

Abstinence-Only Education and Minority Teenagers: The Importance of Race in a Question of Constitutionality

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The teenage population in America reflects the increasingly diverse racial and ethnic make-up of the United States.¹ Against the backdrop of this steadily growing minority youth population, the U.S. government has implemented drastic changes in the content of sex education classes in public schools. A significant portion of schools now teach abstinence from sexual relations as the only way to avoid pregnancy and sexually transmitted infections (STIs).² Controversy over this new focus on “abstinence-only” education is rife. Supporters believe that it represents a novel public health approach, while detractors are concerned that it restricts needed health information, often provides medically inaccurate instruction, and infuses prejudice, stereotypes, and religious morals into public schools. Dorothy Roberts, a noted scholar on race and reproductive health, challenges Americans to make “race take center stage in our deliberations about reproductive health policy.”³ Racial equality

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1. See U.S. Census Bureau, Resident Population by Race, Hispanic Origin, and Age: 2000 to 2005, <http://www.census.gov/compendia/statab/tables/07s0014.xls> (last visited Jan. 24, 2007) (charting the percentage of 14 to 17 year olds who are minorities at 37.9% and the percentage of minorities of all ages at 32.5%).

2. See Cynthia Dailard, *Sex Education: Politicians, Parents, Teachers and Teens*, GUTTMACHER REP. ON PUB. POL’Y, February 2001, at 9, available at <http://www.guttmacher.org/pubs/tgr/04/1/gr040109.pdf> (noting that over one-third of all school districts now require abstinence-only education; GUTTMACHER INST., *FACTS ON SEX EDUCATION IN THE UNITED STATES* (2006), available at http://www.guttmacher.org/pubs/fb_sexEd2006.pdf (noting that one out of every four teachers is now required to teach abstinence-only education—a dramatic change since 1988, when only one out of every 50 teachers taught abstinence-only education).

3. DOROTHY ROBERTS, *KILLING THE BLACK BODY* 311 (1997). Advocates for women of color have a long history of using scholarship and community organizing to bring attention to the ways in which reproductive justice in communities of color differs from that of the mainstream reproductive rights movement. See Jael Silliman et al., *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* 1-18 (2004) (providing an overview of

may initially seem far removed from the debate on sex education policy, but the following analysis seeks to meet Roberts' challenge by illustrating how "race" politics intersect with "gender" politics and bear upon the constitutionality of government funding for abstinence-only education.

The federal government spent \$178 million on abstinence-only education in 2006.⁴ Funding for the abstinence-only initiative began as a trickle in the 1980s, with an average of \$4 million annually until 1996.⁵ In 1996, funding levels began to increase substantially and the Bush Administration further bolstered allocations in 2002.⁶ Prior to this tidal wave of federal funding, teachers who promoted abstinence usually did so within the context of comprehensive sex education programs.⁷ Such comprehensive programs encourage young people to avoid sexual activity but also provide them with information on contraceptive use should they be unable or choose not to adhere to the goal of abstinence. These programs do not fall under the definition of abstinence-only education. Rather, abstinence-only programs prohibit any instruction on contraceptive use and teach abstinence as the "only certain way" of avoiding teen pregnancy and STIs.⁸

This Article explores the disproportionate impact of abstinence-only programs on students from communities of color. Part I situates the emergence of abstinence-only funding within the broader context of the race and gender politics that have influenced American welfare policy since the 1960s. Part II traces the flow of abstinence-only funding to schools with large minority populations and explains why a race-based perspective should inform future legal challenges to this funding. The subsequent Parts of the Article focus on African-American and Latino teenagers, who are the largest minority groups in

scholarship and activism among women of color on reproductive health); Byllye Y. Avery, *Breathing Life into Ourselves: The Evolution of the National Black Women's Health Project United States of America*, in *THE BLACK WOMEN'S HEALTH BOOK: SPEAKING FOR OURSELVES* 4, 4-10 (Evelyn C. White ed., 1994) (describing the need for and genesis of the National Black Women's Health Project); JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* 1-6 (2003) (explaining that the experiences and goals of women of color regarding reproductive rights have differed dramatically from those envisioned by the mainstream reproductive rights movement); ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* 202-21 (1981) (documenting the ways in which the mainstream reproductive rights movement failed to recognize the history of reproductive coercion in communities of color and thus failed to gain the support of women of color).

4. SIECUS, *A Brief History of Abstinence-Only-Until-Marriage Funding*, <http://www.nonewmoney.org/history.html> (last visited Jan. 26, 2007); SIECUS, *Spending for Abstinence-Only-Until-Marriage Programs (1982-2007)*, <http://www.nonewmoney.org/historyChart.html> (last visited Jan. 26, 2007).

5. Legal Momentum, *An Overview of Federal Abstinence-Only Funding* 3 (2007), available at <http://www.legalmomentum.org/legalmomentum/publications/OverviewofAbs.pdf>.

6. *Id.*

7. See Cynthia Dailard, *Sex Education: Politicians, Parents, Teachers and Teens*, GUTTMACHER REP. ON PUB. POL'Y, Feb. 2001, at 9, 10, available at <http://www.guttmacher.org/pubs/tgr/04/1/gr040109.pdf>.

8. 42 U.S.C.A. § 710 (LexisNexis 2006).

the United States and for whom large-scale demographic and social science research tends to be most comprehensive. However, teenagers from other communities of color undoubtedly share similar experiences.

Part III argues that abstinence-only programs violate the First Amendment by obstructing free speech due to viewpoint discrimination and violation of the unconstitutional conditions doctrine. This argument documents the ways in which abstinence-only programs harm minority students by increasing their risk of STIs and HIV/AIDS, impeding their access to contraceptive information and abortion services, and promoting gender stereotypes—harms that violate constitutionally protected rights. Part IV explores discrimination against gay and lesbian students in abstinence-only programs and explains how this discrimination violates the Equal Protection Clause, especially in the case of gay and lesbian students who are racial and ethnic minorities. Part V applies the Establishment Clause of the First Amendment to abstinence-only programs and underscores the damage that programs not based upon a sound public health approach inflict on students from low-income communities of color.

Part VI concludes with an overview of the benefits of comprehensive sex education for all students—and especially teenagers from communities of color. Redirecting national policy away from abstinence-only education and towards comprehensive sex education will require a variety of legal challenges and public policy strategies. There are three government-funded initiatives for abstinence-only education, and some of the legal challenges in this Article are relevant only to one funding stream, as noted throughout the Article. However, many challenges are relevant to all three funding streams, leaving legal practitioners wide latitude in selecting curricula that best exemplify the unconstitutional aspects of abstinence-only education.

I. A HISTORY OF WELFARE, RACE, AND GENDER POLITICS

The definition of *abstinence* is difficult to capture precisely. It generally refers to “postponing sex,” or more specifically, vaginal intercourse.⁹ However, some proponents envision it reaching beyond this physical definition to encompass a moral commitment to “chastity” that requires abstaining from any type of sexual stimulus prior to marriage.¹⁰ In fact, Title V of the Social Security Act defines abstinence education as a program that “teaches that a mutually faithful monogamous relationship in the context of marriage is the

9. Society for Adolescent Medicine, *Abstinence-only education policies and programs: A position paper of the Society for Adolescent Medicine*, 38 J. OF ADOLESCENT HEALTH 83, 83 (2006).

10. *Id.* (chastity); Abstinence Clearinghouse, <http://www.abstinence.net/library/index.php?entryid=3272> (last visited Aug. 13, 2007) (chastity); Cynthia Dailard, *The Other Shoe Drops: Federal Abstinence Education Program Becomes More Restrictive*, GUTTMACHER POL’Y REV., Winter 2006, at 19, available at <http://www.guttmacher.org/pubs/gpr/09/1/gpr090118.pdf> (refraining from any sexual stimulation).

expected standard of human sexual activity.”¹¹ The federal definition thus translates the concerns of many parents and teachers about teen pregnancy and STIs into an expectation that young people should abstain from all sexual activity prior to marriage. This emphasis on marriage indicates that something besides a mere public health agenda is at issue here. Marriage is not essential to achieving the government’s stated public health goals. A young person could successfully avoid teen pregnancy by waiting until adulthood to become a single parent and could avoid STIs by staying in a committed relationship that does not take the form of marriage. These alternatives, however, are not acceptable in the eyes of the federal government’s abstinence program—it is only chastity until marriage that satisfies the program’s dictates. Accordingly, the Social Security Act requires that abstinence-only programs teach that there are “social, psychological, and health gains to be realized by abstaining from sexual activity” and that “sexual activity outside the context of marriage is likely to have harmful psychological and physical effects.”¹² In addition, the Act requires that programs teach students that it is important to “attain self-sufficiency before engaging in sexual activity” and that “bearing children out-of-wedlock is likely to have harmful consequences for the child, the child’s parents, and society.”¹³

What is it about single adult parenthood and unmarried, monogamous relationships that are inconsistent with the federal government’s abstinence-only program goals? It is the answer to this question that elucidates the link between abstinence-only policy and race politics. The first large increase in abstinence-only funding was financed with national anti-poverty welfare funds during the Clinton Administration.¹⁴ The Bush Administration has since channeled federal welfare funds into abstinence-only programs as a way to address the “non-marital births that have contributed so heavily to the Nation’s domestic problems, including poverty, violence, and intergenerational welfare dependency.”¹⁵ The leap from single parenthood to the social ills that the Administration enumerates has its origins not in conclusive data but in political rhetoric that emerged decades ago. The Bush Administration explains that “[t]he negative effects of single parent families were brought forcefully to the Nation’s attention in 1965 by Daniel Patrick Moynihan, then an Assistant

11. 42 U.S.C.A. § 710 (LexisNexis 2006).

12. *Id.*

13. *Id.*

14. Testimony on Abstinence Education: Dep’t of Health and Human Servs., by Peter C. Van Dyck, House Committee on Commerce, Subcommittee on Oversight and Investigations, <http://www.hhs.gov/asl/testify/t980925a.html> (last visited July 14, 2007) (explaining that Section 510 of the Social Security Act, created in the 1996 Welfare Reform law, provided \$50 million annually from 1998 through 2002 to states based on the proportion of low-income children in each state—a sharp increase from the previous average of \$4 million in annual funding for abstinence-only education).

15. WHITE HOUSE, WORKING TOWARD INDEPENDENCE (2002), <http://www.whitehouse.gov/news/releases/2002/02/welfare-reform-announcement-book-all.html>.

Secretary in the Department of Labor.”¹⁶ The Administration is referring to a 1965 report by Moynihan (later elected to the U.S. Senate) that is well-known for its racially divisive contributions to the debate on welfare reform.¹⁷

Moynihan’s argument about African-Americans and poverty was twofold. First, he explained, “the Negro community has been forced into a matriarchal structure” as a result of the debilitating effects that slavery and poverty have had on traditional family structure.¹⁸ He cites evidence that “Negro husbands have unusually low power” and “Negro families are dominated by the wife.”¹⁹ Secondly, he posits, “ours is a society which presumes male leadership in private and public affairs,” meaning that “a subculture, such as that of the Negro American, in which this is not the pattern, is placed at a distinct disadvantage.”²⁰ Moynihan argued that this non-traditional family structure “seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male,” who “may react with withdrawal...or crime.”²¹ In short, a subculture in which women exercise familial and economic power cannot thrive within a larger society that values the dominance of men.

The idea that female-headed households are responsible for social dissolution is perhaps as old as female-headed households themselves. In one of the first studies of the urban poor, Friedrich Engels laments the “upside down” world of nineteenth century England, in which “the wife supports the family” through factory labor while the “husband sits at home”—an arrangement that “unsexes” and demoralizes men.²² Notably, the view that working mothers are socially undesirable factors in systems of intractable poverty has not been a foundation of social policy in other Western countries.²³ In Scandinavian countries, for example, the government has devoted significant

16. *Id.*

17. DANIEL PATRICK MOYNIHAN, U.S. DEPARTMENT OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965), available at <http://www.dol.gov/oasam/programs/history/webid-meynih.htm>; see also Smart Library on Children and Families, <http://www.children.smartlibrary.org/NewInterface/segment.cfm?segment=1806> (last visited Jan. 26, 2007) (explaining that Moynihan authored this well-known report, though his name does not appear next to the title on the Department of Labor website).

18. DANIEL PATRICK MOYNIHAN, U.S. DEPARTMENT OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION*, CHAPTER IV: THE TANGLE OF PATHOLOGY (1965), available at <http://www.dol.gov/oasam/programs/history/moynchapter4.htm>.

19. *Id.*

20. *Id.*

21. *Id.*

22. FRIEDRICH ENGELS, *THE CONDITION OF THE WORKING CLASS IN ENGLAND* 173 (Academy Chicago Publishers 1994) (1845).

23. See Ann Orloff, *Gender in the Welfare State*, 22 ANN. REV. OF SOC. 51, 63 (1996) (explaining that Scandinavian countries have historically been far more supportive of women’s paid work and far less insistent on promoting patriarchal systems as the panacea for women’s poverty).

resources to supporting working mothers—both married and single—and has achieved far higher levels of economic well-being for families and children than the United States.²⁴ In America, however, the critique of female-headed households is a premise of public policy that has become racialized, due in large part to the pivotal Moynihan report. In the 1980s, the theory that a “culture of poverty” was responsible for the creation of an urban “underclass” gained popularity; the “culture” envisioned by scholars and politicians was, of course, one which existed within African-American communities.²⁵

The influence of Moynihan’s theory of poverty has endured decades later. The 1996 “welfare reform” legislation, known as the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), is perhaps the clearest example of this influence.²⁶ PRWORA included provisions designed to promote marriage and subvert the independence of single mothers who are welfare recipients, of whom African-American women represent a significant percentage.²⁷ For example, in order to receive public assistance, PRWORA requires that a mother maintain contact with the father of her children in order to seek child support, even though many mothers believe that continued contact will have a negative effect on their children and their own lives.²⁸ In addition, PRWORA imposes work requirements on single mothers while allowing married mothers to care for their children at home while their husbands satisfy the work requirements.²⁹ Proponents of marriage promotion have even suggested trying to reserve social services like childcare and public housing to married couples only.³⁰

The rhetoric surrounding these welfare reform measures is not just about gender—it also reflects the workings of racism in America. The denigration of single motherhood is disturbing not only because of its insistence on female

24. *Id.* at 56 (noting that Sweden has virtually eliminated poverty among women).

25. Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fiftly State Overview*, 8 MICH. J. GENDER & L. 121, 133-34 (2002).

26. See ROBERTS, *supra* note 3, at 217 (explaining how Charles Murray’s views on family structure, race, and poverty influenced the 1996 welfare legislation); Lisa A. Crooms, *The Mythical, Magical “Underclass”: Constructing Poverty In Race and Gender, Making the Public Private*, 5 J. GENDER RACE & JUST. 87, 94-95 (2001) (explaining that PRWORA is designed to restructure family relations in the “underclass” by blaming men for not supporting children financially and blaming women for having children outside of marriage).

27. See Gwendolyn Mink, *Violating Women: Rights Abuses in the Welfare Police State*, 577 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 80-81 (2001) (noting that the welfare reform provisions aim to “promote marriage and paternal headship while frustrating child-bearing and child-raising rights outside of marriage” and that approximately two-thirds of recipients are racial and ethnic minorities); see also Smith, *supra* note 25, at 184-85 (explaining that the welfare reform legislation “explicitly establishes the promotion of the two-parent family and heterosexual marriage”).

28. See Mink, *supra* note 27, at 80.

29. *Id.* at 81.

30. *Id.* at 88 (describing the proposal by Wade Horn, a key figure in the Bush Administration’s welfare policymaking, to limit welfare benefits and social programs like Head Start and public housing to married parents).

dependence but because it posits African-Americans themselves as the cause of poverty in the United States, obfuscating the structural factors that perpetuate this poverty.³¹ In this way, welfare reform has reinforced racism by hiding it within suggestions for “behavioral” reform in low-income communities. Proponents of welfare reform have argued that improving relationship skills will encourage economic stability in African-American communities, thus lifting children and families out of poverty. However, the prevailing view among scholars is that single-parent families do not cause poverty.³² Instead, poverty results from the lack of economic opportunities in communities of color, exacerbated by difficulties in accessing affordable childcare and healthcare.³³ Since lack of employment is a problem for both men and women, low-income women facing these difficulties do not usually benefit financially from relationships with men, as the men in their communities are also likely to be unemployed.³⁴

Despite research to the contrary, the idea that single parenthood causes poverty has attracted voters across the political spectrum.³⁵ The political appeal of this message draws on racist assumptions, whether conscious or unconscious, regarding the moral and cultural inferiority of African-Americans.³⁶ Strikingly, the Bush Administration’s official plan for welfare policy hardly mentions race.³⁷ Today, overt condemnations of the moral inferiority of communities of color are a political minefield, and so the language of welfare policy speaks only of “low-income” or “inner-city” communities, without stating outright that the Administration—and much of the American public—envisions these communities as non-White.³⁸

31. See ROBERTS, *supra* note 3, at 21; Patricia Hill Collins, *Gender, Black Feminism, and Black Political Economy*, 568 ANNALS AM. ACAD. POL. & SOC. SCI. 41, 45-48 (2000) (analyzing the stigmatization of single-parent African-American households and the structural factors that underlie poverty); Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 41 DUKE L.J. 274 (1991) (explaining that the discourse of behavioral factors and poverty places the brunt of its blame on women’s behavior—and the behavior of single mothers in particular).

32. See Smith, *supra* note 25, at 189.

33. MISHA WERSCHKUL & ERICA WILLIAMS, INST. WOMEN’S POL’Y RES, THE STATUS OF WOMEN IN THE STATES 31 (2004), available at <http://www.iwpr.org/States2004/PDFs/National.pdf>.

34. See Smith, *supra* note 25, at 20; see also Erik Eckholm, *Childhood Poverty Is Found To Portend High Adult Costs*, N.Y. TIMES, Jan. 25, 2007, at A19 (citing testimony that nearly 40% of all African-American men in New York City are jobless). Compounding this difficulty is the fact that, due to population imbalances and high incarceration rates, a large number of women in African-American communities would have difficulty finding a husband—employed or unemployed—even if they wanted to marry. See HILARY BEARD, BLACK AIDS INST., GETTING REAL: BLACK WOMEN TAKING CHARGE IN THE FIGHT AGAINST AIDS 29 (2005), available at http://www.blackaids.org/image_uploads/article_170/05%20women.pdf.

35. See Mink, *supra* note 27, at 88-89.

36. See Smith, *supra* note 25, at 137.

37. The term “African-American” appears only twice in the 30-plus pages of text on the Administration’s plan. See WHITE HOUSE, *supra* note 15.

38. See Bob Herbert, *A Platform of Bigotry*, N.Y. TIMES, Sept. 28, 2006, at A23 (explaining

It is in this context of veiled racism and gender politics that abstinence-only education emerged. Today, three separate funding streams for this initiative exist.³⁹ The Adolescent Family Life Act (AFLA) was the first source of abstinence-only education funding.⁴⁰ The AFLA, which Congress passed in 1981, allocated a relatively small amount of funding each year—an average of \$4 million annually until 1996—during the course of the Reagan Administration and the first Bush Administration.⁴¹ While the AFLA continues to provide funding today, welfare reform funds became the major source of abstinence-only support during the Clinton Administration, providing an additional \$50 million each year from 1998 onwards under Title V, Section 510 of the Social Security Act.⁴² This second funding stream is generally referred to as “Title V” funds.⁴³ In addition, in 2001, the current Bush Administration introduced a new funding stream, the Community Based Abstinence Education (CBAE) program, which now allocates more than \$100 million each year, not only to schools, but also to state and local organizations that may come into schools to provide abstinence-only education.⁴⁴

The Administration presents all three funding streams as tools to combat poverty by reducing non-marital births.⁴⁵ Backed by these tremendous financial resources, abstinence-only education has become the new star in the ongoing quest to regulate African-American women’s marital and childbearing decisions, a project which inevitably emphasizes the moral and cultural

that, as overt expressions of racism in the United States have become less acceptable, racist beliefs are now expressed primarily through economic policies); Crooms, *supra* note 26, at 89-90.

39. See NARAL Pro-Choice America Foundation, *Abstinence-Only Programs: Ideology Over Science 1* (2006), <http://www.prochoiceamerica.org/assets/files/Sex-Ed-Ab-Only-Ideology.pdf> (providing an overview chart).

40. 42 U.S.C.A. § 300z (LexisNexis 2006).

41. See LEGAL MOMENTUM, *supra* note 5.

42. 42 U.S.C. § 710; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (allocating \$50 million annually in Title V funds from 1998-2002); U.S. Dep’t of Health and Human Servs., FY 2006 Budget in Brief 88-89 (2005), <http://www.hhs.gov/budget/06budget/FY2006BudgetinBrief.pdf> (noting that the budget for 2006 includes \$13 million in AFLA funds and charting the amount of Title V abstinence education grants to states at \$50 million annually); see also *id.*

43. See Legal Momentum, *supra* note 5, at 5.

44. 2000 Supplemental Appropriations Act, Pub. L. No. 106-246, 114 Stat. 511 (2000) (allocating funds for the CBAE program, also known as “special projects of regional and national significance”); Legal Momentum, *supra* note 5, at 5; see also Abstinence Education, Letter from the United States Government Accountability Office to the Honorable Michael O. Leavitt, Secretary of Health and Human Services 2, <http://www.gao.gov/decisions/other/308128.pdf> (last visited Jan. 26, 2007) (explaining that 42 U.S.C. § 1310 is the statute that authorizes the allocation of these funds); see also CARMEN SOLOMON-FEARS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, REDUCING TEEN PREGNANCY: ADOLESCENT FAMILY LIFE AND ABSTINENCE EDUCATION PROGRAMS 4-5 (2004), <http://www.senate.gov/~hutchison/RS20873.pdf> (providing the Public Law citations for this program’s funding, which was previously referred to as Special Projects of Regional and National Significance).

45. WHITE HOUSE, *supra* note 15, at 22-23.

inferiority of African-American communities. The critique of single-parent families also reaches beyond its African-American focus to encompass other communities of color. The Heritage Foundation, one of the most vociferous right-wing institutions, explains that poverty in America is increasing because “family formation is also weak” among Latinos, whose out-of-wedlock births cause “family disintegration.”⁴⁶

II. PUTTING RACE AT CENTER STAGE: A NEW PERSPECTIVE

The concentration of abstinence-only programs in minority schools indicates that a race-based perspective is necessary to understand the impact of these programs. Title V welfare legislation allocates abstinence-only funds in proportion to the number of children in each state who are low-income.⁴⁷ Since poverty rates are highest among African-American and Latino families, states with large numbers of African-American and Latino youth are likely to receive larger amounts of abstinence-only funding.⁴⁸ Not all abstinence-only funding flows through state governments; AFLA and CBAE funds may go directly to local organizations that provide abstinence education in schools.⁴⁹ However, even these funds are more likely to find their way to poorer schools; organizations that receive AFLA and CBAE funds provide no-cost programs in schools, and schools with few resources can hardly afford to turn away these offers of outside help in the classroom.⁵⁰ In addition, because minority students tend to be lower-income, and are therefore less likely than White students to be able to afford private secondary school education, they often have no alternative but to participate in these federally-funded abstinence-only programs.⁵¹

Public concern about teenage pregnancy reaches beyond African-American and Latino youth; many Americans believe that this is a “Black

46. THE HERITAGE FOUNDATION, ROBERT E. RECTOR, IMPORTING POVERTY: IMMIGRATION AND POVERTY IN THE UNITED STATES, October 25, 2006, <http://www.heritage.org/Research/Immigration/SR9.cfm> (last visited Jan. 26, 2007).

47. See Adam Sonfield & Rachel Benson Gold, *States' Implementation of the Section 510 Abstinence Education Program, FY 1999*, 33 FAM. PLAN. PERSP. 166, 166 (2001), available at <http://www.guttmacher.org/pubs/journals/3316601.pdf>; see also 42 U.S.C. § 710(a) (explaining that the amount of Title V funds each state shall receive depends upon the percentage determined under 42 U.S.C.A. § 702(c)(1)(B) (LexisNexis 2006) (amending 42 U.S.C. § 502), which is calculated based on the number of low income children in the state).

48. U.S. Census Bureau, Population Profile of the United States: Poverty in 2004, 2-3 <http://www.census.gov/population/pop-profile/dynamic/poverty.pdf> (last visited Jan. 24, 2007) (noting that the poverty rate in 2004 was 24.7% for Blacks and 21.9% for Latinos, but only 8.6% for Whites).

49. See SIECUS, A Brief History, *supra* note 4; Legal Momentum, *supra* note 5, at 8.

50. See Project Reality, <http://projectreality.org/potential/index.php?id=58> (last visited October 26, 2007) (advertising the programs that an abstinence-only grantee provides at no cost to schools around the country).

51. See U.S. Census Bureau, *supra* note 48.

cultural trait” that is influencing behavior among White teenagers as well.⁵² Accordingly, the abstinence-only legislation does not reserve its funding only for schools and organizations in communities of color, but has evolved into a “cross-class type of sexual regulation project.”⁵³ However, despite the presence of abstinence-only education programs in some predominately White schools, these funding initiatives target a disproportionate number of minority schools, as the above overview of the Title V allocation system illustrates. In addition, the majority of AFLA funds go to counties and cities in which many, if not most of the students, are not only low-income but also minorities.⁵⁴ Accordingly, organizations receiving AFLA and CBAE funding are developing programs designed specifically for schools with predominantly African-American and Latino populations.⁵⁵

In *Brown v. Board of Education*, the Supreme Court took the dramatic step of imagining and articulating the harm that a racist educational system inflicts upon minority students.⁵⁶ When race overlaps gender issues, however, the Court has not been so willing to step outside the perspective of a White, economically-stable plaintiff. In *Rust v. Sullivan*, the Court upheld regulations that imposed a prohibition on doctors’ ability to provide abortion counseling and referrals to women in family planning clinics that received public funding through Title X of the Public Health Service Act.⁵⁷ The NAACP, the National

52. ROBERTS, *supra* note 3, at 113. The projection of concerns about stereotypically African-American “behavior” onto a larger population that includes Whites is not a new phenomenon. See Lisa A. Crooms, *Don’t Believe the Hype: Black Women, Patriarchy and the New Welfareism*, 38 HOW. L.J. 611, 613 (1995) (explaining that rhetoric of welfare reform was still racially derogatory even though it condemned single motherhood among all low-income women who “act like black women” by having children outside of marriage while on public assistance).

53. Smith, *supra* note 25, at 185.

54. See Office of Population Affairs, Office of Adolescent Pregnancy Programs, Abstinence Education Demonstration Projects FY 2007, <http://opa.osophs.dhhs.gov/titlexx/ae-project-descriptions-2007.pdf> (listing the 57 AFLA grantees for 2007 and the cities and counties in which they operate); see also U.S. Census Bureau, State and County Quick Facts, <http://quickfacts.census.gov/qfd/index.html> (providing information on the racial and ethnic breakdown of each city and county). The AFLA grantee list includes 16 grantees that self-identify their programs as focused on minority populations. In addition, the census data on the cities and counties in which the grantees are operating reveal that 20 programs are in an area where over 50% of the population are minorities and 11 others are in an area where over 30% of the population are minorities—usually a higher percentage than in the state as a whole. In sum, 47 of the 57 grantees operate in areas with a large minority population.

55. See Linda Carter-Jessop et al., *Abstinence Education for Urban Youth*, 25 J. OF COMTY. HEALTH 293, 297 (2000) (describing the operation of the AFLA-funded “FACTS” abstinence-only education program in a predominately African-American school); see also The Choice Game, Urban Version Overview, Sample Script, <http://www.thechoicegame.com/index.html> (last visited Aug. 10, 2007) (promoting an “urban” version of a popular CBAE-funded abstinence-only curriculum, with African-American and Latino characters).

56. 347 U.S. 483, 494 (1954) (explaining that the racial segregation of African-American students “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone”).

57. 500 U.S. 173, 262 (1991).

Black Women's Health Project, and other progressive organizations acting as amici in the case explained that "African-American and other women of color are overrepresented as clinic patients" and thus would be "severely disadvantaged by any limitations imposed on family planning clinics."⁵⁸

The Court, however, declined to recognize any racial dimension in the *Rust* case. In an opinion that does not even mention the words "African-American" or "race," a five-member majority of the Court deemed the prohibition on abortion information to be constitutional and hypothesized that poor women at public clinics could simply go elsewhere to receive information on abortion services. The opinion contains no recognition of the difficulties that poor women of color would face in finding or affording alternative health care, nor any mention of the amici evidence that African-American women and other women of color disproportionately face a number of serious health risks associated with pregnancy.⁵⁹ By ignoring the economic reality that women of color face, the *Rust* decision implicitly sanctioned a two-tiered system of reproductive health care whereby the population of predominantly White, upper-class women has access to a full range of services and information in private doctors' offices and the predominately lower-income population of women of color confronts a wall of silence in public clinics.⁶⁰ While President Clinton lifted the prohibition on abortion information in Title X clinics three years after the *Rust* decision,⁶¹ the United States is still plagued by a sharp contrast in the reproductive health care available to high- and low-income populations, a contrast that plays out in the form of racial disparities.⁶²

With the rise of abstinence-only education, racial disparities in access to reproductive health information and services may be intensifying among young people, since minority teenagers are more likely to receive abstinence-only education and to be negatively affected by this education. In a society in which people of color are currently one-third of the population and will in several decades constitute the majority, the Court can no longer imagine its plaintiffs solely as members of the White, middle- and upper-class population.⁶³ Race

58. Brief for the NAACP Legal Defense and Educational Fund, Inc. and Other Organizations as Amici Curiae in Support of Petitioners at 18, *Rust v. Sullivan*, 500 U.S. 173 (1990) (Nos. 89-1391, 89-1392).

59. See *id.* at 34-35.

60. See ROBERTS, *supra* note 3, at 136.

61. Rachel N. Pine & Lori F. Fischler, *The United States of America*, in *THE RIGHT TO KNOW: HUMAN RIGHTS AND ACCESS TO REPRODUCTIVE HEALTH INFORMATION* 289, 303 (Sandra Coliver ed., 1995).

62. See HEATHER D. BOONSTRA ET AL., GUTTMACHER INST., *ABORTION IN WOMEN'S LIVES* 25-29 (2006), available at <http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf>; Angela Hooton, *A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U.J. GENDER SOC. POL'Y & L. 59, 72-80 (2005) (describing how disparities in reproductive health care affect Latinas).

63. U.S. Census Bureau, *supra* note 1; U.S. Census Bureau, *United States Population Projections by Race and Hispanic Origin: 2000 to 2050*, <http://www.census.gov/Press->

must play a central role in shaping legal decisions on reproductive health issues. The following analyses outline the ways in which the Court might be called upon to address the issue of abstinence-only education—and how it might meet this challenge by recognizing the barriers that communities of color face in accessing health information and services and the disproportionately harmful impact of abstinence-only programs on minority teenagers.

III. FREE SPEECH

When an organization or entity receives federal funding, the government may restrict the services it can offer to its clients with that funding in order to promote the government's own message on an issue.⁶⁴ In *Harris v. McRae*, the Court underscored this point by holding that the government may use federal Medicaid dollars to fund childbirth, but not abortion, in order to promote the government's view that childbirth is a more desirable option than abortion for women who rely on publicly-funded family planning services.⁶⁵ When an entity receives federal funding, the government may also restrict the speech of the entity's staff members by limiting the information they can convey to clients.⁶⁶ In *Rust*, the Court upheld restrictions prohibiting doctors in federally-funded family planning clinics from providing patients with information on abortion.⁶⁷

However, there are limits on the federal government's ability to condition its funding upon such restrictions. The unconstitutional conditions doctrine prohibits the government from providing a grant under conditions that require the recipient to relinquish a constitutional right.⁶⁸ The Court employs this doctrine when the government seeks to restrict an organization's activities or speech not only in the context that the government has funded, but in all contexts, even those privately financed.⁶⁹ Thus, in *FCC v. League of Women Voters*, the Court invalidated a federal grant that required broadcasting stations to refrain from any editorializing, even though the stations had private, non-governmental funds that would otherwise have allowed for editorial comments.⁷⁰

Release/www/releases/PROJ_PIO-tab1.xls (last visited Jan. 24, 2007) (charting the projected increase in minority groups, which are expected to constitute a majority of the population by 2050).

64. *Harris v. McRae*, 448 U.S. 297, 314-15 (1980).

65. *Id.*

66. *Rust v. Sullivan*, 500 U.S. 173, 262 (1991).

67. *Id.*

68. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989).

69. *Rust*, 500 U.S. at 197.

70. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 400 (1984). It is worth noting that the restrictions in *FCC v. League of Women Voters* would have been constitutional if there had been some way for stations to segregate their activities so that their editorializing took place only when it was clear to the public that they were using solely private funds. See *Rust*, 500 U.S. at 197-98 (explaining that such restrictions are constitutional in cases in which segregation of

In contrast, when a grant does not require a recipient to limit its use of non-federal funds but simply imposes a restriction on the use of government funds, the Court employs a test of “viewpoint discrimination.”⁷¹ The government engages in “discrimination based on viewpoint” when the conditions on the use of federal funds “discriminate invidiously... in such a way as to ‘aim at the suppression of dangerous ideas.’”⁷² The Court has been clear about what does not constitute viewpoint discrimination, explaining that the state’s decision to fund childbirth services but not abortions is not discrimination, since “[a] refusal to fund protected activity... cannot be equated with the imposition of a ‘penalty’ on that activity.”⁷³

It is not entirely clear, however, what would fail the test of viewpoint discrimination. In *Rust*, the Court does not define what would constitute an impermissible viewpoint “penalty.”⁷⁴ However, in considering whether the ban on abortion information in *Rust* interferes with a woman’s Due Process right to abortion services, the Court indicates that it will consider whether government funding of one viewpoint at the expense of another places an “obstacle in the path of a woman” who would otherwise choose abortion.⁷⁵ The *Rust* Court theorizes that the government’s restrictions on abortion information in *Harris* “leave a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all.”⁷⁶ In other words, the Court explains, a woman is “in no worse position than if Congress had never enacted Title X.”⁷⁷ While the exact parameters of viewpoint discrimination remain murky, the Court thus provides some guidance as to what type of unequal viewpoint subsidization would not pass Constitutional muster: that which would leave a potential recipient of information or services “in a worse position” than if the government had not provided any funding at all.

Progressive scholars have since critiqued the logic by which the *Rust* Court concluded that women are left “in no worse position” by the government’s restriction on abortion information.⁷⁸ They, and the dissent in

activities is possible, such as when a charitable organization can establish a separate affiliate organization to pursue a cause that the government does not support).

71. *Rust*, 500 U.S. at 192.

72. *Id.* (quoting *Regan v. Taxation without Representation of Wash.*, 461 U.S. 540 (1983)).

73. *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980).

74. *See Rust*, 500 U.S. at 193.

75. *See id.* at 201 (citing *Harris*, 448 U.S. at 315).

76. *Id.* at 201-02. Critics of the *Harris* and *Rust* decisions argue that the Court may have erred in reaching its conclusion because it used an incorrect “baseline.” A baseline is the alternative scenario which one envisions in order to determine whether a plaintiff’s position has been worsened by a government action that changed the status quo. The Court in *Harris* and *Rust* used a baseline of a government that did not have the responsibility to provide any abortion-related health care or other health care, rather than a government that should have provided universal healthcare. *See Kathleen M. Sullivan, Unconstitutional Conditions, supra* note 68, at 1440.

77. *Rust*, 500 U.S. at 203.

78. *See Dorothy E. Roberts, Rust v. Sullivan and the Control of Knowledge*, 61 GEO.

Rust, note that the low-income women of color who are the primary client base of Title X clinics would be likely to interpret their doctor's statement that the Title X clinic does not consider abortion an appropriate alternative to be the doctor's own opinion that abortion is not a medically sound option.⁷⁹ The argument that low-income women will take their doctor's advice at face value is especially compelling given that low-income women have little or no access to other sources of contrary medical advice.⁸⁰

While the *Rust* Court's "no worse position" paradigm did not recognize the barriers low-income women of color face in accessing health information, abstinence-only funding provides a new slate on which to clearly draw the connection between unequal government viewpoint subsidies and the well-being of communities of color. As the following Section illustrates, the *Rust* test of whether speech restrictions leave a person in "no worse position" in exercising a constitutional right is also relevant to classrooms that teach abstinence-only education for several reasons. First, by providing distorted information on contraceptive failure rates, abstinence-only education may prevent young people from exercising their constitutionally protected right to access information on contraceptive methods that protect against STIs and HIV.⁸¹ In addition, abstinence-only curricula may worsen a young woman's ability to exercise her constitutionally protected right to abortion services and to access information on contraception in order to prevent pregnancy. Finally, the "no worse position" paradigm is also relevant to abstinence-only curricula that teach girls that they should be less ambitious, confident, and successful than men, since the Court has identified a constitutionally protected right of all students to access an equal education that does not teach that one group is inferior to another.⁸²

The following Section identifies specific abstinence-only curricula that should fail the viewpoint discrimination test. Such curricula leave students less able to enjoy their constitutional rights than had the government provided no health education funding at all.

WASH. L. REV. 587, 589-90 (1993).

79. See *Rust*, 500 U.S. at 216-17 (Blackmun, J., dissenting).

80. See Roberts, *supra* note 78, at 600; Planned Parenthood, Title X: America's Family Planning Program, <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/birth-control-access-prevention/title-x-13163.htm> (last visited July 17, 2007) (noting that Title X clinics are the sole source of family planning services for 80 percent of women who visit the clinics).

81. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 697 (1977) (finding that young people have a constitutionally protected right to access information on contraceptive methods).

82. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

A. Viewpoint Discrimination

While the *Rust* Court declined to consider how unequal viewpoint subsidies could negatively affect the health and rights of low-income communities, abstinence-only funding might provide an easier case in which to see this link. In *Rust*, the Court specified that the restriction on abortion information was acceptable only because it did not “significantly impinge upon the doctor-patient relationship” since the Court believed that “a doctor’s silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her.”⁸³ The Court reached this conclusion based on the assumption that “the doctor-patient relationship established by the Title X program” is not “sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice.”⁸⁴ In other words, since Title X provides only a very specific type of medical care (i.e. preconception family planning instead of, for example, post-natal care or general health care), a woman could reasonably be expected to seek out medical advice from other doctors outside the Title X program. In reality, low-income women often receive no other preventive medical care.⁸⁵ Still, the majority’s argument in *Rust* has some degree of merit since it is at least conceivable that an adult woman might have the sufficient knowledge, necessary connections, and financial resources to find additional information on abortion services. In contrast, it is unrealistic to expect that a teenager receiving abstinence-only education would have the sufficient knowledge, financial resources, or motivation to seek out information on comprehensive sex education after a teacher or other adult educator in the classroom has stated that condoms are not effective.⁸⁶

The “all-encompassing” nature of the student-teacher relationship may alone be enough to remove abstinence-only education from the constitutionally protected sphere of free speech restrictions that the *Rust* Court delineated. However, as this Section illustrates, abstinence-only education also falls outside the realm of constitutionality because it puts low-income, minority

83. *Rust*, 500 U.S. at 200.

84. *Id.*

85. Roberts, *supra* note 78, at 593; Dep’t of Health and Human Servs., Title X National Family Planning Program, <http://216.239.51.104/search?q=cache:cWesPZgEk8oJ:www.dgimeetings.com/careconference/Agenda/2-1%25209.30%2520Moskosky-panel.ppt+dhhs+title+x+primary+source&hl=en&ct=clnk&cd=2&gl=us> (last visited July 17, 2007) (noting that many people use Title X clinics as their primary source of health care).

86. In the United States, school has long been relied upon as the source of sex education for teenagers, making it unlikely that outside institutions could step in to fill this gap in information even if students tried to seek such information outside of school. See Pine & Fischler, *supra* note 61, at 298

teenagers in a decidedly “worse position” than they would have been in had the government chosen not to fund any type of education on sexuality.

1. Heightened Risk of STIs and HIV/AIDS

By actively discouraging teenagers from using condoms, abstinence-only education exacerbates the existing disparity in STIs among minority youth and leaves them in a worse position than had the government declined to fund any type of sexuality instruction. One abstinence-only curriculum, used in over 37 states, asks “could condoms be just another stupid idea?”⁸⁷ Many curricula explicitly tell students that condoms offer no protection against the human papillomavirus (HPV) and limited or no protection against HIV, gonorrhea, and chlamydia.⁸⁸ This denigration of condoms is a hallmark of abstinence-only programs. A report on the thirteen most widely-used CBAE-funded curricula, commissioned by Representative Henry Waxman, revealed that eleven contained “major errors and distortions of public health information,” including statements that condoms are not effective against HIV and other STIs.⁸⁹ The Government Accountability Office has stated that such medical inaccuracies in abstinence-only education violate the Public Health Service Act’s requirement that educational materials contain “medically accurate information about condom effectiveness.”⁹⁰

There is particular cause for concern about the impact of distorted sexual health information on minority teenagers for a number of reasons. First, minority teens may be less likely to use contraception than their White counterparts, making the need for condom instruction more urgent.⁹¹ Second,

87. Legal Momentum, Sex, Lies, & Stereotypes: Profiles of Federally Funded Abstinence-Only Grant Recipients, Why kNOW 1, <http://legalmomentum.org/legalmomentum/files/whyknow.pdf> (last visited Jan. 26, 2007).

88. See SIECUS Curriculum Review, Choosing the Best Path, <http://www.communityactionkit.org/reviews/ChoosingTheBestPathSummary.html> (last visited Jan. 26, 2007); see also SIECUS Curriculum Review, FACTS, <http://www.communityactionkit.org/reviews/FACTS.html> (last visited Jan 26, 2007). These statements are patently false; medical and public health experts agree that condoms are highly effective in preventing STIs—even HPV. See U.S. HOUSE OF REPRESENTATIVES, REPORT PREPARED FOR REP. HENRY A. WAXMAN, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS 8-11 (2004), available at <http://oversight.house.gov/Documents/20041201102153-50247.pdf>; Planned Parenthood, Heather Boerner, *Condoms and HPV*, Sept. 20, 2006, <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/medical-sexual-health/condoms-hpv-7600.htm>; Rachel L. Winer et al., *Condom Use and the Risk of Genital Human Papillomavirus Infection in Young Women*, 354 THE NEW ENG. J. MED. 2645, 250-51 (2006).

89. See U.S. HOUSE OF REPRESENTATIVES, *supra* note 88, at 7-10.

90. See Abstinence Education, *supra* note 44, at 1.

91. See JENNIFER J. FROST & ANNE K. DRISCOLL, GUTTMACHER INST., OCCASIONAL REPORT NO. 19, SEXUAL AND REPRODUCTIVE HEALTH OF U.S. LATINAS: A LITERATURE REVIEW 13 (2006), available at <http://www.alanguttmacher.org/pubs/2006/02/07/or19.pdf> (noting that only 43% of Latinas used contraception during their first sexual experience, in contrast with 60% of African-Americans and 68% of Whites); see also CENTERS FOR DISEASE CONTROL AND

rates of HIV/AIDS are higher among minority teenagers. HIV/AIDS disproportionately affects Latinos, who represent 13% of the population but 24% of AIDS cases among 13- to 19-year-olds.⁹² The AIDS rate among Latinas is nearly seven times that of White women.⁹³ HIV/AIDS also disproportionately affects African-Americans, who represent almost 13% of the population but 55% of HIV cases among 13- to 24-year-olds.⁹⁴ These rates are partly explained by the fact that poverty increases the risk of HIV infection; approximately one out of four African-Americans and one out of five Latinos lives in poverty.⁹⁵ African-American community advocates have explained that one of the reasons for the correlation between poverty and HIV is that “young African-American women and men who find themselves in poverty, with little hope of doing better economically, may believe they have no real reason to take preventive measures to protect themselves from HIV.”⁹⁶ Whereas comprehensive sex education aims to empower students by teaching them that condom use is a simple way to significantly decrease their risk of HIV infection and take control of their own health, abstinence-only education merely reinforces the message that preventive measures like condoms are not worthwhile.

Rates of STIs are also higher among minority teenagers. Rates of gonorrhea are eighteen times higher among African-Americans than among Whites, and twice as high among Latinos as among Whites.⁹⁷ Of particular concerns is the fact that among African-American teenagers, gonorrhea rates for girls are fourteen times higher than among White teenage girls and rates for boys are thirty-six times higher than for White teenage boys.⁹⁸ Rates of

PREVENTION, VITAL HEALTH AND STATISTICS, TEENAGERS IN THE UNITED STATES: SEXUAL ACTIVITY, CONTRACEPTIVE USE, AND CHILDBEARING, 2002 2 (2004), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_024.pdf (noting that one quarter of African-American teenage girls did not use protection during their most recent sexual experience, whereas only 10% of White teenage girls were unprotected).

92. Ctr. for Reprod. Health Res. and Pol’y and The Inst. for Health Pol’y Stud., U.C.S.F., Fact Sheet on Latino Youth: STIs & HIV/AIDS (2002), available at <http://reprohealth.ucsf.edu/publications/files/Latino.sti.pdf>; The Hispanic Population, Census 2000 Brief (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf>.

93. *Id.* at 27.

94. CENTERS FOR DISEASE CONTROL AND PREVENTION, FACT SHEET, HIV/AIDS AMONG YOUTH 1 (2005), available at <http://www.cdc.gov/hiv/resources/factsheets/PDF/youth.pdf>; The Black Population, Census 2000 Brief (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>.

95. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 94, at 3; see also CATHY COHEN ET AL., BLACK AIDS INST., RECLAIMING OUR FUTURE: THE STATE OF AIDS AMONG BLACK YOUTH IN AMERICA 33 (2005), available at http://www.blackaids.org/image_uploads/article_136/Reclaim%20final%202.pdf.

96. COHEN ET AL., *supra* note 95, at 34.

97. CENTERS FOR DISEASE CONTROL AND PREVENTION, STD SURVEILLANCE 2005: RACIAL AND ETHNIC MINORITIES, <http://www.cdc.gov/std/stats/minorities.htm> (last visited Jan. 24, 2007).

98. *Id.*

chlamydia are more than twice as high among African-Americans than among Whites.⁹⁹ In addition, rates of cervical cancer, which is caused by HPV, are significantly higher among African-American and Latina women, as are mortality rates from the disease.¹⁰⁰

In light of the disparity in STI rates among minority teenagers and the prevalence of abstinence-only education in schools, it is particularly troubling that minority teenagers may be less likely than White teenagers to receive information on condom use outside of school. Most research on Latino parent-child communication about sexuality concludes that cultural norms make Latina girls less likely than White girls to receive sex education at home.¹⁰¹ Research on levels of communication about sex education in African-American families is not as conclusive.¹⁰² However, the stigma associated with AIDS in African-American communities indicates that many African-American teenagers are unlikely to receive sufficient information at home on HIV.¹⁰³ Moreover, because low-income, minority teenagers must often deal with immediate daily challenges such as finding safe and affordable housing and transportation, they may be less likely to prioritize—or even be able to consider—the prospect of asking parents or other adults for advice on sex education.¹⁰⁴

Abstinence-only programs often encourage teenagers to take a formal pledge of abstinence-until-marriage.¹⁰⁵ However, research shows that most of the teenagers who participate in such pledge programs will nonetheless go on to engage in premarital sex.¹⁰⁶ And, when they do, they are less likely than students who did not take abstinence pledges to use condoms, since they have learned that condoms are ineffective and that it is foolish to rely on them.¹⁰⁷ Given the likelihood that minority teenagers will rely solely on in-school

99. *Id.*

100. CENTERS FOR DISEASE CONTROL AND PREVENTION, CERVICAL CANCER STATISTICS, COMPARING CERVICAL CANCER BY RACE AND ETHNICITY, <http://www.cdc.gov/cancer/cervical/statistics/race.htm> (last visited Aug. 14, 2007).

101. COSSMHO, THE STATE OF HISPANIC GIRLS 25 (1999), available at <http://www.hispanichealth.org/pdf/stateofgirls.pdf>; Laura F. Romo, *A Longitudinal Study of Maternal Messages About Dating and Sexuality and Their Influence on Latino Adolescents*, 31 J. OF ADOLESCENT HEALTH 59, 60 (2002).

102. Kim S. Miller et al., *Family Communication About Sex: What are Parents Saying and Are Their Adolescents Listening?*, 30 FAM. PLAN. PERSP. 218, 218 (1998), available at <http://www.guttmacher.org/pubs/journals/3021898.pdf>.

103. See COHEN ET AL., *supra* note 95, at 16 (discussing how the stigma associated with homosexuality in African-American communities impedes precautions like discussion and testing); see also BEARD, *supra* note 34, at 43 (describing the barriers to parent-child communication about sex in African-American communities).

104. See COHEN ET AL., *supra* note 95, at 13.

105. Hannah Bruckner & Peter Bearman, *After the Promise: The STD Consequences of Adolescent Virginity Pledges*, 36 J. OF ADOLESCENT HEALTH 271, 271 (2005).

106. *Id.* at 277.

107. *Id.*

instruction for sex education, it is particularly concerning that these students are exposed to only one viewpoint on STI prevention—a viewpoint that discourages them from purchasing, trusting, or using condoms, thus making them less likely to protect themselves when they do have sex.

2. Increased Risk of Pregnancy and Burdens on Abortion Access

Students in abstinence-only education classes learn misinformation on pregnancy and abortion that ranges from distorted statistics on condom failure rates to medically false warnings that “five to ten percent of women will never again be pregnant after having a legal abortion.”¹⁰⁸ The curricula ignore medical evidence on the physical safety of abortion and the psychological relief that it provides most women, asserting instead that the “serious psychological effects” of abortion include “depression, grief, anxiety, lowered self-esteem, regret, suicidal thoughts and behavior, sexual dysfunction, avoidance of emotional attachment, flashbacks, and substance abuse.”¹⁰⁹ Not only are minority teenagers less likely than White teenagers to receive any education on birth control in school,¹¹⁰ they are also more likely to receive this deliberate misinformation. Since the federal government allocates more abstinence-only funding to districts with greater numbers of low-income students who are more likely to be minorities, abstinence-only education widens the divide in sexual and reproductive health knowledge between White and minority teenagers.¹¹¹

One curriculum unconsciously reflects the reality of this racial and ethnic divide. The Choice Game, an abstinence-only program used in Newark, New Jersey, touts both an “urban” and a “Midwestern” version of its curricula. In the urban version used in Newark an African-American teenager talks with her grandmother about her decision to give her baby up for adoption so that “my son has two parents.”¹¹² In the Midwest version, a teenage couple discusses the decision to wait until marriage to have sex.¹¹³ The fact that the urban version

108. See U.S. HOUSE OF REPRESENTATIVES, *supra* note 88, at 12 (discussing misinformation and distorted statistics); Legal Momentum, Sex, Lies, & Stereotypes: Profiles of Federally Funded Abstinence-Only Grant Recipients, Teen-Aid 3, <http://legalmomentum.org/legalmomentum/files/teenaid.pdf> (last visited Jan. 26, 2007) (citing the medically false warning on never again becoming pregnant).

109. See BOONSTRA, *supra* note 62, at 23 (discussing the relief that most women feel following abortion); SIECUS Curriculum Review Summary, Worth the Wait, <http://www.communityactionkit.org/reviews/WorthTheWaitSummary.html> (last visited Jan. 26, 2007) (citing quote on “depression, grief, anxiety . . .”).

110. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 91, at 13 and Table 27.

111. See *supra* notes 47 and 54.

112. The Choice Game, Urban Version Overview, Sample Script, <http://www.thechoicegame.com/urban/topic-preg.html> (last visited Jan. 26, 2007).

113. The Choice Game, Midwest Version Overview, Sample Script, <http://www.thechoicegame.com/mw/topic-preg.html> (last visited Jan. 26, 2007).

focuses on an already-pregnant teenager, rather than on the avoidance of pregnancy, reflects the unspoken reality that for most minority teenagers abstinence-only education does not work to prevent pregnancy.¹¹⁴

There are several ways in which abstinence-only misinformation on pregnancy and abortion puts minority teenagers in a worse position than had the government chosen not to fund any type of sexuality education. First, abstinence-only education deprives minority teenagers of the chance to exercise their reproductive autonomy by making an informed decision about becoming pregnant. Although abstinence-only education espouses the goal of decreasing teen pregnancy by encouraging teenagers to abstain from sex entirely, the goal of “abstinence-until-marriage” is unrealistic and unattainable for the vast majority of teenagers.¹¹⁵ Consequently, abstinence-only education places low-income, minority teenagers at a higher risk of pregnancy than they would be without such education. Years before abstinence-only education took hold on a national scale, Dorothy Roberts exposed the injustice of the federal regulations that prohibited doctors from providing poor women of color with information on abortion:

The government deposits limited information about reproduction into the minds of poor women....[It] treats women as objects to be manipulated by government policy and not subjects who participate fully in decisions that determine the course of their lives.... The regulations’ most direct consequence was depriving poor women of their only source of important information about reproduction. The exclusion from sources of knowledge has played a principal role in racial oppression in America.¹¹⁶

Robert’s observations about government control of low-income, minority women’s reproductive autonomy are startlingly relevant to the power and knowledge dynamic that abstinence-only education creates for minority teenagers. Her criticism illustrates the degree to which such obstruction of knowledge harms people who are already disenfranchised by poverty and racism.

In *Carey v. Population Services International*, the Supreme Court held that restrictions on young people’s access to contraceptives, even if not a complete ban, must pass strict scrutiny since they may “significantly burden the

114. See John B. Jemmott III et al., *Abstinence and Safer Sex HIV Risk-Reduction Interventions for African-American Adolescents*, 279 JAMA 1529, 1535 (1998) (reporting study results showing that abstinence-only education did not significantly reduce unprotected sexual intercourse among African-American adolescents).

115. See Bruckner, *supra* note 105, at 277. In fact, the vast majority of Americans (95%) have had premarital sex, and this was the norm in the United States even in the “pre-sexual revolution” period of the 1950s. See Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954 – 2003*, 122 PUB. HEALTH REP. 73, 75-78 (2007).

116. Roberts, *supra* note 78, at 624.

right to decide whether to bear children.”¹¹⁷ Using a strict scrutiny analysis, the Court found that a state cannot impede young people’s access to contraceptives or ban advertisements for contraceptives.¹¹⁸ The Court’s decision critiqued the state’s “complete absence of supporting evidence” for its assertion that “limiting access to contraceptives will in fact substantially discourage early sexual behavior.”¹¹⁹ Like the state ban on contraceptives for young people in *Carey*, abstinence-only programs are based on the unfounded premise that access to information about contraceptives will increase rates of sexual activity.¹²⁰ Abstinence-only programs undermine the procreative decisions of minority teenagers to an extent that is arguably even more pronounced than the *Carey* ban on contraceptive advertising, since the programs do not simply ban information on contraceptive use but rather actively disseminate false information on contraceptive failure rates. An unwanted pregnancy leaves a young minority woman in a worse position on many fronts, making it more difficult for her to complete her education and achieve economic self-sufficiency. It is for these reasons that feminist scholars have described information on reproductive health as “a political resource [that] enables women to take control of their lives and to join in transforming social institutions.”¹²¹

The second major reason that abstinence-only education puts minority teenagers in a worse position is because it restricts their access to abortion information and services when faced with an unintended pregnancy. As explained above, due to the “all-encompassing” student-teacher relationship in abstinence-only programs, students will not receive outside information to counter the negative portrayal of abortion they receive in abstinence-only classes. This negative portrayal includes medically-false claims that abortion causes sterility, depression, and mental retardation in future births.¹²² If the government had chosen not to fund any type of sexuality education, young women would be in a far better position; they would not have heard the misinformation on abortion that would scare them away from visiting a local Planned Parenthood or other publicly-funded clinic, where they could receive medically-accurate information.

117. 431 U.S. 678, 697 (1977).

118. *See id.* at 697-700.

119. *Id.* at 695-96.

120. Douglas Kirby, *Emerging Answers: Research Findings on Programs to Reduce Teen Pregnancy*, Summary 8 (2001), available at <http://www.teenpregnancy.org/resources/data/pdf/emerswsum.pdf> (explaining that a large body of research conclusively shows that sex education programs do not cause teenagers to have sex earlier, more frequently, or with more partners).

121. Roberts, *supra* note 78, at 646; *see also* SILLIMAN, *supra* note 3, at 2 (describing the connection between reproductive health and political activism in communities of color).

122. *See* U.S. HOUSE OF REPRESENTATIVES, *supra* note 88, at 13-14.

Although this medically-inaccurate portrayal of abortion is enough to establish that abstinence-only education puts young women in a worse position with respect to reproductive decision-making, there is yet another factor that compounds this burden on access to abortion information and services, particularly for minority teenagers. “Crisis pregnancy centers” (known as CPCs) are programs that complement the abstinence-only initiative and are funded by the same sources that finance abstinence-only education.¹²³ These centers are facilities that misleadingly advertise themselves as medical clinics offering abortion services.¹²⁴ Instead, however, they assail women with false warnings that abortion will irreparably harm their mental and physical health, using a variety of aggressive anti-abortion tactics, including deceiving women into carrying their pregnancies past the point when abortion is legal in their home state.

A number of abstinence-only programs are affiliated with CPCs.¹²⁵ As a result, CPC staff may actually teach abstinence-only classes in public schools.¹²⁶ This access to classrooms gives local CPCs name recognition in their neighborhood schools and makes it more likely that a teenager in need of abortion services will walk through the doors of a CPC. In addition, CPCs openly target low-income women and minorities by developing a strong presence in minority neighborhoods.¹²⁷ Consequently, not only does abstinence-only education discourage minority teenagers from accessing medically-accurate information at legitimate family planning clinics, it also steers them towards outside organizations dedicated to reinforcing the misinformation they have already been taught in school. In *Rust*, the Supreme Court validated restrictions on abortion information in Title X clinics because it reasoned that women would simply go elsewhere for this information.¹²⁸ However, since CPCs falsely advertise themselves to be legitimate medical clinics, it is unrealistic to expect teenagers to seek out information beyond the doors of the CPC. Such misinformation, combined with the CPC strategy of

123. National Abortion Federation, *Crisis Pregnancy Centers: An Affront to Choice 11* (2006), available at http://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf.

124. U.S. HOUSE OF REPRESENTATIVES, REPORT PREPARED FOR REP. HENRY A. WAXMAN, FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS 1 (2006), available at <http://oversight.house.gov/Documents/20060717101140-30092.pdf>.

125. See Legal Momentum, *Sex, Lies, & Stereotypes: Profiles of Federally Funded Abstinence-Only Grant Recipients*, Heritage Community Services 2, <http://legalmomentum.org/legalmomentum/files/heritagecommunity.pdf> (last visited Jan. 26, 2007); Legal Momentum, *Sex, Lies, & Stereotypes: Profiles of Federally Funded Abstinence-Only Grant Recipients*, National Abstinence Clearinghouse 1-2, <http://legalmomentum.org/legalmomentum/files/nationalabstinenceclearinghouse.pdf> (last visited Jan. 26, 2007).

126. National Abortion Federation, *supra* note 123, at 9.

127. *Id.* at 5.

128. *Rust*, 500 U.S. at 200.

deceiving women into carrying pregnancies past a state's legal limit on abortion, severely impairs young women's ability to exercise their constitutionally protected right to access abortion services. The anti-abortion tactics of abstinence-only programs connected with CPCs therefore leave young women, and especially those in communities of color, in a markedly worse position than had the government chosen to fund no sexuality education at all.

Lastly, abstinence-only education puts minority teenagers in a worse position with regard to pregnancy because it ignores the needs of already-pregnant teenagers and those who have experienced sexual abuse. Teenage birth rates are significantly higher within Latina and African-American populations than they are within the White teenage population.¹²⁹ However, there is no place in abstinence-only curricula for teenagers who are already pregnant or parenting. Abstinence-only programs emphasize that self-respect can be attained only by adhering to the goal of abstinence-until-marriage; teen pregnancy is a marker of shame and irresponsibility. Teenage parents need added support to remain and succeed in school, but they receive only condemnation from abstinence-only programs, which deem them to be failures. The shame-oriented focus of these programs is particularly damaging not only to teenage parents, but also to students who have experienced sexual abuse or assault, a topic that abstinence-only programs tend to ignore or imply may even be the fault of the victim.¹³⁰ The association between sex and shame in abstinence-only education is potentially devastating to these teenagers, who are already struggling with the guilt and shame associated with sexual abuse and sexual assault.¹³¹ Given that sexual victimization has been correlated with a higher likelihood of teen pregnancy among both Latina and African-American girls, the use of shame-focused themes in abstinence-only education is particularly disturbing with regard to this group of students.¹³² By sending a clear message of inferiority to pregnant and parenting teenagers and intensifying the guilt that many victims of sexual abuse and assault already experience, abstinence-only programs alienate these teenagers. Abstinence-only education deprives them of the opportunity to enjoy their constitutionally protected right to an education that does not stigmatize one group as inferior to

129. See Frost & Driscoll, *supra* note 91, at 13.

130. See SIECUS, Reality Behind Programs, <http://www.nonewmoney.org/reality.html> (last visited Jan. 26, 2007).

131. Nicole M. Else-Quest et al., *Context Counts: Long-Term Sequelae of Premarital Intercourse or Abstinence*, 42 J. OF SEX RESEARCH 102, 108-11 (2005) (finding that premarital sex is linked with negative sexual health and life satisfaction outcomes only for teenagers whose first sexual experience is non-consensual, suggesting that abstinence-only curricula based on shame and fear may be more likely to exacerbate feelings of guilt in these teenagers rather than to delay future sexual encounters); SIECUS, Abstinence-Only Programs Ignore Those Most In Need, http://communityactionkit.org/pdfs/Understanding_Abstinence/abstinence-only-until-mar.html (last visited Jan. 26, 2007).

132. See COSSMHO, *supra* note 101, at 26; ROBERTS, *supra* note 3, at 217.

others, thereby leaving them in a worse position than had the government chosen to fund no sexuality education of any kind.

3. Gender Stereotypes that Devalue Girls

Abstinence-only education programs promote a range of gender stereotypes, each of which puts minority teenage girls in a worse position than had the government decided to forgo funding any sexuality education.¹³³ As outlined below, these gender stereotypes tend to take three forms: (1) describing women as unambitious and unassertive; (2) presenting women as dependent on men for protection and financial security; and (3) portraying women as the guardians of morality in sexual encounters. The harm of these stereotypes stems not only from the way in which they encourage teenage boys and the larger society to view young women, but also from the effect that internalizing these stereotypes has on minority teenage girls.

First, abstinence-only education portrays women as unambitious and unassertive in comparison to men, who are portrayed as leaders in the public sphere and in interpersonal relationships. One curriculum teaches that “[w]omen gauge their happiness and judge their success by their relationships. Men’s happiness and success hinge on their accomplishments.”¹³⁴ A different curriculum summarizes this sentiment by stating that “[m]en are more aggressive, goal-oriented and solution-oriented.”¹³⁵ Yet another opines that men are “strong” and “courageous.”¹³⁶ To explain how women should relate to their strong and aggressive male counterparts in interpersonal relationships, one lesson plan cautions girls that “[o]ccasional suggestions and assistance may be alright, but too much of it will lessen a man’s confidence....”¹³⁷

These stereotypes have a particularly damaging effect on teenage girls from minority communities. The high drop-out rates of Latino and African-American teenagers substantially exceed those of White students.¹³⁸ Minority

133. See U.S. HOUSE OF REPRESENTATIVES, *supra* note 88, at 16-18.

134. Legal Momentum, Sex, Lies, & Stereotypes: Profiles of Federally Funded Abstinence-Only Grant Recipients, Why kNOW 4, <http://legalmomentum.org/legalmomentum/files/whyknow.pdf> (last visited Jan. 26, 2007).

135. Legal Momentum, Sex, Lies, & Stereotypes: Profiles of Federally Funded Abstinence-Only Grant Recipients, Free Teens USA 3, <http://legalmomentum.org/legalmomentum/files/freeteens.pdf> (last visited Jan. 26, 2007).

136. Legal Momentum, Sex, Lies, & Stereotypes: Profiles of Federally Funded Abstinence-Only Grant Recipients, Heritage Community Services 6, <http://legalmomentum.org/legalmomentum/files/heritagecommunity.pdf> (last visited Jan. 26, 2007).

137. SIECUS Curriculum Review, Choosing the Best Path, <http://www.communityactionkit.org/reviews/ChoosingTheBestPathSummary.html> (last visited Jan. 26, 2007).

138. U.S. Census Bureau, Annual High School Dropout Rates of 15 to 24 Year Olds by Sex, Race, Grade, and Hispanic Origin: 1967 to 2005, <http://www.census.gov/population/socdemo/school/TableA-4.xls> (last visited Jan. 24, 2007).

girls, in particular, are under-represented in gifted and advanced placement classes.¹³⁹ Not surprisingly, minority girls tend to perceive that American society has low expectations for their achievement.¹⁴⁰ Advancing the idea that women are unambitious and not destined for successful careers is therefore particularly harmful to minority girls, as it dulls whatever expectations they might otherwise have for themselves and reinforces the lesson that their place is not to assert their voice and change the world they live in, but to accept the leadership of others.

There may also be other immediate consequences of such gender stereotypes. Research indicates that female job applicants who display a stereotypically “feminine” lack of assertiveness are likely to face gender discrimination that may result in decreased employment opportunities.¹⁴¹ This fact may help to explain why experts on girls’ social and psychological development suggest that programs that use role models who are not stereotypically feminine are more likely to attain positive outcomes for teenage girls.¹⁴² The benefit of such role models is especially pronounced for African-American girls.¹⁴³

The second common gender stereotype in abstinence-only programs is that of a woman who is dependent on men for protection and financial security. One lesson plan traces the trajectory of a woman’s life and teaches students that “[t]he Groom... is the one who assumes responsibility to protect her.... There is much to be said for a man who provides for his family.”¹⁴⁴ Some of the messages verge on humorous in their outdated portrayals of chivalry. One lesson plan instructs that “[a] gentleman... goes first down the escalator to protect her in case she loses her balance.”¹⁴⁵ Still, these teachings serve to reinforce the program’s underlying message that women are dependent on men and in need of constant protection by men. Accordingly, another curriculum

139. MARY THOM, THE NATIONAL COUNCIL FOR RESEARCH ON WOMEN, *BALANCING THE EQUATION: WHERE ARE WOMEN AND GIRLS IN SCIENCE, ENGINEERING AND TECHNOLOGY?* 44-45 (2001).

140. See Willa M. Doswell & Betty Braxter, *Risk-Taking Behaviors in Early Adolescent Minority Women: Implications for Research and Practice*, 31 *JOGNN* 454, 457 (2002).

141. See Eugene Borgida et al., *On the Use of Gender Stereotyping Research in Sex Discrimination Litigation*, 13 *J.L. & POL’Y* 613, 616, 619 (2005) (noting that “stereotypically male traits are associated with success in the business world and that stereotypically female traits are not” and that “conformity to the stereotype of a feminine personality may result in diminished perceptions of a woman’s competence”).

142. See Faye Z. Belgrave et al., *An Evaluation of Sisters of Nia: A Cultural Program for African-American Girls*, 30 *J. OF BLACK PSYCHOL.* 329, 331 (2004).

143. *Id.*

144. Legal Momentum, *Sex, Lies, & Stereotypes: Profiles of Federally Funded Abstinence-Only Grant Recipients, Why kNOw 5*, <http://legalmomentum.org/legalmomentum/files/whyknow.pdf> (last visited Jan. 26, 2007).

145. Legal Momentum, *Sex, Lies, & Stereotypes: Profiles of Federally Funded Abstinence-Only Grant Recipients, Teen-Aid 1*, <http://legalmomentum.org/legalmomentum/files/teenaid.pdf> (last visited Jan. 26, 2007).

lists “financial support” as one of women’s main needs in a relationship and “domestic support” as one of men’s main needs.¹⁴⁶

It is no accident that the officials who oversee the evaluation of abstinence-only education programs do not critique these stereotypes. Wade Horn, the former Assistant Secretary for Children and Families of the U.S. Department of Health and Human Services who was instrumental in developing the abstinence-only funding initiative, has openly defended the conservative Christian position that a wife should submit to the leadership of her husband.¹⁴⁷

The effect of stereotyping women as dependent on men is particularly harmful for minority teenagers. First, while domestic violence is a problem in all socio-economic classes, low-income women, who are often women of color, are especially at risk since they may be more easily coerced into staying in an abusive relationship due to economic circumstances.¹⁴⁸ Beyond this obvious harm, telling women to marry instead of becoming economically self-sufficient on their own reinforces the myth that all that is needed to combat poverty is marriage.¹⁴⁹ In reality, poverty in communities of color results from the lack of economic opportunities available in those communities and a lack of support for women who do work.¹⁵⁰ The focus on marriage forecloses any discussion or awareness of structural, societal changes that would reduce poverty in communities of color, such as increased pay for women and improved support for working women through efforts such as government-funded childcare, healthcare, and family leave benefits.¹⁵¹ Abstinence-only education thus deprives teenage girls from communities of color of a realistic assessment of their own situation and their own potential, promising instead that a man’s income is their hope for future economic stability.

The third type of gender stereotype that abstinence-only education promotes is one that both over-sexualizes women and presents them as the guardians of morality in sexual encounters. Echoing the widespread message in abstinence-only programs that girls are responsible for sexual enticement, one curriculum tells students that “[g]irls tend to flirt naturally.”¹⁵² Another underscores the consequences of this message by stating that women “have a responsibility to wear modest clothing” so as not to attract attention from men who presumably cannot control their lust.¹⁵³ More explicitly, another

146. See U.S. HOUSE OF REPRESENTATIVES, *supra* note 88, at 17.

147. See Wade F. Horn, *When a Dad Is Bad, Don’t Blame Religion*, WASH. TIMES, Aug. 3, 1999.

148. See Smith, *supra* note 25, at 153.

149. See Mink, *supra* note 27, at 90.

150. Werschkul & Williams, *supra* note 33, at 31.

151. See Mink, *supra* note 27, at 90-91; *id.* at 32.

152. Legal Momentum, Sex, Lies, & Stereotypes: Profiles of Federally Funded Abstinence-Only Grant Recipients, Why kNOW 3,

<http://legalmomentum.org/legalmomentum/files/whyknow.pdf> (last visited Jan. 26, 2007).

153. Legal Momentum, Sex, Lies, & Stereotypes: Profiles of Federally Funded Abstinence-

curriculum advises that “because they generally become physically aroused less easily,” girls are “in a good position to slow down the young man and help him learn balance in a relationship.”¹⁵⁴ The particular harm of these stereotypes for minority women is that they reinforce already-existing stereotypes in our society that over-sexualize women of color, a problem that African-American women have long endured.¹⁵⁵ Ironically, research indicates that stereotypes that present women as sexualized objects may actually cause a decrease in condom use.¹⁵⁶ Abstinence-only education places the blame on girls when teenagers do engage in sexual relationships, making teenage girls more likely to bear the burden of negative emotions such as guilt and depression. The stereotype of the objectified woman who is responsible for controlling men’s sexuality is likely to worsen the struggles that minority teenagers may already face in developing self-confidence and supportive interpersonal relationships.

By promoting these harmful gender stereotypes, burdening access to contraceptive information and abortion services, and increasing students’ risk of STIs and HIV/AIDS, abstinence-only education undermines constitutionally-protected rights in ways that disproportionately impact students of color. Since abstinence-only programs puts students in a markedly worse position than had the government chosen to forgo funding any sex education at all, the Court should find abstinence-only funding to be an unconstitutional exercise of government coercion.

B. The Unconstitutional Conditions Doctrine

As the above Section illustrates, abstinence-only education disempowers and endangers minority teenagers by creating barriers to reproductive health information and services. One of the abstinence-only funding streams, the CBAE program, obstructs medically accurate information so absolutely that it may not be necessary to reach the above arguments to demonstrate that the funding is unconstitutional. The CBAE funding appears to exceed the limits of the government’s ability to promote its own viewpoint without violating the unconstitutional conditions doctrine. This doctrine is relevant when the government grants funding under the condition that a recipient adhere to a restriction on constitutionally protected free speech even when the recipient is using its own private, non-governmental funds.¹⁵⁷

Only Grant Recipients, Heritage Community Services 6, <http://legalmomentum.org/legalmomentum/files/heritagecommunity.pdf> (last visited Jan. 26, 2007).

154. SIECUS Curriculum Review Summary, Sex Respect, <http://www.communityactionkit.org/reviews/SexRespectSummary.html> (last visited Jan. 24, 2007).

155. See COHEN ET AL., *supra* note 95, at 17-18, 49.

156. *Id.* at 49.

157. *Rust v. Sullivan*, 500 U.S. 173, 197 (1991).

The CBAE funding stream specifies that a grantee that provides abstinence-only education with CBAE funds to an adolescent “will not provide to that adolescent any other education regarding sexual conduct, except in the case of an entity expressly required by Federal law to provide health information or services.”¹⁵⁸ This restriction prohibits grant recipients who receive CBAE funds for abstinence-only education from using even their own non-governmental funds to provide any other education—i.e. comprehensive sex education—to students.

The unconstitutional conditions doctrine prohibits the government from requiring that an organization or entity relinquish a constitutionally protected right in order to receive government funding.¹⁵⁹ The entities eligible to receive CBAE funds include school districts and non-profit organizations. Local school districts—not the federal government—have traditionally had broad control over classroom curricula, and courts acknowledge their freedom to choose curricula that reflect particular values or ideas.¹⁶⁰ If a school district receives CBAE funds, however, it must relinquish the right to use its own funds to present materials that teach comprehensive sex education and the right to allow its teachers to even mention, for example, that there are benefits to condom use. If a school district invited a non-profit organization receiving CBAE funds into the classroom, the non-profit would also have to relinquish these rights in order to comply with the funding requirements.

These restrictions on the expression of ideas in the classroom are prohibitions that school districts themselves would probably have difficulty imposing even if they supported abstinence-only education; the Court has looked skeptically on attempts by local school officials to completely eliminate students’ access to a disfavored idea.¹⁶¹ There is no basis for according the federal government more deference than local school districts in the development of curricula and the silencing of viewpoints in the classroom. The CBAE restrictions on the grantees’ use of their own private funding therefore

158. Dep’t of Health & Human Servs., Funding Opportunity Announcement No. HHS-2006-ACF-ACYF-AE-0099: Community-Based Abstinence Education Program 13 (on file with author). Although the 2006 Funding Announcement is no longer available on the Department of Health and Human Services website, the 2007 Funding Announcement contains the same language on restricting comprehensive sex education. See Dep’t of Health & Human Servs., Funding Opportunity Announcement No. HHS-2007-ACF-ACYF-AE-0099: Community-Based Abstinence Education Program, <http://www.acf.hhs.gov/grants/open/HHS-2007-ACF-ACYF-AE-0099.html> (last visited January 18, 2007).

159. Sullivan, *supra* note 68, at 1415.

160. Edwards v. Aguillard, 482 U.S. 578, 583 (1987); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

161. Bd. of Educ. v. Pico, 457 U.S. 853, 864, 866 (1982) (holding that a local board of education could not remove from the school library books it found morally offensive, since “the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the *First Amendment*”—imperatives that include “affording the public access to discussion, debate, and the dissemination of information and ideas”).

fall squarely into the realm of restrictions that the unconstitutional conditions doctrine prohibits.

The unconstitutional conditions doctrine does, however, allow restrictions on the use of the grant recipient's non-governmental funds if, and only if, it is possible for a grantee to segregate its activities so that when the grantee engages in activities of which the government disapproves (for example, comprehensive sex education), the grantee makes it very clear that the government is not funding that part of the grantee's activities.¹⁶² The CBAE funding guidelines suggest that it may be possible for some grantees to segregate their activities in this way, thus making the funding requirements constitutionally unproblematic for those grantees. Specifically, the funding guidelines explain that "[n]othing shall preclude entities that have a *public health mandate* from discussing other forms of sexual conduct or providing services, as long as this is conducted *in a different setting—either in time or place*—than where and when the abstinence-until-marriage course is being conducted."¹⁶³

The question of whether this provision for organizations that have a public health mandate removes the funding restrictions from constitutional scrutiny with respect to such organizations is complex and requires an understanding of how the funding process works in practice. When the government awards CBAE funding, it may go to a range of entities, including independent school districts and non-profit organizations.¹⁶⁴ If a non-profit organization receives the funding, the non-profit may then arrange to come into classrooms in the school district and provide abstinence-only education. The CBAE program provides no definition of a "public health mandate" other than the reference to a federal requirement that an organization provide health information and services. The office that administers the CBAE grants does not help to clarify this definition for potential grantees, and it is therefore difficult to determine the entities to which the public health mandate provision might apply.¹⁶⁵ School districts presumably do not appear have a public health mandate, since they are not required under federal law to provide health information or services, as

162. See *supra* text accompanying note 70.

163. Dep't of Health & Human Servs., *supra* note 158, at 13 (emphasis added).

164. *Id.* at 14-15.

165. In response to an inquiry made by the author to the office, the contact person explained that she did not know what the public health mandate provision meant. However, she guessed that if an organization claimed to have a public health mandate because it received separate government funds to provide family planning services (e.g. Title X funds), this would not help it qualify for CBAE funding; it was unlikely that the organization would be awarded CBAE funding, since the fact that the organization previously applied for Title X funds meant that the organization favored comprehensive sex education. She suggested that the safest way to develop a proposal likely to be funded would be to partner with a church. Telephone Call to the Primary Contact for Technical Assistance at the Family and Youth Services Bureau, Administration on Children Youth and Families regarding the Community-Based Abstinence Education Program Funding Opportunity HHS-2006-ACF-ACYF-AE-0099 (Aug. 29, 2006).

evidenced by the fact that they may forego sex education entirely if they wish. Thus, the public health mandate exception does not remedy the violation of the unconstitutional conditions that abstinence-only funding imposes upon a school district. It is also difficult to envision how a non-profit organization receiving abstinence-only funds could have a public health mandate, unless, for example, it was an organization like Planned Parenthood that received separate government funding requiring it to provide reproductive health services (such as funding under Title X of the Public Health Service Act).¹⁶⁶

Conservative organizations that support abstinence-only education argue that the public health mandate provision is evidence that CBAE funding does not place impermissible restrictions on the use of a grantee's private funds.¹⁶⁷ In contrast, public health advocates and progressive organizations characterize the "public health mandate" provision as vague and unhelpful language that does not free grantees to use their own private funds for comprehensive sex education.¹⁶⁸ Giving the public health mandate language the greatest possible benefit of the doubt requires, first, imagining a scenario in which it is possible to identify an organization with a public health mandate. For the sake of this exercise, imagine that the federal government issues a statement making it clear that there is a public health mandate for organizations like Planned Parenthood that receive Title X funding. Would this mean that these organizations could obtain grants to go into their local school districts to provide abstinence-only classes and then, in a different setting either in time or place, also provide comprehensive sex education to the same students? The answer, even under this scenario, is no. The newest CBAE funding guidelines require grant recipients to espouse a variety of abstinence-only precepts that organizations with a public health mission could not in good conscience teach. For example, under the new funding guidelines, instructors must teach that abstinence requires teenagers to abstain not just from sexual intercourse, but from any activity that could result in "sexual stimulation."¹⁶⁹ This prohibition includes behaviors like kissing, which public health experts consider "developmentally

166. Title X of the Public Health Service Act, enacted in 1970, grants funding to organizations to provide family-planning services. See *Rust v. Sullivan*, 500 U.S. 173, 178-79 (1990).

167. KATE HENDRICKS ET AL., *MEDICAL INST. FOR SEXUAL HEALTH, THE ATTACK ON ABSTINENCE EDUCATION: FACT OR FALLACY?* 6-7 (2006), available at <http://www.medinstitute.org/includes/downloads/antellirevised.pdf>.

168. See HUMAN RIGHTS WATCH, *IGNORANCE ONLY: HIV/AIDS, HUMAN RIGHTS AND FEDERALLY FUNDED ABSTINENCE-ONLY PROGRAMS IN THE UNITED STATES* 12 (2002), available at <http://hrw.org/reports/2002/usa0902/USA0902.pdf>; Cynthia Dailard, *Abstinence Promotion and Teen Family Planning: The Misguided Drive for Equal Funding*, GUTTMACHER REP. ON PUB. POL'Y, February 2002, at 1, 2, available at <http://www.guttmacher.org/pubs/tgr/05/1/gr050101.pdf>.

169. Cynthia Dailard, *Legislating Against Arousal: The Growing Divide Between Federal Policy and Teenage Sexual Behavior*, GUTTMACHER POL'Y REV., Summer 2006, at 12, available at <http://www.guttmacher.org/pubs/gpr/09/3/gpr090312.pdf>.

appropriate for teenagers.”¹⁷⁰ The guidelines also require instructors to teach that abstinence is far more reliable than condoms in preventing STIs and pregnancy.¹⁷¹ The funding guidelines prohibit any indication of the fact that abstinence is a contraceptive method that is highly ineffective in terms of typical use rates, given that most teenagers are unable to adhere to abstinence vows.¹⁷²

Since the CBAE guidelines prohibit any positive discussion of contraception and allow condoms to be discussed only in terms of failure rates, the instruction they require is antithetical to the mission of an organization like Planned Parenthood that is committed to providing accurate information on public health.¹⁷³ Thus, the only organizations that could conceivably qualify to provide both abstinence-only education and comprehensive sex education are the very organizations whose missions would prevent them from teaching the harsh-line abstinence-only principles that the federal government demands. For this reason, the CBAE funding requirements for abstinence-only grants violate the unconstitutional conditions doctrine by making it impossible to award a grant to the type of organization that would use its own funds to teach comprehensive sex education.

IV. EQUAL PROTECTION

The Equal Protection Clause “neither knows nor tolerates classes among citizens.”¹⁷⁴ School is the institution that shapes young people of all backgrounds to live together as citizens. It instills in students norms that guide their perception of the attitudes and beliefs that are acceptable in the classroom and the larger world.¹⁷⁵ Abstinence-only education draws sharp distinctions between different groups of students in ways that call into question the

170. *Id.*

171. Dailard, *supra* note 10, at 19.

172. The “typical-use” of a contraceptive method is its effectiveness for the average user who does not always use a method perfectly or consistently. For example, for oral contraceptives, perfect use results in over 99.5% effectiveness but typical use results in 92.5% effectiveness. Thus, claims that abstinence-only education is 100% effective are referring only to perfect use, which is impossible for most teenagers to achieve, since most teenagers who take abstinence vows nevertheless go on to engage in premarital sex. See Cynthia Dailard, *Understanding ‘Abstinence’: Implications for Individuals, Programs and Policies*, GUTTMACHER REP. ON PUB. POL’Y, December 2003, at 4, 4-5, available at <http://www.guttmacher.org/pubs/tgr/06/5/gr060504.pdf>.

173. See Dailard, *supra* note 10, at 20 (quoting Rep. Henry Waxman’s observation that “[t]he new guidelines eliminate the requirement that federally funded abstinence-only education programs have health-based goals....”).

174. *Lawrence v. Texas*, 539 U.S. 558, 584 (2003) (O’Connor, J., concurring) (quoting *Romer v. Evans*, 517 U.S. 620 (1996)).

175. See Roberts, *supra* note 78, at 620-21; see also Henry Giroux, *Cultural Studies in Dark Times: Public Pedagogy and the Challenge of Neoliberalism* (2005), http://www.henryagiroux.com/online_articles/DarkTimes.htm (last visited July 16, 2007) (building on the work of the renowned educational theorist Paulo Freire to describe the relationship of education to democracy, culture, and power).

Constitution's equal protection principle—that government power not be used to discriminate against a class of people.¹⁷⁶ As explored above, teenage girls from communities of color are negatively affected by abstinence-only education in ways that teenage boys are not, from bearing the burden of unwanted pregnancy to facing a future that is dimmed by the limitations of disempowering gender stereotypes. While Part III of this Article dealt with this differential treatment in the context of free speech, an equal protection analysis could also be appropriate. However, arguments for invoking the Equal Protection Clause are perhaps strongest for the distinctions that abstinence-only education draws between heterosexual and homosexual students. The argument below explores how these distinctions should fare if the Court were to evaluate whether the government had a “rational basis” for its actions, as is required for distinctions based on sexual orientation.

The federal government's official definition of abstinence-only education states that these programs must teach that “a mutually faithful monogamous relationship in the context of marriage is the expected standard of sexual activity” and that “sexual activity outside the context of marriage is likely to have harmful psychological and physical effects.”¹⁷⁷ This condemnation of sex outside of marriage applies not only to pre-marital sex among heterosexual students but to same-sex relationships at any stage in a gay or lesbian student's life. Accordingly, a widely-used abstinence-only program instructs teachers that “[a]ny same sex ‘sexual experimentation’ can be confusing to young persons and should be strongly discouraged.”¹⁷⁸ Another program instructs that since “[t]he only safe sex is in a marriage relationship where a man and a woman are faithful to each other for life,” teachers must tell students that “if the person doesn't marry, abstinence is still the safest, healthiest lifestyle.”¹⁷⁹ With these directives, the curricula imply that gay and lesbian students—who cannot legally marry in most states—should remain abstinent for life. As part of this message, abstinence-only curricula deny gay and lesbian relationships the dignity afforded to heterosexual unions by talking about homosexuality in a purely physical context, as exemplified in one widely-used lesson plan that defines homosexuality as “a persistent and predominant attraction of a sexual-genital nature to persons of one's own sex.”¹⁸⁰ Through medically inaccurate

176. Although abstinence-only education is a federally-funded initiative, the Court views the Fourteenth Amendment's proscription against “state” denial of equal protection as applicable to the federal government as well as to state governments. See *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

177. 42 U.S.C.A. § 710 (LexisNexis 2006).

178. SIECUS Curriculum Review Summary, FACTS, <http://www.communityactionkit.org/reviews/FACTSSummary.html> (last visited Jan. 24, 2007).

179. SIECUS Curriculum Review Summary, Game Plan, <http://www.communityactionkit.org/reviews/GamePlanSummary.html> (last visited Jan. 24, 2007).

180. SIECUS Curriculum Review Summary, FACTS, <http://www.communityactionkit.org/reviews/FACTSSummary.html> (last visited Jan. 24, 2007).

statements, such as the assertion that AIDS is “the STI most common among homosexuals,” the curricula also suggest that people who are gay are to blame for the AIDS epidemic and that AIDS primarily affects gay people.¹⁸¹ Notably, one curriculum states that the best way to avoid AIDS is to “avoid homosexual behavior,” since it is “unnatural.”¹⁸²

In *Lawrence v. Texas*, the Court held that a state statute criminalizing same-sex conduct violated the Due Process Clause.¹⁸³ The Court stated that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹⁸⁴ By telling gay and lesbian students that they must remain forever celibate, abstinence-only education undercuts the right, articulated in *Lawrence*, to enter into a same-sex relationship without state-imposed stigma. The *Lawrence* Court chose a due process analysis instead of using the Equal Protection Clause, in order to make clear that even a statute that was not as facially discriminatory would be invalid.¹⁸⁵ The due process analysis emphasized that a statute that allowed the state to prosecute same-sex relations would be invalid even if the state had written the statute to apply to both homosexual and heterosexual sodomy, since the criminalization of consensual sexual relationships infringes on the personal liberty that the Due Process Clause demands for heterosexual and homosexual relationships.¹⁸⁶ However, in evaluating a challenge to abstinence-only education, the Court might not be so generous towards a plaintiff, since abstinence-only education does not criminalize same-sex relationships and its infringement on fundamental rights might therefore be more questionable to some of the Justices. Instead, it is likely that the Court would use an equal protection analysis, requiring evidence of a specific intent to discriminate against gay and lesbian students.

Justice O’Connor’s concurring opinion in *Lawrence* advocated the use of the Equal Protection Clause and provides insight into how such an analysis might play out. Her concurring opinion notes that for legislation to pass an equal protection analysis, the state must show that its motivation for passing the statute was grounded in a rational basis, rather than merely an intent to discriminate.¹⁸⁷ The state in *Lawrence* argued that in enacting a statute criminalizing homosexual sodomy, it sought to further a rational state interest

181. SIECUS Curriculum Review, Sex Respect, <http://www.communityactionkit.org/reviews/SexRespect.html> (last visited Jan. 24, 2007).

182. Advocates for Youth, Abstinence-Only-Until-Marriage Education: Abandoning Responsibility to GLBTQ Youth, <http://www.advocatesforyouth.org/PUBLICATIONS/safespace/abstinenceonly.htm> (last visited July 17, 2007).

183. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

184. *Id.* at 562.

185. *Id.* at 575.

186. *Id.*

187. *See id.* at 582 (O’Connor, J., concurring).

in promoting morality.¹⁸⁸ However, the concurring opinion concludes that moral disapproval of homosexuality cannot possibly be grounded in a rational basis, since such disapproval is evidence of an intent to discriminate against gay people as a class instead of merely to criminalize a particular act.¹⁸⁹ Like the statute in *Lawrence*, programs that teach abstinence-only-until-marriage do not merely condemn the act of unmarried sex. Instead, they condemn gay and lesbian students as a class by teaching that these students' sexual relationships will be immoral even in adulthood, due to prohibitions on gay marriage.

Unlike the statute in *Lawrence*, the goal of abstinence-only education is not to impose criminal sanctions on the physical relationships of gay couples. In fact, instead of calling attention to same-sex relationships between students, abstinence-only education seeks to avoid discussion of the existence of gay and lesbian students or their relationships. By talking about gay and lesbian relationships only in the context of sexual urges and sexually transmitted diseases, abstinence-only curricula pointedly deny the possibility of fulfilling and healthy same-sex partnerships. Although these programs ignore the existence of same-sex relationships while the statute in *Lawrence* sought to identify and prosecute these relationships, abstinence-only education violates the same rights that were at issue in *Lawrence*. The majority opinion in *Lawrence* states that the case "involves liberty of the person both in its spatial and more transcendent dimensions."¹⁹⁰ Specifically, the Court was concerned not only with the "spatial" freedom of same-sex couples to engage in physical relationships but also with "dignity" and the "transcendent" freedom to "define one's own concept of existence" and "personhood" by entering into relationships of one's own choosing.¹⁹¹

To fully enjoy this freedom, the Court found that it was necessary to overturn its previous decision upholding the criminalization of same-sex relationships in *Bowers v. Hardwick*.¹⁹² In *Bowers*, the Court had validated the prosecution of a gay couple under a Georgia law that imposed criminal sanctions on couples of any sexual orientation who engaged in consensual sodomy.¹⁹³ The facially neutral language of the statute in *Bowers*—like the language of the federal abstinence-only legislation—did not overtly state an intent to discriminate against gay couples but was applied in a discriminatory way. The *Bowers* decision, the Court explained, "demeans the lives of

188. *Id.*

189. *Id.* at 583 (citing *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) for the principle that moral disapproval, manifested in "a bare . . . desire to harm a politically unpopular group," is not a government interest that satisfies rational basis review).

190. *Lawrence*, 539 U.S. at 562.

191. *Id.* at 562 (spatial and transcendent), 567 (dignity), 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)) (existence and personhood).

192. *Id.* at 575.

193. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

homosexual persons” and “is an invitation to subject [them] to discrimination both in the public and private spheres.”¹⁹⁴

Scholars have noted that although the majority in *Lawrence* purportedly used a substantive due process framework, the language of self-determination and personal liberty in the opinion reflects the Court’s incorporation of the concept of equality into the substantive due process analysis.¹⁹⁵ The right to equality and self-determination that the *Lawrence* Court sought to protect should also apply in the context of abstinence-only education, whether under an equal protection or due process analysis. However, the majority in *Lawrence* concludes by noting that the case’s holding does not necessarily apply to the situation of minors, coercive situations or prostitution—situations in which the state could have a legitimate ground for criminalizing sexual conduct.¹⁹⁶ That the Court listed minors along with situations of sexual coercion and prostitution indicates the Court’s specific concern about minors: it did not want to challenge statutory rape laws or laws criminalizing sex offenses against minors.¹⁹⁷ It is unlikely that the Court mentioned minors in order to withhold from them the right of self-determination and dignity articulated in *Lawrence*. Indeed, such a restrictive interpretation would subvert the central tenet of *Lawrence*: that people have a right to define their own identity by choosing interpersonal relationships that are meaningful to them, regardless of sexual orientation.¹⁹⁸ The process of defining one’s sense of self takes place to a large degree in adolescence, and the dignity due to gay and lesbian students in that process is no less than that due to adults. *Lawrence* prohibited discrimination against gay and lesbian relationships because of the implications that such stigma has on both the private and public lives of people who are gay and lesbian.¹⁹⁹ Abstinence-only education tells gay and lesbian students that their private relationships are immoral. Moreover, it encourages other students to share this disapproval in the public setting of the classroom, thus perpetuating a state-sponsored public stigma similar to that in *Lawrence*.

Abstinence-only education denies gay and lesbian students the ability to envision a life in which they can enter into healthy and fulfilling relationships

194. *Lawrence*, 539 U.S. at 575.

195. Lawrence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1897-98 (2004).

196. *Lawrence*, 539 U.S. at 578 (stating that, “[t]he present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.”).

197. Andrew Koppelman, *Lawrence’s Penumbra*, 88 MINN. L. REV. 1171, 1173 (2004) (explaining that the reference to minors was intended to protect statutory rape laws); Mary Ann Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 SUP. CT. REV. 75, 99 (describing the relationship of Justice Kennedy’s previous decisions on sex offenders to his note of caution in *Lawrence* that the decision should not be construed to legitimize sex offenses against minors).

198. *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

199. *Id.* at 575.

of their own choosing. As the *Lawrence* Court explained, without the freedom to define oneself according to the relationships one finds meaningful, a person's sense of self-determination is demoralized in a way that cuts at the very essence of what it is to be human. While the eloquent language in *Lawrence* defines a right with rather nebulous boundaries and applications, the context of an abstinence-only program provides an opportunity to envision how that right would play out in practice. Among the myriad consequences that are likely to follow from telling gay and lesbian students that their future cannot include healthy and fulfilling relationships, perhaps the most certain is to increase the sense of social alienation that many of these students already experience. Experts have correlated the ability to publicly identify as gay or lesbian with improved self-esteem and mental health.²⁰⁰ This is especially critical for gay and lesbian students of color, as they are likely to experience lower self-esteem and more stigma within their families and communities than White students who are gay and lesbian, potentially making school the only safe environment in which to disclose their sexual orientation.²⁰¹

Had the *Lawrence* Court extrapolated on the concrete effects of inability to define one's own sense of "personhood," it might well have identified a sense of hopelessness and despair as one chief consequence. Such feelings are commonplace among gay and lesbian students, accounting for estimates that up to 40% of these youth have attempted suicide.²⁰² Low self-esteem and social alienation are key predictors of suicide attempts among gay and lesbian youth.²⁰³ As explained above, these risk factors are particularly common among gay and lesbian students of color, especially when the school environment exacerbates the stigma they already experience. Moreover, studies suggest that the depression gay and lesbian students of color experience may make them more, rather than less, likely to engage in risky sexual behaviors.²⁰⁴

It may not be that gay and lesbian students have a constitutional right to education that nourishes their self-confidence and hopes for future happiness in

200. RAFAEL M. DÍAZ AND GEORGE AYALA, THE POL'Y INST. OF THE NAT'L GAY AND LESBIAN TASK FORCE, SOCIAL DISCRIMINATION AND HEALTH: THE CASE OF LATINO GAY MEN AND HIV RISK 20 (2001), available at <http://cci.sfsu.edu/files/NGLTF%20SD&H%20zine%20Eng.pdf> (linking status as an openly gay or "out" person with higher self-esteem).

201. See *id.* at 5 (describing the stigma gay Latino men face from their communities); see also Kim S. Miller et al., *The STI and HIV Epidemics in African American Youth: Reconceptualizing Approaches to Risk Reduction*, 30 J. OF BLACK PSYCHOL. 124, 131 (2004) (describing the increased stigma associated with homosexuality in African-American communities).

202. Scott L. Hershberger et al., *Predictors of Suicide Attempts Among Gay, Lesbian, and Bisexual Youth*, 12 J. OF ADOLESCENT RES. 477, 478 (1997).

203. *Id.* at 488 (describing variables related significantly to past suicide attempts).

204. CENTERS FOR DISEASE CONTROL AND PREVENTION, FACT SHEET, HIV/AIDS AMONG MEN WHO HAVE SEX WITH MEN 5 (2007), available at <http://www.cdc.gov/hiv/topics/msm/resources/factsheets/pdf/msm.pdf> (noting the relationship between depression and risky sexual behavior among men who have sex with men).

life. However, they undoubtedly have a right to an education that does not purposefully denigrate that vision by singling them out as a group that is unworthy of equal treatment in society.²⁰⁵ Abstinence-only education's impact on gay and lesbian students, and particularly those from communities of color, goes beyond mere indifference to their sense of personhood and violates the Equal Protection Clause in ways likely to cause severe psychological harm to these students.

Despite the similarities of abstinence-only education to the situation created by the statute in *Lawrence*, the government could attempt to argue that its motivation is rational and should survive an equal protection analysis because it serves a different purpose than mere moral disapproval. The government might argue that it believes that conveying disapproval of gay and lesbian relationships is wise from a public health perspective and that its public health goals legitimize the message in abstinence-only programs that gay sex is linked to HIV transmission. The reasons why the Court should reject this inaccurate and misleading argument about HIV transmission as irrational are most clear in examining the impact of abstinence-only education on communities of color, since these communities bear the highest incidence of HIV/AIDS.²⁰⁶ Cultural stereotypes and stigma within communities of color contribute to these disproportionately high rates of HIV.²⁰⁷ Health advocates for communities of color have explained that the stigma associating HIV with homosexuality discourages people from seeking out HIV testing, which is one of the most effective tools in slowing the spread of the epidemic.²⁰⁸ This stigma is based on the false belief that HIV is most common among people who are gay, a belief that not only discourages testing among both heterosexuals and homosexuals because of stigma but also lulls heterosexuals into a false sense of security.

By associating gay relationships with HIV and teaching that gay and lesbian students should remain forever abstinent, abstinence-only education encourages homophobic attitudes in schools and society. When gay students of color experience this homophobia—which exacerbates the stigma they already experience in their own communities—they may be more, not less, likely to

205. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

206. See discussion *supra* Section III.A.1 on HIV/AIDS.

207. CENTERS FOR DISEASE CONTROL AND PREVENTION, FACT SHEET, HIV/AIDS AMONG AFRICAN AMERICANS (2007), available at <http://www.cdc.gov/hiv/topics/aa/resources/factsheets/pdf/aa.pdf> (describing stigma in African-American communities); CENTERS FOR DISEASE CONTROL AND PREVENTION, FACT SHEET, HIV/AIDS AMONG MEN WHO HAVE SEX WITH MEN, *supra* note 204, at 5 (describing cultural factors in Latino communities).

208. Leslie Fulbright, *AIDS at 25: Disease Denial Devastating for African Americans*, SAN FRAN. CHRON., June 5, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/06/05/AIDSBBLACK.TMP>; CENTERS FOR DISEASE CONTROL AND PREVENTION, FACT SHEET, HIV/AIDS AMONG AFRICAN AMERICANS, *supra* note 207, at 3.

engage in behaviors that put them at risk for HIV infection.²⁰⁹ From a public health perspective, there is therefore no rational basis for the government message that stigmatizes gay and lesbian students in abstinence-only programs.

The government might also attempt to argue that seeking to repress gay and lesbian sexuality is rational because it benefits society by promoting what the government considers to be healthy attitudes in young people—i.e. attitudes that discourage homosexuality. This argument should similarly fail. Abstinence-only programs suggest that students who are gay and lesbian (and of course, also bisexual and transgender) will be leading morally objectionable lives if they enter into same-sex relationships. Such attitudes contribute directly to homophobia in the school environment and the outside world. The *Lawrence* Court explained that the *Bowers* statute criminalizing same-sex sodomy invited discrimination against gays in other facets of public and private life.²¹⁰ Although the statutes authorizing the abstinence-only legislation do not criminalize homosexuality, the discrimination that these programs invite against gay and lesbian students is no less disturbing than the discrimination a criminal statute would perpetuate.

The homophobia that abstinence-only education engenders has ramifications that include physical violence towards gays and lesbians, a problem that may disproportionately impact students of color. Community advocates have called attention to the degree to which the problem of homophobia in the larger society is exacerbated in communities of color.²¹¹ Approximately 20% of all hate crimes against gays and lesbians in 2005 involved African-American perpetrators.²¹² African-Americans and Latinos together—who represent only one-quarter of the population—represent almost half of all victims of hate crimes based on sexual orientation.²¹³ Moreover, physical harassment of gays and lesbians often occurs within the school

209. Díaz and Ayala, *supra* note 200, at 13, 2 (describing the connection between stigma and risky sexual behavior and noting that “[i]t is increasingly clear that HIV is spreading not at random, but within pockets of powerlessness and alienation created by social injustice, inequality and oppression.”).

210. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

211. See COHEN ET AL., *supra* note 95, at 14-16; Kevin Kumashiro, *Queer Students of Color and Antiracist, Antiheterosexist Education: Paradoxes of Identity and Activism*, in TROUBLING INTERSECTIONS OF RACE AND SEXUALITY 1, 6 (Kevin Kumashiro ed. 2001).

212. U.S. DEP’T OF JUST., UNIFORM CRIME REPORT, HATE CRIME STATISTICS 2005, TABLE 5 (2006), <http://www.fbi.gov/ucr/hc2005/table5.htm>. This is a significant percentage given that African-Americans comprise only 13% of the total U.S. population. See U.S. Census Bureau, Resident Population by Race, Hispanic Origin, and Age: 2000 to 2005, <http://www.census.gov/compendia/statab/tables/07s0014.xls> (last visited Jan. 24, 2007).

213. NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, ANTI-LESBIAN, GAY, BISEXUAL AND TRANSGENDER VIOLENCE in 2006 13 (2007), available at <http://www.avp.org/> (charting the percentage of African-American victims at 22% and the percentage of Latino/a victims at 21%); The Hispanic Population, Census 2000 Brief, *supra* note 92; The Black Population, Census 2000 Brief, *supra* note 94.

environment, as does verbal harassment.²¹⁴ Gay and lesbian students who are minorities are disproportionately targeted by such harassment.²¹⁵

Advocates for gay and lesbian youth have established a direct link between this harassment and abstinence-only education; gay and lesbian students whose schools teach abstinence-only education are more likely to have experienced harassment at school.²¹⁶ This harassment correlates to negative educational outcomes such as lower grades, absence from school, and decreased educational aspirations.²¹⁷ Since students from communities of color are already more likely to drop out of school and have lower educational aspirations than White students,²¹⁸ gay and lesbian students who are minorities suffer disproportionately from this discrimination. Far from benefiting society and encouraging healthy childhood development, the discrimination embodied in abstinence-only education is harmful to gay and lesbian teenagers—especially those from communities of color. The government should therefore not be able to claim to have a rational basis for its promotion.

In summary, an analysis of abstinence-only education under the Equal Protection Clause calls attention to the harm that these programs inflict on gay and lesbian students by denigrating gay and lesbian relationships as psychologically harmful and associating gay people with HIV. These messages increase the social alienation, low self-esteem, and stigma that gay and lesbian students from communities of color are already more likely to experience. The government cannot claim to have a rational basis for the promotion of such messages, since they do not decrease risky sexual behaviors and in fact increase the risk of physical violence and the risk that these teenagers will not succeed in school, particularly among minority teenagers. Since the government's duty to refrain from discriminating against people who are gay and lesbian is not limited to discrimination against adults, abstinence-only education should fail an equal protection analysis

V. THE ESTABLISHMENT CLAUSE

The Establishment Clause of the First Amendment prohibits the government from using its funds to promote religious doctrine.²¹⁹ Abstinence-

214. GLSEN, THE 2005 NATIONAL SCHOOL CLIMATE SURVEY 26 (physical harassment) & 14 (verbal harassment) (2006), available at <http://www.delawareonline.com/assets/pdf/BL509831121.pdf>.

215. See Stephen T. Russell & Nhan L. Truong, *Adolescent Sexual Orientation, Race and Ethnicity, and School Environments: A National Study of Sexual Minority Youth of Color*, in TROUBLING INTERSECTIONS OF RACE AND SEXUALITY 113, 124 (Kevin Kumashiro ed. 2001) (noting that African-American students who are gay and lesbian have higher levels of concern about their safety at school than do White students who are gay and lesbian).

216. See GLSEN, *supra* note 214, at xvi.

217. *Id.* at 78.

218. See U.S. Census Bureau, *supra* note 138.

219. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

only curricula teach moral values that are aligned with traditional Christian religious ethics, such as the promotion of chastity, the belief that life begins at conception, and the condemnation of homosexual relationships.²²⁰ After a 1998 lawsuit challenged the religious nature of programs funded by the AFLA, the Court stated in *Bowen v. Kendrick* that the fact that the moral values in abstinence-only education were aligned with religious doctrine was not enough to violate the Establishment Clause.²²¹ However, since that decision, many curricula have pushed the line the Court drew and have included explicitly religious messages. One widely-used curriculum refers students to the Bible as “the best guideline on love ever written.”²²² It also encourages students to involve themselves in a program that asks young people to take “virginity pledges” that commit them “to God, myself, my family, my friends, my future mate, and my future children until the day I enter a biblical marriage relationship.”²²³ As a result of such blatant promotion of religion, Rhode Island public schools recently dropped an abstinence-only program after the American Civil Liberties Union (ACLU) challenged the religious nature of the curriculum.²²⁴ Additionally, in 2006, the federal government settled a lawsuit with the ACLU of Massachusetts that exposed the overtly religious nature of the “Silver Ring Thing” virginity pledge program, a cornerstone of many abstinence-only programs.²²⁵ The religious content of abstinence-only programs makes it necessary to consider a legal challenge that is not as directly linked to arguments about the well-being of minority teenagers as the legal challenges in the Parts III and IV, but one which is still relevant and worth exploring. The following argument explores how abstinence-only programs might fare under an Establishment Clause analysis and why the religious nature of these programs has negative implications for the health and rights of communities of color.

220. U.S. HOUSE OF REPRESENTATIVES, REPORT PREPARED FOR REP. HENRY A. WAXMAN, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS 15 (2004), available at <http://oversight.house.gov/Documents/20041201102153-50247.pdf>.

221. 487 U.S. 589, 605 (1988). The *Bowen* Court remanded the case to the lower court to determine if the abstinence-only program in question had the effect of advancing religion due to possible failure by the federal government to monitor the content of grantees’ programs. The parties reached a settlement in the case, binding the federal government to provide more monitoring; however, the settlement expired in 1998. See Ira C. Lupu & Robert W. Tuttle, Legal Update, Roundtable on Religion and Social Welfare Policy, http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=44 (last visited Jan. 25, 2007).

222. SIECUS Curriculum Review, Why kNOw, <http://www.communityactionkit.org/reviews/WhyKnow.html> (last visited Jan. 24, 2007).

223. *Id.*

224. Legal Momentum, Sex, Lies, & Stereotypes: Profiles of Federally Funded Abstinence-Only Grant Recipients, Heritage Community Services 3, <http://legalmomentum.org/legalmomentum/files/heritagecommunity.pdf> (last visited Jan. 26, 2007).

225. See Lupu & Tuttle, *supra* note 221.

A. The Lemon Test

The Court usually evaluates the constitutionality of an Establishment Clause challenge regarding separation of church and state using a three-pronged test derived from its decision in *Lemon v. Kurtzman*, a case that invalidated a statute providing government aid to church-affiliated schools.²²⁶ The *Lemon* test requires that, to be constitutionally valid, a statute must: (1) have a secular purpose; (2) have a primary effect that does not advance religion; and (3) not foster an excessive entanglement with religion on the part of the government.²²⁷ An examination of these three prongs indicates that the three sources of abstinence-only funding should fail the *Lemon* test.

1. No Secular Purpose

The three funding streams for abstinence-only education differ in their statement of purpose. The AFLA states that its purpose is to reduce the problems associated with teenage sexual relations, including teenage pregnancy.²²⁸ Underscoring this secular purpose, the statute that authorizes the AFLA funding includes a series of findings on the purported health and economic consequences of teenage pregnancy and states that the statute's secular purpose will be furthered by the strategy of involving "religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives."²²⁹ The Court in *Bowen* found that this language reflected the goal of involving a wide variety of groups in order to effectively help teenagers understand the potential health and economic consequences of sex.²³⁰ For this reason, the Court concluded that the AFLA has a valid secular purpose and passes the first prong of the *Lemon* test, despite its emphasis on involving religious groups.²³¹

Unlike the AFLA, however, the Title V and CBAE funding could not even pass this first prong of the *Lemon* test. Title V and CBAE programs espouse lessons on morality that mirror religious values.²³² The Title V abstinence-only funding statute states that its purpose is "to promote abstinence from sexual activity," with no findings on the health concerns prompting this

226. 403 U.S. 602, 612-13 (1971).

227. *Id.*

228. 42 U.S.C.A § 300z (LexisNexis 2006)

229. *Id.*

230. *Bowen v. Kendrick*, 487 U.S. 589, 603 (1988).

231. *Id.* at 603-04.

232. See 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, 1093 (2002) (describing the religious values in the Title V program); see also U.S. HOUSE OF REPRESENTATIVES, REPORT PREPARED FOR REP. HENRY A. WAXMAN, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS 15 (2004), available at <http://oversight.house.gov/Documents/20041201102153-50247.pdf> (describing the religious values in the CBAE-SPRANS program).

purpose and no mention of strategies to ensure that Title V programs effectively change teenage behavior rather than simply promote religious values.²³³ The CBAE funding offers a similarly limited statement that its purpose is “to educate young people and create an environment within communities that supports teen decisions to postpone sexual activity until marriage,” with no mention of public health and no explanation of why its strategies are likely to be effective in changing teens’ behavior.²³⁴ Since the Title V and CBAE legislation do not even purport to address public health and lack any mention of strategies to ensure effective behavior change—as the Court required in evaluating the AFLA—an analysis like that in *Bowen* should find that the Title V and CBAE legislation lack a secular purpose.

2. Advancing Religion

Though the Title V and CBAE funding should fail the *Lemon* test based on the first prong alone, there are also several reasons why they, along with the AFLA, would violate the second prong of the test. The second prong of the *Lemon* tests asks whether a statute has a primary effect of advancing religion, based either on the facial language of the statute or on the effect of the statute as it is applied in real-life situations.²³⁵ All three of the abstinence-only funding streams state that their purpose is to encourage teenagers to abstain from sexual relations. At the time of the *Bowen* case, this language could pass as “facial” evidence that a statute was written to advance secular goals and not religion. Nearly two decades later, however, the Court could find such language to be disingenuous, since scientific evidence to date has failed to substantiate claims that abstinence-only education is effective in addressing “the problems of teenage sexuality” by reducing rates of pregnancy and STIs.²³⁶ A ten-year study of abstinence-only programs, funded by the government itself, concluded that the programs did not result in students being more likely to abstain from sex, have fewer sexual partners, or delay sexual activity.²³⁷ Evidence on the ineffectiveness of abstinence-only education stands in sharp contrast to a wide body of evidence that has proven comprehensive sex education to be effective not only in reducing rates of pregnancy and STIs but also in delaying teenage

233. 42 U.S.C.A § 710 (LexisNexis 2006); see also 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, 1096-97 (2002).

234. Dep’t of Health & Hum. Servs., *supra* note 158, at 3.

235. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

236. See Kirby, *supra* note 120, at 8; Society for Adolescent Medicine, *supra* note 9, at 84-85.

237. MATHEMATICA POLICY RESEARCH, INC., IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS xvii (2007), available at <http://www.mathematica-mpr.com/publications/pdfs/impactabstinence.pdf>; National Campaign to Prevent Teen Pregnancy Statement on Abstinence-Only Program Evaluation, Press Release, April 13, 2007, http://www.teenpregnancy.org/press/pdf/abstinence_04_07.pdf.

sexual activity.²³⁸ Studies of minority teenagers, the population most affected by teen pregnancy and STIs, have demonstrated the same results on the effectiveness of comprehensive sex education and the inefficacy of abstinence-only education.²³⁹ Based on this evidence, the Court today might be more willing to find a religious intent—instead of a realistic public health strategy—lurking behind statutory language that promotes abstinence-only education as a way to solve the problems associated with teenage sexual activity.

The *Bowen* Court also explained that a statute would violate the second prong on its face if the language of the statute indicated that “a significant proportion of the federal funds will be disbursed to ‘pervasively sectarian’ institutions.”²⁴⁰ The Court concluded that this was not a risk for the AFLA because of factors including “AFLA’s facially neutral grant requirements” and “the wide spectrum of public and private organizations which are capable of meeting the AFLA’s requirements.”²⁴¹ As explained above, recent evidence on the inefficacy of abstinence-only programs undermines the proposition that the grant language of the three abstinence-only funding streams is facially neutral. In addition, a “wide spectrum” of organizations are not capable of meeting the current requirements of abstinence-only funding. As discussed previously, the CBAE funding requirements effectively preclude even organizations with a public health mission from receiving funding.²⁴² Conspicuously disadvantaged in the pool of applicants for and beneficiaries of abstinence-only funds are organizations with purely secular missions—often those organizations that have been addressing issues of teenage pregnancy and STIs for decades.²⁴³ Given the large number of sectarian organizations that receive abstinence-only funding, it is not surprising that the ACLU has already identified instances of these organizations using funding in ways that appear to violate the second prong of

238. See Kirby, *supra* note 120, at 8-9; see also John Santelli et al., Explaining Recent Declines in Adolescent Pregnancy in the United States: The Contribution of Abstinence and Improved Contraceptive Use, 97 AM. J. OF PUB. HEALTH 1, 5 (2007) (explaining that recent declines in teenage pregnancy are due primarily to improved contraceptive use)

239. John B. Jemmott III et al., *Abstinence and Safer Sex HIV Risk-Reduction Interventions for African American Adolescents*, 279 JAMA 1529, 1534 (1998).

240. *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988).

241. *Id.* The *Bowen* Court found that the AFLA did not violate this second prong on its face, but that the lower court would have to reevaluate the case to determine whether AFLA violated that prong “as applied.” The parties in the case ultimately reached a settlement agreement that prevented the district court from having to make this determination. See *supra* text accompanying note 221.

242. See sources cited *supra* note 168.

243. Government-appointed reviewers of grant programs for which faith-based organizations (FBOs) are eligible to apply claim that a commitment not to preference FBOs in the grant process is evidenced by the fact that reviewers are not informed of which organizations have identified themselves as FBOs. However, this claim is doubtful, since reviewers can still tell which organizations are FBOs by the name and mission of the organization. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FAITH-BASED AND COMMUNITY INITIATIVE: IMPROVEMENTS IN MONITORING GRANTEES AND MEASURING PERFORMANCE COULD ENHANCE ACCOUNTABILITY 6 & 25 (2006), available at <http://www.gao.gov/new.items/d06616.pdf>.

the *Lemon* test by advancing religion “as applied,” through curricula that overtly proselytize.²⁴⁴

3. Excessive Entanglement

When the government monitors an organization to ensure that it does not use federal funds for religious purposes, “excessive entanglement” may occur if the government finds it necessary to intrude into the organization’s “day-to-day operation” to ensure that funds are not misused.²⁴⁵ It is not clear whether abstinence-only funding would violate the third prong of the *Lemon* test, although it is unlikely that the Court would need to reach this third prong in order to invalidate the abstinence-only funding. In *Bowen*, the Court stated that reviewing a grantee’s program and its educational materials and making site visits to evaluate the program’s actual operations would not rise to the level of excessive government entanglement.²⁴⁶ All of these measures—and perhaps more—are necessary in monitoring abstinence-only education grants. The Government Accountability Office (GAO) recently issued a report detailing the problems that faith-based organizations, including those in abstinence-only programs, are having in complying with the Establishment Clause’s requirement of separation of church and state.²⁴⁷ The GAO noted that the general government audit guidelines do not remind auditors to check that federal funds are not being used for religious activities and that the CBAE program needs to develop some program-specific guidelines on this matter for its auditors.²⁴⁸ The GAO also suggested that programs with faith-based participant organizations, like the CBAE program, need to conduct more rigorous evaluations to determine whether faith-based organizations are as efficient as secular organizations.²⁴⁹ While these GAO recommendations illustrate that the government has created new monitoring issues with its drive to fund faith-based organizations, it is not certain that the required monitoring would rise to the level of “excessive” government monitoring that would fail the *Lemon* test.

However, the larger problem is not whether the government will have to do too much monitoring to ensure separation of church and state, but rather that it has not done enough. Government review of abstinence-only education has been lax, as evidenced by the number of overt references to religion in the curricula and the fact that the government office in charge of monitoring CBAE

244. See sources cited *supra* notes 227 (on an ACLU challenge regarding religion in Rhode Island abstinence-only programs) & 228 (on an ACLU lawsuit regarding religion in Massachusetts abstinence-only programs).

245. *Bowen v. Kendrick*, 587 U.S. 589, 616 (1988).

246. *Id.* at 616-17.

247. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 243.

248. *Id.* at 38-39.

249. *Id.* at 49-50.

grants has conducted hardly any site visits to schools to observe the implementation of lesson plans.²⁵⁰ By drawing attention to this insufficient monitoring, advocates for comprehensive sex education may be able to bring attention to the question of whether government monitoring of abstinence-only programs would indeed need to be excessive—and whether these funds are being used for religious proselytizing instead of public health interventions.

4. Relevance to Communities of Color

This analysis of Establishment Clause issues bears directly on the interests of communities of color. As the above discussion illustrates, large amounts of federal funding for anti-poverty efforts are being funneled into abstinence-only programs run by organizations that are selected by the federal government for their adherence to religious tenets rather than their commitment to the health and lives of teenagers in low-income communities. The Black AIDS Institute, addressing the issue of abstinence-only education, has declared that “[w]e can no longer allow those with little investment in Black communities to limit the information young Black people receive in schools and community-based programs.”²⁵¹

An article promoting an “urban” abstinence-only program in a school with a predominately African-American and Latino population explains that the program uses a national curriculum but that “people of the Black, Hispanic, or minority cultures need to be on the teaching team,” so as to display “the language, mannerisms, and knowledge of the African-American culture.”²⁵² Such programs merely give lip service to cultural empowerment; in reality, they aim only to bring in the requisite number of teachers who are minorities to deliver a message developed by outside organizations.²⁵³ In contrast, programs that are likely to be successful in improving outcomes for minority teenagers are programs designed to strengthen ethnic identity, instead of preaching religiously-based abstinence-only themes that denigrate single-parent families and instill shame.²⁵⁴ Such positive programs draw on the cultural strengths of

250. *Id.* at 37 (noting that in 2005, the CBAE program officials conducted only two site visits).

251. COHEN ET AL., *supra* note 95, at 8.

252. See Carter-Jessop et al., *supra* note 55, at 298 (national curriculum), 302-03 (teaching team), 301 (language and mannerisms).

253. See *id.* (describing a mainstream program that recruited minority instructors to disseminate its message); see also COHEN ET AL., *supra* note 95, at 8 (criticizing the control that outsiders have over abstinence-only programs in African-American communities).

254. See Faye Z. Belgrave et al., *Cultural, Contextual, and Intrapersonal Predictors of Risky Sexual Attitudes Among Urban African American Girls in Early Adolescence*, 6 CULTURAL DIVERSITY AND ETHNIC MINORITY PSYCHOL. 309, 318-20 (2000) (associating a positive ethnic identity and with less risky attitudes regarding sexual behavior).

minority communities by developing curricula grounded in the values and traditions of African-American and Latino culture.²⁵⁵

A self-evaluation of one abstinence-only program, *Winners Wait*, inadvertently reveals the harm that minority teenagers may suffer from abstinence-only programs that ignore the strengths of minority communities and teach shame-based messages.²⁵⁶ The *Winners Wait* program operates in Essex county New Jersey, home to the city of Newark, where the population is predominately African-American and Latino and almost half of all children under age 18 are living in poverty.²⁵⁷ The *Winners Wait* evaluation summary compiles the results of pre- and post-program assessments by students and touts a marginal increase in the number of students who say they plan to remain abstinent until marriage.²⁵⁸ Notably, however, the evaluation summary ignores the fact that measures associated with self-esteem indicate that the self-esteem of program participants actually decreased as a result of the program.²⁵⁹

Since abstinence-only programs convey unrealistic expectations for teenage chastity, denigrate single-parent families, and promote harmful gender stereotypes, it is not surprising that they would have an immediate, negative effect on the self-esteem of low-income minority students who are most in need of realistic and empowering guidance on sexual and reproductive health issues and life goals. In contrast, programs that develop a positive sense of ethnic identity and improve self-esteem among teenagers are likely to be effective in

255. See Belgrave et al., *supra* note 142, at 330-34 (describing the Sisters of Nia program for African-American girls); see also SILLIMAN, *supra* note 3, at 255 (describing a similar program for Latina girls). Such programs might encourage teenagers to delay sexual activity, but this is quite different than abstinence-only education, which forbids any mention of contraception and asserts that teenagers should never become sexually active until they marry, in addition to espousing harmful medical misinformation and gender stereotypes.

256. See *Winners Wait*, Mission, <http://www.winnerswait.com/mission.htm> (last visited Jan. 17, 2007).

257. U.S. Census Bureau, State & Country QuickFacts: Newark, New Jersey, <http://quickfacts.census.gov/qfd/states/34/3451000.html> (last visited Jan. 13, 2007) (detailing the racial and ethnic make-up of Newark); U.S. Census Bureau, American Community Survey Profile, Population and Housing Profile: Newark, <http://www.census.gov/acs/www/Products/Profiles/Single/2003/ACS/Narrative/155/NP15500US3451000013.htm> (last visited Jan. 17, 2007) (detailing the number of residents under age 18 who are living in poverty in Newark).

258. *Winners Wait*, High School Evaluation Results, Executive Summary, <http://www.winnerswait.com/2005-2006%20Winners%20Wait%20High%20School%20executive%20summary.doc> (last visited Jan. 17, 2007). However, even this measure does not merit applause, since research indicates that the majority of teenagers will be unable to maintain this commitment to abstinence and will then be more likely to engage in unprotected sex when they do have sex. See Bruckner & Bearman, *supra* note 105, at 271.

259. *Winners Wait*, High School Evaluation Results 2005-2006, <http://www.winnerswait.com/2005-2006%20Winners%20Wait%20High%20School%20Evaluation.xls> (last visited Jan. 17, 2007) (charting differences between pre and post-test results for measures such as "I don't have much to be proud of"; "I believe in myself"; and "I feel that I am a failure").

improving sexual health outcomes.²⁶⁰ Encouragingly, a growing number of states are rejecting Title V funding for abstinence-only education out of concern for the medical misinformation and overtly religious views contained in these programs.²⁶¹ However, the two other federal abstinence-only programs still operate in many of the states that have taken such a stand.²⁶²

VI. MOVING TOWARDS A BETTER POLICY

The fight against poverty in America requires major structural reforms in areas such as wages and job opportunities, childcare for working mothers, and health insurance. Comprehensive sex education programs, which may encourage abstinence but still provide teenagers with accurate and complete information on contraception, are a key component of this effort. The current abstinence-only education initiative creates an absurd dynamic in which our government insists that the fight against poverty should focus its resources overwhelmingly on the behaviors that cause teen pregnancy, yet denies teenagers the sexual and reproductive health information that has proven effective in changing their behavior with respect to pregnancy and STIs.

Other countries with similar economic resources have developed more realistic and successful policies to deal with teen pregnancy. The United States has significantly higher rates of teen pregnancy than other industrialized Western countries.²⁶³ These other countries have a long history of teaching comprehensive sex education and providing better access to contraceptive services for teenagers.²⁶⁴ Notably, rates of sexual activity are essentially the same in the United States as compared to these other countries, an observation that is consistent with evidence that public health advocates have long pointed to in our own country that teaching about contraception does not increase rates of sexual activity.²⁶⁵ In addition to being the only country with a national policy that promotes abstinence-only education, the United States is also the only one of these developed countries that often excludes contraceptive services from basic health care and makes it difficult for teenagers to obtain these services

260. See Belgrave et al., *supra* note 254 (discussing the association between a positive sense of ethnic identity and lower levels of risky attitudes regarding sexual behavior).

261. Kaiser Family Foundation, *Title V Abstinence Education Program Expires Without Reauthorization*, DAILY WOMEN'S HEALTH POLICY REPORT, July 2007, http://www.kaisernet.org/daily_reports/rep_index.cfm?DR_ID=45982; Laura Beil, *Abstinence Education Faces an Uncertain Future*, N.Y. TIMES, July 18, 2007, at A1.

262. SIECUS, State Profile: New Jersey, <http://www.siecus.org/policy/states/2005/mandates/NJ.html> (last visited Jan. 26, 2007).

263. JACQUELINE E. DARROCH ET AL., GUTTMACHER INST., OCCASIONAL REPORT NO. 3, TEENAGE SEXUAL AND REPRODUCTIVE BEHAVIOR IN DEVELOPED COUNTRIES: CAN MORE PROGRESS BE MADE? 5 (2001), available at http://www.guttmacher.org/pubs/eurosynth_rpt.pdf.

264. *Id.* at 9.

265. *Id.* at 80 (explaining that rates of sexual activity do not significantly vary); see *supra* note 120 (citing studies that demonstrate that comprehensive sex education does not increase sexual activity).

confidentially.²⁶⁶ The result, which should not be surprising, is that U.S. teenagers are less likely to use contraception than are teenagers in other Western countries, thus explaining the higher rates of teen pregnancy in the United States.²⁶⁷

The misguided focus on abstinence-only education in the United States runs counter to the recommendations of public health experts.²⁶⁸ Parents and teachers also overwhelmingly express support for comprehensive sex education and the goal of ensuring that young people have the information and resources to make informed decisions about their health.²⁶⁹ The first step towards this goal is to halt the flow of federal money to abstinence-only programs. A number of states have already taken a firm stance on this issue by rejecting federal abstinence-only money, which may eventually help to convince legislators to de-fund the federal abstinence-only funding streams.²⁷⁰ An even more effective strategy would be to create a federal funding program specifically designated for comprehensive sex education.²⁷¹ In addition, teenagers—especially those from low-income, minority neighborhoods—need greater access to sexual and reproductive health information and services outside of the classroom. Communities of color can be a powerful voice in calling for increased funding for the federal Title X program, which provides the subsidized health care services that are critical to reducing racial and ethnic health disparities in rates of STIs, HIV and unintended pregnancies.²⁷²

CONCLUSION

Behind the purportedly noble goals of abstinence-only programs lies a history of racial politics that translates into a profound disregard for the needs of low-income minority teenagers. These programs provide appealing sound

266. DARROCH ET AL., *supra* note 263, at 9.

267. *Id.* at 6.

268. See Society for Adolescent Medicine, *supra* note 9, at 86 (explaining why the Society for Adolescent Medicine does not support abstinence-only education); see also ADVOCATES FOR YOUTH & SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE U.S., TOWARD A SEXUALLY HEALTHY AMERICA: ROADBLOCKS IMPOSED BY THE FEDERAL GOVERNMENT'S ABSTINENCE-ONLY-UNTIL MARRIAGE EDUCATION PROGRAM 25-27 (2001), available at <http://www.advocatesforyouth.org/publications/abstinenceonly.pdf> (providing a list of organizations that support comprehensive sex education).

269. Dailard, *supra* note 2, at 10-11 (discussing the support of parents and teachers for abstinence-only education).

270. Kaiser Family Foundation, *Title V Abstinence Education Program Expires Without Reauthorization*, DAILY WOMEN'S HEALTH POLICY REPORT, July 2007, http://www.kaisernet.org/daily_reports/rep_index.cfm?DR_ID=45982; Laura Beil, *Abstinence Education Faces an Uncertain Future*, THE N.Y. TIMES, July 18, 2007, at A1.

271. See Advocates for Youth, Responsible Education About Life (REAL) Act, <http://www.advocatesforyouth.org/real.htm> (last visited November 2, 2007).

272. Planned Parenthood, Title X: America's Family Planning Program, <http://www.plannedparenthood.org/news-articles-press-politics-policy-issues/birth-control-access-prevention/title-x-13163.htm> (last visited November 2, 2007).

bites for politicians seeking to appeal to conservative voters but offer no real solutions to poverty. Moreover, the harm inflicted by abstinence-only programs reaches levels that violate the protections that our Constitution guarantees for free speech, equal protection, and separation of church and state. An analysis of the constitutionality of these programs reveals that they disproportionately impact minority teenagers by increasing their already-heightened risk of STIs, HIV, and unintended pregnancy and by compounding the burdens that teenage girls from communities of color already face in succeeding in school and building careers. The disproportionate harm of these programs in communities of color is also evident in their impact on gay and lesbian teenagers who are minorities and who face higher rates of physical violence, decreased self-esteem, and riskier sexual behavior because of abstinence-only education. The religious nature of the federal funding streams for abstinence-only education highlights the fact that these programs are not developed and evaluated based on their ability to make sound public health interventions in the lives of minority teenagers.

While abstinence-only education might not at first glance seem like a matter of race, one way that racism in our society perpetuates itself is by converting derogatory beliefs into facially neutral expressions of economic and social policy.²⁷³ Abstinence-only education accomplishes this by folding racism into a program that encourages “traditional” gender norms and heterosexuality, since distinctions based on gender have traditionally been viewed with less suspicion in U.S. society (and courts) than distinctions based on race. The irony of this strategy is that an issue that should be worthy of two bases of constitutional scrutiny—both race and gender—appears to be only a matter of gender and thus not offensive at all to many people. Focusing on the impact that abstinence-only education has on low-income, minority teenagers is a way to counteract this complacency and to demonstrate why effective anti-poverty programs must not prevent minority communities from accessing the resources they need to make informed decisions about their own sexual and reproductive health.

273. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378-79 (1988) (explaining that the “explicit ideology of white supremacy” is now hidden behind the facial race-neutrality of the law).

ESSAYS