states are engaged in different social experiments. Those experiments certainly may not unduly interfere with individual constitutional rights, but short of that, this very sort of state-by-state experimentation is at the core of our national system. It has frequently been noted that the states "serve as laboratories for the development of new social, economic, and political ideas."<sup>64</sup>

In the area of divorce, for example, fault-based regimes led to widespread collusion and perjury.<sup>65</sup> California was the first state to implement a pure no-fault divorce regime, and eventually every state added no-fault or similar grounds to existing statutes or replaced their divorce regimes with a pure no-fault regime.<sup>66</sup> And a few decades from now, Massachusetts may be to gay marriage what California has been to no-fault divorce.<sup>67</sup>

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<sup>62</sup> See *supra* note 4.

<sup>63</sup> See *supra* notes 49-51 and accompanying text.

<sup>64</sup> Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 787-88 (1982) (O'Connor, J., concurring in part and dissenting in part); New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). See also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 315 (3d ed. 2006).

<sup>65</sup> See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1507 (2000).

<sup>66</sup> See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 4-6 (1987). A number of states had provisions in their statutes

Today, some states may enact systems of social regulation that tend to reflect the religiously derived values of their citizens. Others may enact systems of social regulation that tend to reflect different values. Open exchanges of information might eventually illustrate convincingly to the citizens of a given state which of the existing policies enjoy success. Eventually, perhaps more states will adopt the policy that better reflects the values of their citizenry; we can hope that it will also be one that works.

### CONCLUSION

Given that the empirical evidence demonstrates that abstinence-only education does not work, *Deep Purple* persuasively criticizes the continued commitment to it as driven by ideology rather than the goal of protecting young people.<sup>68</sup> Professors Cahn and Carbone have eloquently laid out the policy dilemma facing the nation. But while the high stakes involved emerge clearly, the way forward is less clear.

The dialogue between entrenched groups that they propose may be difficult, and any progress is likely to be slow. And there is no doubt that allowing federalism to run its course poses some risk: legal secularists might view the risk as the nation's young people getting married and having babies too young (not reaching their own full potential, educational and otherwise), and religious conservatives might view the risk as those same young people having too much meaningless sex and living morally bankrupt lives.

Yet it is indeed possible that a combined approach—new approaches to dialogue (perhaps a dialogue that Cahn and Carbone envision could accommodate both public reasons and religious elements) as well as both federal and state-based advocacy—may ultimately result in national consensus that will in the end reflect the right course for American society. It may take time, but there appears to be no other realistic course of action.

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that predated the California Act and that permitted divorce based on separation or incompatibility grounds. *Id.* at 6 n.22.

<sup>67</sup> Massachusetts is the first (and so far only) state to allow same-sex couples to marry. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding the exclusion of same-sex couples from marriage to be "incompatible with the [Massachusetts] constitutional principles of respect for individual autonomy and equality under law."); see also *Largess v. Supreme Judicial Court for the State of Mass.*, 373 F.3d 219 (1st Cir. 2004) (refusing to enjoin the implementation of *Goodridge*).

<sup>68</sup> *Deep Purple*, *supra* note 1, at 486.