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A, B, C'S AND CONDOMS FOR FREE: A LEGISLATIVE SOLUTION TO PARENTS' RIGHTS AND CONDOM DISTRIBUTION IN PUBLIC SCHOOLS

I. INTRODUCTION

"You are not having enough orgasms."¹ When Jason Mesiti and Shannon Silva, both fifteen years old, attended a mandatory school-wide assembly, this is what they heard.² The program was a ninety-minute AIDS³ awareness presentation.⁴ Highlighting the event was a speaker who engaged in lewd and sexually explicit language and actions throughout the monologue.⁵

1. *Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525, 529 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996).

2. *Id.* The assembly took place at Chelmsford High School in Boston, Massachusetts. *Id.* The students and their parents became plaintiffs in the case of *Brown v. Hot, Sexy and Safer Products*. *Id.* One of the defendants was a corporation wholly owned by Suzi Landolphi, the speaker at the assembly. *Id.* The assembly was mandatory for the students. *Id.* The students alleged that compulsory attendance at an indecent assembly deprived them of their privacy rights and their right to be free from sexual harassment. *Id.* at 530.

3. Acquired Immunodeficiency Syndrome. This note uses the acronym "AIDS" throughout the text and footnotes. AIDS is caused by the human immunodeficiency virus (HIV) weakening the human body by destroying white blood cells needed to attack and kill bacteria and other infectious material in the body. Alexandra M. Levine, *Technical Article: Acquired Immunodeficiency Syndrome: The Facts*, 65 S. CAL. L. REV. 423, 427-28 (1991).

HIV follows along a continuum, with AIDS as the last stage of infection. *Id.* at 427. The state of infection caused by AIDS may be completely asymptomatic in which the individual is healthy in all respects, has no illness signs or symptoms, and yet the HIV virus is alive and well, growing in the blood, with the capacity to transmit the virus to others. *Id.* at 429. At this stage, the danger to the public health is high since carriers may not know that they have the virus, and thus, fail to take extra precautions. Marjorie H. Lawyer, Note, *HIV and Dentistry*, 29 VAL. U. L. REV. 297, 302 n.20 (1994). The latency period from initial infection to full-blown AIDS averages from seven to ten years. *Id.*

4. *Brown*, 68 F.3d at 529.

5. *Id.* During the speech, the speaker allegedly:

- 1) told the students that they were going to have a "group sexual experience, with audience participation";
- 2) used profane, lewd, and lascivious language to describe body parts and excretory functions;
- 3) advocated and approved of oral sex, masturbation, homosexual activity, and condom use during masturbation;
- 4) characterized the loose pants worn by one minor as "erection wear";
- 5) referred to being in "deep shit" after anal sex;
- 6) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up;
- 7) encouraged a male minor to display his "orgasm face" with her for the camera;

As a result of the actions and language used at the assembly, Jason and Shannon's parents brought suit against the public school board for infringement of their constitutional right to raise their children as they see fit.⁶ The First Circuit Court of Appeals, however, found no violation of this right.⁷ Instead, the court found that this language was part of an educational AIDS awareness curriculum.⁸ Further, the court found that parents do not possess an all-encompassing right to restrict the flow of information into the public schools.⁹

The extreme example of the lewd assembly demonstrates how far public elementary and secondary schools¹⁰ have gone in providing sex and AIDS education for students.¹¹ Thirty-three state legislatures and the District of Columbia have implemented mandatory sex education and AIDS curriculum

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- 8) informed a male minor that he was not having enough orgasms;
 - 9) closely inspected a minor and told him he had a "nice butt"; and
 - 10) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.

Id. The preceding was included in the complaint Jason and Shannon's parents brought against the producers of the show. *Id.*

6. *Id.* The parents claimed an infringement of their right to raise their children as they see fit under the Fourteenth Amendment. For a full discussion of parental rights under the Fourteenth Amendment, see *infra* section III.

7. *Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525, 534 (1st Cir. 1995).

8. *Id.*

9. *Id.*

10. Some school boards have implemented condom distribution programs in elementary schools, as well as secondary schools. See *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995), *cert. denied*, No. 95-617, 1995 WL 625541 (U.S. Jan. 8, 1996). To date, only public school districts' condom distribution plans have been litigated. Thus, this note only considers parental challenges to condom distribution programs in elementary and secondary public school districts. See *infra* section IV for a full discussion of these cases.

11. Karl J. Sanders, *Kids and Condoms: Constitutional Challenges to the Distribution of Condoms In Public Schools*, 61 U. CIN. L. REV. 1479, 1479 (1993). This extreme example also demonstrates that the right to free speech is specifically enumerated in the First Amendment to the United States Constitution. The text of the First Amendment is as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Thus, parents can more easily demonstrate a burden on these enumerated rights. Compare parental rights under the First Amendment to parents' rights to raise their children as they see fit under the Fourteenth Amendment: parental rights to raise children are not explicitly enumerated in the United States Constitution. The applicable section of the Fourteenth Amendment states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1. Although generally upheld, parents' rights have been subject to varying degrees of judicial interpretation due to the U.S. Constitution's lack of an express grant of authority to parents in raising their children. See *infra* section III for a history of parental rights. See *infra* section IV for an example of varying judicial opinions in the area of parental rights asserted in condom distribution programs in public schools.

throughout their public school systems.¹² However, in certain school districts, sex and AIDS education is no longer confined to curriculum within the classroom.¹³ These districts have begun the controversial practice of distributing condoms to students during school hours.¹⁴ Public school districts are engaging in these programs based on their belief that sex education is not enough to prevent the spread of AIDS,¹⁵ sexually transmitted diseases, and

12. See, e.g., ALA. CODE § 16-40A-2 (1975); ARK. CODE ANN. § 6-18-703 (Michie 1975); CAL. EDUC. CODE § 51550 (West Supp. 1996); CONN. GEN. STAT. ANN. § 10-16C (1986); GA. CODE ANN. § 20-2-143 (1991); HAW. REV. STAT. § 296-11 (1988); IDAHO CODE § 33-1608 (1970); 105 ILL. COMP. STAT. ANN. § 5/27-9.1 (West 1993); IND. CODE ANN. § 20-10.1-4-10 (West 1994); MASS. GEN. LAWS ANN. ch. 71, § 380 (West 1982); MICH. COMP. LAWS ANN. § 380.1169 (West 1988); MO. ANN. STAT. § 161.092 (West 1991); NEV. REV. STAT. § 389.065 (1979); N.H. REV. STAT. ANN. § 189.10 (1989); N.J. STAT. ANN. § 18A:35-4.7 (West 1989); N.M. STAT. ANN. § 22-5-4 (Michie 1978); N.C. GEN. STAT. § 115C-81 (1995); N.D. CENT. CODE § 15-38-07 (1993); OKLA. STAT. ANN. tit. 70, § 11-105.1 (West Supp. 1996); PA. STAT. ANN. tit. 24, § 15-1512 (West 1992); R.I. GEN. LAWS § 16-22-18 (1988); S.C. CODE ANN. § 59-32-10 (Law Co-op. 1988); S.D. CODIFIED LAWS § 13-33-1 (Michie 1993); TENN. CODE ANN. § 71-3-701 (1989); UTAH CODE ANN. § 53A-13-101 (1953); WASH. REV. CODE ANN. § 28A.640.020 (West Supp. 1996); WIS. STAT. ANN. § 118.01 (West 1991); WYO. STAT. ANN. § 21-9-1 (Michie 1977).

Some states have also mandated stringent AIDS education curriculum statutes based on the goal of eradicating discrimination against students with AIDS. Frederic C. Kass, *Schoolchildren with AIDS, in AIDS AND THE LAW* 66, 76 (Harlon L. Dalton & Scott Burris eds., 1987). The well-publicized plight of Ryan White brought AIDS discrimination among schoolchildren into the limelight. *Id.*

Ryan White was denied access to Western Middle School in Kokomo, Indiana, because he was a hemophiliac who had AIDS. Ryan's family was forced to seek an injunction to prevent the school from denying Ryan admittance. *White v. Western Sch. Corp.*, IP No. 85-1192-C, (S.D. Ind. Aug. 23, 1985). Ryan was attending school by telephone connection while his lawyers exhausted four levels of state administrative appeals ordered by a federal judge. *Id.*

Part of the reason for discrimination against AIDS infected schoolchildren is the public's unreasonable fear of contracting this highly contagious disease. Lynn E. Sudbeck, *Students With Aids: Protecting an Infected Child's Right to a Classroom Education and Developing a School's AIDS Policy*, 40 S.D. L. REV. 72, 72 (1995). Parents, teachers, and school administrators have a responsibility to children to approach AIDS and those children infected with it, not with unreasonable fear, but with rational decision making and acceptance. *Id.* Only from this rational perspective may education begin to eliminate the spread of AIDS and the discrimination that accompanies AIDS. *Id.* For a discussion of the benefits of AIDS education, see Jane Harris Aiken, *Education as Prevention, in AIDS AND THE LAW* 90 (Harlon L. Dalton & Scott Burris eds., 1987). Arguably, AIDS education, along with decreasing discrimination, will slow the spread of AIDS because knowledge of how HIV is spread will result in proper precautionary measures. *Id.* at 91-95.

13. Sanders, *supra* note 11, at 1479.

14. *Id.* The issue of whether condoms are considered education or part of a school's sex education curriculum has not been resolved. See *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 263 (N.Y. App. Div. 1993). Opponents of condom distribution plans argue that condom distribution programs are "mere supplements to the education process." *Id.* Proponents of the plans argue that condom distribution is a necessary and logical extension of sex and AIDS education curricula. *Id.*

15. Throughout this note, the use of "AIDS" includes HIV because schools are also concerned with HIV infection among students. "HIV turns infected cells into virus factories." Geoffrey Cowley, *Living Longer With HIV*, NEWSWEEK, Feb. 12, 1996, at 60. The HIV infection process is as follows:

unwanted teen pregnancies.¹⁶

In response to the schools' actions, parents have brought suit against local school boards. While polls indicate that a majority of parents approve of condom distribution in public schools, a strong minority of parents disfavor the plans.¹⁷ Those who approve of condom distribution are further divided into

[A] virus attaches to receptors on a host cell, releasing its genetic material as RNA. An enzyme [then] converts the viral RNA into DNA. The viral DNA is [then] integrated into the host cell's chromosomes. The infected cell produces new viral RNA, which generates proteins and other constituents of whole viruses. The protease enzyme creates more proteins by cutting them into shorter pieces. [Then] [t]he newly milled proteins fold together to form HIV capsules. [Finally], [c]ompleted HIV capsules break away to infect other cells.

Id. at 62.

[Thus,] HIV is a wily foe. Armed with special enzymes, it splices its own genes into the immune cells it infects, turning them into factories for producing more HIV. Few AIDS researchers expect any drug to reverse the infection once it occurs Despite the best efforts of researchers and caregivers, half of all HIV-positive people develop AIDS within nine years of contracting the virus, and 40 percent die within that period.

Id. at 60.

16. Eugene C. Bjorklun, *Condom Distribution in the Public Schools: Is Parental Consent Required?*, 91 EDUC. L. REP. 11, 13 (1994). In 1990, approximately 10% (835,000) of teenage females aged 15-19 became pregnant and either gave birth or had an abortion. *State-Specific Pregnancy and Birth Rates Among Teenagers*, MORBIDITY & MORTALITY WKLY. REP., Sept. 22, 1995, at 677 (citing CDC, U.S. DEP'T OF HEALTH & HUMAN SERVS., UNINTENDED PREGNANCY AND CHILDBEARING IN THE UNITED STATES (1995)). An alternative methodology which included fetal losses estimated one million pregnancies in this age group in 1990. *Id.* An estimated 95% of these pregnancies were unintended. *Id.* While the national birth rate for 15-19 year olds decreased by 2% between 1991 and 1992, there had been a 24% increase in births from 1986 to 1991. *Id.*

17. Bjorklun, *supra* note 16, at 11.

In order to determine the extent of public support and opposition to such programs, the Gallup/Phi Delta Kappa poll incorporated questions about condom distribution in the schools in both its 1992 and 1993 surveys of the public's attitudes toward public schools. In the 1992 survey the results showed that "a majority of respondents (68%) would approve of condom distribution in their local public schools, although 25% of them would approve of distribution only with parental consent." Another 25 percent were opposed to any condom distribution in the public schools. In the 1993 survey, the support for distribution declined to 60 percent, and of those, 19 percent would require parental consent. The percent opposed to any distribution jumped to 38. Based on these results, it might be concluded that while there is substantial opposition to any condom distribution in the schools, well over half and perhaps as much as two-thirds of the population approves of it.

Id. at 13-14 (citations omitted). *But see Parents Magazine—Wave 5*, Kane, Parsons & Assoc., Jan. 1988, available in WL, Poll Database (stating that only 37% of respondents thought that schools should both teach about condoms and make them available).

Many students also approve of condom distribution in public schools. A 1992 student's poll conducted in Denver, Colorado, found that 85% of the Denver students surveyed agreed with the programs, while 15% were opposed to condoms in schools. Johnathon T. Fanburg et al., *Student Opinions of Condom Distribution at a Denver, Colorado High School*, 65 J. SCH. HEALTH 181, 182 (1995).

those who support parental notification in condom distribution and those who oppose it.¹⁸ Specifically, parents who desire parental notification have claimed that by implementing the plans without parental notice, school boards have violated their Fourteenth Amendment rights to raise their children as they see fit,¹⁹ as well as infringed upon their First Amendment right to a free exercise of religion.²⁰

When countering parents' claims, states assert their interest in curbing the spread of AIDS.²¹ Some public schools contend that because schools have

18. Bjorklun, *supra* note 16, at 14. The approval group of condom distribution is further split into those who would require parental consent and those who would not. *Id.* Parental notification in condom distribution plans is "the most difficult and sensitive issue." *Id.* (quoting Barbara Soloman, *Legal Issues*, in *CONDOMS IN SCHOOLS* 74 (Sarah E. Samuels & Mark D. Smith eds., 1993)).

19. Parents have brought their claims against school boards under the United States Constitution, as well as their respective state constitutions. *See infra* notes 177-78 and accompanying text. The Fourteenth Amendment of the United States Constitution has been interpreted to include parental rights to raise their children in accordance with how they see fit. This right has been extended to the educational context. *See infra* section III for a discussion of traditional parents' rights to raise their children as they see fit, particularly in an educational setting.

20. *See* Alfonso v. Fernandez, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993); Curtis v. School Comm. of Falmouth, 652 N.E.2d 580 (Mass. 1995), *cert. denied*, No. 95-617, 1995 WL 625541 (U.S. Jan. 8, 1996). This note addresses the fundamental, substantive due process right of parents to direct the upbringing of their children. It does not address parents' First Amendment free exercise claims in condom distribution plans. Coercion is a prerequisite to a finding of a free exercise violation under the United States Constitution. *Alfonso*, 606 N.Y.S.2d at 267. Due to the voluntary nature of accepting a condom where a distribution plan is present, there is likely no compulsion to act contrary to one's religious beliefs. *Id.* Thus, parents have not been able to effectively argue their claim of a violation upon their right to freely exercise their religious beliefs. For a discussion of parents' free exercise claims, *see generally* Sanders, *supra* note 11.

21. States are asserting their interests in curbing the spread of AIDS via the public schools. *See generally* notes 64-84 and accompanying text (detailing which public school districts currently distribute condoms and what procedures are employed in their distribution).

The following excerpt demonstrates California's legislative intent in providing sound education to prevent the spread of AIDS:

The Legislature hereby finds and declares that acquired immune deficiency syndrome (AIDS) is a growing threat to the State of California. Since there is currently no cure and no vaccine for AIDS, education is the most effective weapon to combat the epidemic. It is, therefore, the intent of the Legislature in enacting this act to ensure that school districts provide their pupils with adequate and appropriate education on AIDS and AIDS prevention. It is also the intent of the Legislature to allow local school district governing boards to determine the appropriate grade levels and courses for AIDS instruction.

CAL. EDUC. CODE § 51201.5 (West 1992) (originally enacted as Act of June 1, 1991, ch. 818, § 44, 1 Stat. 11).

daily contact with students, they are in the best position to provide AIDS education.²² Condoms, schools argue, most effectively curb the spread of AIDS.²³

In attempting to adjudicate these competing arguments, state courts in Massachusetts and New York have ruled differently on the issue of whether parental notification is required for condom distribution in public schools.²⁴ Recently, the Supreme Court of the United States denied a writ of certiorari to the Massachusetts case of *Curtis v. School Committee of Falmouth*²⁵ which involved the issue of condom distribution in public schools. Thus, school boards have no clear, judicial guidance regarding condom distribution plans.

While state courts grapple with the issue of whether parental involvement is required in condom distribution plans, state legislatures have yet to effectively address this area.²⁶ State legislatures, however, possess the power to select the

22. Sanders, *supra* note 11, at 1508 n.169 ("Among all the institutions of society, only [schools] have direct daily access to the . . . students . . . Arguably, [schools] have the best chance of any group to make a real difference in this area.") (quoting Respondents Memorandum of Law in Opposition to Injunctive Relief and in Opposition to the Petition at 26-27, *Alfonzo v. Fernandez*, 584 N.Y.S.2d 406, No. 8785/91 (N.Y. App. Div. 1992)).

23. See *Alfonso*, 606 N.Y.S.2d at 261. According to the U.S. Public Health Service, "[c]ondoms are the best preventive measure against AIDS besides not having sex . . ." U.S. PUBLIC HEALTH SERVICE, UNDERSTANDING AIDS, HHS Publication No. (CDC) HHS-88-8404, 4 (1988). Furthermore, condoms are generally the response to the question, "What can be done to end the STD epidemic?" Stephen J. Genius & Shelagh K. Genius, *Adolescent Sexual Involvement: Time For Primary Prevention*, 345 THE LANCET 240, 240 (1995).

24. The only condom distribution cases litigated to date are the following: *Alfonso*, 606 N.Y.S.2d at 266 (holding that in the absence of a parental opt out program, condom distribution plans violate parents' rights to raise their children as they see fit); *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580, 586 (Mass. 1995), *cert. denied*, No. 95-617, 1995 WL 625541 (U.S. Jan. 8, 1996) (holding that due to the voluntary nature of condom distribution plans, parents' rights to raise their children as they see fit are not violated); *Parents United for Better Schs., Inc. v. School Dist. of Phila. Bd. of Educ.*, 646 A.2d 689, 692-93 (Pa. Commw. Ct. 1994) (holding that parents' advocate group had standing to sue where their children attended the school, and the schools only provided for an opt out program, not a parental notification scheme). Thus, these courts have differed on the issue of whether a parental opt out provision is constitutionally required in public school condom distribution programs.

25. 652 N.E.2d 580 (Mass. 1995), *cert. denied*, No. 95-617, 1995 WL 625541 (U.S. Jan. 8, 1996).

26. As of this writing, three state legislatures have addressed the issue of condom distribution in public schools. These states are Texas, North Carolina and Arkansas. North Carolina and Texas do not allow for any condoms to be distributed. See N.C. GEN. STAT. § 115C-81(e)(9)(1995) (mandating that "[c]ontraceptives, including condoms and other devices, shall not be made available or distributed on school property"); TEX. EDUC. CODE ANN. § 28.004 (West 1995) (providing that schools may not distribute condoms in connection with any human sexuality instruction).

Arkansas is the only state that legislatively provides for condom distribution in schools. See generally ARK. CODE ANN. § 6-18-703 (Michie 1995). This statute mandates that parental consent is required before a student may receive condoms from a school based clinic. *Id.* Requiring

curriculum and course of study to be pursued in public school systems.²⁷ This legislative mandate is final and binding upon all school districts.²⁸ State legislatures are given wide discretion in prescribing "suitable" education.²⁹ Legislatures have used this discretion to implement sex education and AIDS curriculum in public schools.³⁰ State legislatures have not, however, addressed the issue of the increasing use of condom distribution programs.

Legislation in this area is desperately needed. Teenagers are the fastest growing group of AIDS victims.³¹ Incidences of sexually transmitted diseases and unwanted pregnancies continue to increase.³² To assert their interest in slowing the spread of AIDS and related diseases, public schools will continue to expand their sex education and AIDS curriculum to include condom distribution.³³ As schools expand their curriculum, parents will continue to

parental consent, however, will not make condom distribution in public schools effective. Instead, this note proposes that states wishing to allow for condom distribution in public schools should provide for parental opt out procedures instead. Parental opt out requires that parents be notified that all students at their child's school may receive condoms *unless* the parents "opt out" their particular child. Conversely, parental consent requires a parent to first consent to their child's receipt of condoms. Thus, a parent will know that her child wishes to receive a condom. Under opt out schemes, however, a parent will not know if her individual child is receiving condoms, yet she can still opt her child out of the program. See notes 67-76 and accompanying text discussing the difference between parental consent and opt out provisions.

27. 68 AM. JUR. 2D *Schools* § 298 (1993) (citing *Mumme v. Marrs*, 40 S.W.2d 31, 34 (Tex. 1931); *Associated Schs. of Indep. Dist. v. School Dist.*, 142 N.W. 325, 327 (Minn. 1913); *Posey v. Board of Educ.*, 154 S.E. 393, 397 (N.C. 1930)). For example, the Texas state constitutional grant of authority given to its state legislature to maintain public school systems is found in Article 7, § 1: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1.

28. 68 AM. JUR. 2D *Schools* § 298 (1993).

29. *Mumme*, 40 S.W.2d at 36. The word "suitable" in Article 7, section 1 of the Texas Constitution is an "elastic term, depending upon the necessities of changing times or conditions and clearly leaves to the Legislature the right to determine what is suitable, and its determination will not be reviewed by the courts if the act has a real relation to the subject and object of the Constitution." *Id.*

30. See *supra* note 12.

31. Bjorklun, *supra* note 16, at 11. See also *infra* note 50 for statistics on the alarming spread of AIDS among teenagers in the United States.

32. *Genius & Genius*, *supra* note 23, at 240. In North America, there has been an unprecedented increase in sexually transmitted diseases, especially among young adult women. *Id.* While the rates of increase of chlamydial infection, herpes, genital warts and gonorrhoea are "soaring," the awareness of their impact on the health of young women has not risen proportionately. *Id.*

33. Condom distribution plans in public schools are increasing. Many educators and students praise these plans. See, e.g., Jane D. Oswald, *AIDS: Coping With HIV on Campus*, 27 J. MARSHALL L. REV. 449, 456 (1994) (advocating condom distribution and noting that condom distribution is generally popular with students). Critics of the programs continue to denounce them,

assert their rights in directing the upbringing of their children.³⁴ Thus, increased litigation and differing conclusions by state courts on whether parental notification is required in condom distribution is likely to continue.³⁵

Based on the lack of a uniform judicial solution to the question of whether parental involvement in condom distribution in public schools is constitutionally mandated, this Note proposes that state legislatures amend current sex education statutes to include provisions addressing the issue of condom distribution. The majority of current sex education statutes gives parents the option of excusing their children from mandatory sex-related curriculum.³⁶ Amending these statutes to include condom distribution would mandate parental opt out provisions³⁷ in the programs. Thus, under the amended statute, parents' constitutional rights in raising children would be protected.

Section II of this Note will explore the evolution of condom distribution plans, demonstrating a state's interest in combatting AIDS.³⁸ Section III will examine traditional rights of parents to raise their children as they see fit under the Due Process clause of the Fourteenth Amendment.³⁹ Next, Section IV will illustrate the judicial conflict between parents' rights and a state's interest in implementing condom distribution plans, as demonstrated by *Alfonso v. Fernandez*⁴⁰ and *Curtis v. School Committee of Falmouth*.⁴¹ Additionally,

however, especially when parental acknowledgement is not provided for in their implementation. See, e.g., Nick Chiles, *New York to Schools: "Use Condoms,"* WASH. POST, Nov. 3, 1991, at R16 (quoting Cardinal John O'Connor's comment that condom distribution programs promote promiscuity and are similar to "giving an alcoholic a bottle of white wine so he won't drink whiskey"); Kevin Moran, *Citizens Beg Panel to Halt Condom Distribution,* HOUS. CHRON., Aug. 6, 1992, at A27 (demonstrating one parent's concern that schools distributing condoms might give teenagers a false sense of security); Laurie Goodstein, *Condoms to be Available at New York High Schools,* WASH. POST, Feb. 28, 1991, at A3 (quoting one minister's observation that when he went to school, "'you couldn't get an aspirin without parental consent . . . Today, you can get an abortion without parental consent. You can get a condom without parental consent . . . They're taking a Mack truck and running over your authority as a parent.'").

34. Larry Witham, *Lawsuits Grow as Schools Pass Out Condoms,* WASH. TIMES, May 24, 1992, at A3 (noting Larry Crain's, a lawyer for the plaintiffs in *Alfonso v. Fernandez*, concern that "[w]hen school officials ignore, as they have [in *Alfonso*], the complaints and warnings of thousands of parents and students, the only recourse [for parents] is to sue").

35. *Id.* Witham refers to the possibility of parents filing class action lawsuits against schools who begin administering condoms, claiming damages in excess of \$1,000 each. *Id.*

36. See *infra* note 51 for a discussion of current sex education statutes' parental opt out provisions.

37. See *infra* note 67 for a description of a parental opt out provision and how it differs from parental consent.

38. See *infra* notes 44-87 and accompanying text.

39. See *infra* notes 88-145 and accompanying text.

40. 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

Section V argues that parental notification should be implemented in all condom distribution plans.⁴² Finally, Section VI suggests a model condom distribution amendment for state legislatures to add to their current sex education curriculum statutes.⁴³ This statute will effectively fulfill the state's interest in combatting AIDS and other diseases, while simultaneously preserving parents' rights to direct the upbringing of their children.

II. THE EVOLUTION OF CONDOM DISTRIBUTION PLANS

Since the late 1970s, public funding has been used to facilitate teenagers' access to contraceptive information, services, and products.⁴⁴ Title X of the Public Health Services Act⁴⁵ specifically provides federal funding for family planning services at health clinics. This Act was initially promulgated in response to the alarming rate of teenage pregnancies.⁴⁶ In addition to funding, Congress adopted a policy at these federally funded clinics of guaranteeing confidentiality to teenagers who received contraceptives.⁴⁷ This policy, however, became controversial, thus setting the stage for the creation of clinics which were required to condone abstinence.⁴⁸ Public schools further added to the controversy by taking it upon themselves to instruct on contraceptive information during school hours.⁴⁹

When the AIDS epidemic began in 1981, school boards had a strong interest in AIDS awareness because of the rapid spread of the disease among teenagers.⁵⁰ Thus, public schools began supplementing their sex education

41. 652 N.E.2d 580 (Mass. 1995), *cert. denied*, 116 S. Ct. 753 (1996). See *infra* section IV for a discussion of the judicial conflict regarding condom distribution programs in public schools. While only addressing whether parents had standing to sue a school board, a third case also addressed the issue of parental involvement in condom distribution plans in public schools. See *Parents United for Better Schs., Inc. v. School Dist. of Phila. Bd. of Educ.*, 646 A.2d 689 (Pa. Commw. Ct. 1994).

42. See *infra* notes 186-238 and accompanying text.

43. See *infra* notes 239-68 and accompanying text.

44. Lynn Wardle, *Parents' Rights v. Minors' Rights Regarding the Provision of Contraceptives to Teenagers*, 68 NEB. L. REV. 216, 216-17 (1989).

45. 42 U.S.C. §§ 300-300a-41 (1972).

46. Wardle, *supra* note 44, at 217. See *supra* note 16 for a discussion of recent teenage pregnancy statistics.

47. Wardle, *supra* note 44, at 217.

48. *Id.*

49. *Id.* Schools began instruction on sex education within the classroom.

50. Bjorklun, *supra* note 16, at 11. "Teenagers appear to be one of the fastest growing age groups in contracting AIDS." *Id.*

As of June, 1987, only 148 persons in the 13-19 age group had AIDS. Two years later by June, 1989, the number of teenagers with AIDS had jumped to 389 and it almost doubled between then and January, 1991, to 646. Such statistics reinforce. . . [predictions] that AIDS will become a major killer of adolescents in the United States

curriculum with AIDS prevention information.⁵¹ Schools' sex education courses, however, focused mainly on communication skills and how drugs and alcohol could impair a person's judgment, not on the use of condoms, sharing of needles for drug injection purposes, and the topic of how to avoid sexual intercourse.⁵²

Avoidance of these topics in sex education prompted Congress, via the House of Representatives Select Committee on Children, Youth and Families, to legislate in the area.⁵³ The Committee called for more outspoken and "blunt talk" in public schools regarding sex, including speech concerning condoms.⁵⁴ In response to this legislation, many school districts relented and began utilizing explicit language in the area of sex education.⁵⁵ Some school boards took this outspoken language even further and began implementing condom distribution plans within their public school districts.⁵⁶ These schools, using AIDS as well as unwanted teenage pregnancy for a justification, reasoned that "blunt talk" was not enough to curb the spread of these calamities.⁵⁷ Thus, these school districts implemented condom distribution, believing this was the only way to successfully combat AIDS and related diseases.

during the 1990's.

Id. Fulfilling this prophecy, as of December 1993, there were 361,164 reported cases of AIDS in the United States, with 6782 of these reported in individuals under the age of 20. CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., HIV/AIDS SURVEILLANCE REPORT 13 (1993). In 1991, AIDS was the sixth leading cause of death among 15 to 24 year olds. CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., FACTS ABOUT ADOLESCENTS AND HIV/AIDS 1 (1993)

51. Bjorklun, *supra* note 16, at 11. Currently, 80% of public schools offer HIV/AIDS education. *Id.* Due to the controversial nature of HIV/AIDS education, 94% of those districts offering this education within their curriculum allow students to be excused, based on parents' beliefs. *Id.* However, less than one percent of parents exercise this right. *Id.* See also 1995 Conn. Legis. Serv. 95-101 (West); GA. CODE ANN. § 20-2-143 (1996); NEV. REV. STAT. § 389.065 (1995); TENN. CODE ANN. § 49-6-1005 (1996). Many states, including these, mandate sex education as well as HIV/AIDS education. See *supra* note 12 for additional states that mandate sex education in public schools.

52. Bjorklun, *supra* note 16, at 11.

53. *Id.*

54. Kim Painter, *AIDS Surging Among Teens*, USA TODAY, Apr. 13, 1992, at 1D. The House of Representatives Select Committee on Children, Youth and Families advocated "more explicit education, including blunt talk on sex and condoms." *Id.*

55. Bjorklun, *supra* note 16, at 12.

56. *Id.* at 11.

57. *Id.* at 12.

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As of January 1993, there were thirty-six school districts dispensing condoms.⁵⁸ These districts constitute only eight percent of the total public high school and middle school students in the nation.⁵⁹ Most of the approved programs are concentrated in the Northeast and Midwest where the concern for AIDS transmission is higher than in other parts of the country.⁶⁰ A recent state department of education study in Iowa demonstrated, however, that HIV/AIDS among teenagers is multiplying in other areas of the country as well.⁶¹ Cities such as Chapel Hill, North Carolina, for example, are beginning to enter the condom distribution fray.⁶² It follows, then, that as the concern for AIDS prevention among teenagers⁶³ spreads throughout the United States, condom distribution plans will multiply.

Schools participating in condom distribution plans generally dispense condoms at school based health clinics or individual secondary schools within

58. SARAH E. SAMUELS & MARK D. SMITH, *CONDOMS IN THE SCHOOLS* 131-32 (1993). In Massachusetts alone, over twenty school districts distribute condoms. John Ellement, *State High Court OK's Falmouth Plan to Provide Condoms in Public Schools*, BOSTON GLOBE, July 18, 1995, at 1. At least nine school districts in Philadelphia also distribute condoms to students. Henry Chu, *Free Condoms Now Just a Fact of Life at High Schools*, L.A. TIMES, July 6, 1993, at B1. San Francisco and Los Angeles also participate in these programs. *Id.* School districts in Cambridge and Lexington, Massachusetts; Little Rock, Arkansas; Chicago; Minneapolis; Baltimore; and Adams County, Colorado also have established condom distribution programs. Fanburg et al., *supra* note 17, at 183. Roslyn High School in Long Island, New York, has also decided to start distributing condoms to students. *High School Will Hand Out Condoms to Students*, N.Y. TIMES, Nov. 4, 1995, at 29. However, school districts in Madison, Wyoming, have decided to stop giving out information on safe sex and to stop distributing condoms. *News From Every State*, USA TODAY, Dec. 6, 1995, at 9A.

59. SAMUELS & SMITH, *supra* note 58, at 4.

60. *Id.* See *supra* note 58 for school districts that distribute condoms.

61. Bjorklun, *supra* note 16, at 11. "[A]s the state department of education study in Iowa revealed, teenagers in the heartland also engage in behaviors that place them at risk for HIV/AIDS." *Id.* Although teenagers may engage in sexual behavior, condom distributions are still not a way of life at Cave Spring High School in Roanoke, Virginia where a student was reprimanded for distributing condoms during a presentation in English class. Joel Turner, *Roanoke County Student Disciplined Over Condoms Handout Followed Talk on Plague, AIDS*, ROANOKE TIMES & WORLD NEWS, Mar. 7, 1995, at A1. The student distributed condoms when making a comparison between AIDS and the Middle Ages plague which killed 25 million people. *Id.*

62. Bjorklun, *supra* note 16, at 11. However, public school districts in Omaha, Nebraska are forbidden to distribute condoms. *News From Every State*, USA TODAY, Jan. 6, 1996, at A8. The Omaha Health Service apologized for handing out condoms at a health fair. *Id.*

The concern for HIV/AIDS prevention among teenagers is prevalent in the media as well. A recent, dramatic television series portrayed Montel Williams as "Matt Waters," a high school teacher, searching for parental support to reinforce his distribution of condoms in school. Matt Roush, *Shallow 'Waters' Oddball 'Gothic'*, USA TODAY, Jan. 3, 1996, at D3. See also *Matt Waters* (CBS television broadcast, Jan. 2, 1996).

63. Twenty-nine percent of all AIDS cases diagnosed in the United States are in young adults, ages 20 to 29. Alfonso v. Fernandez, 606 N.Y.S.2d 259, 268 (N.Y. App. Div. 1993). Since AIDS has an eight to ten year latency period, many of those persons were infected as teenagers. *Id.*

their respective districts.⁶⁴ These districts differ, however, on the issue of parental notification. Some districts do not require any parental involvement. In such districts, condoms are distributed via the school health center or vending machines located in restrooms and locker rooms throughout the school.⁶⁵ Counseling on AIDS, teenage pregnancy, or condom use is optional in these schools.⁶⁶

In other districts, students will receive condoms unless parents contact the school to opt their child out of any condom distribution program.⁶⁷ The

64. Bjorklun, *supra* note 16, at 13.

65. See *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580, 582-83 (Mass. 1995). The condom distribution procedures in the Falmouth School District in Boston are as follows:

At Lawrence Junior High School, students could request free condoms from the school nurse. Prior to receiving them, students would be counseled. The nurse was also instructed to give students pamphlets on AIDS/HIV and other sexually transmitted diseases. At Falmouth Senior High School, students could request free condoms from the school nurse, or students could purchase them for \$.75 from the condom vending machines located in the lower level boys' and girls' restrooms. Counseling by trained faculty members would be provided for students who requested it, and informational pamphlets were available in the [school] nurse's office.

Id. at 583.

66. *Id.*

67. Parental notification (opt out) is different from parental consent. *Parents United for Better Schs., Inc. v. School Dist. of Phila. Bd. of Educ.*, 646 A.2d 689, 691 (Pa. Commw. Ct. 1994). A parental consent form is the same type of form that a child must return to the teacher when she wishes to go on a field trip to a museum. She may not go unless her parent affirmatively answers the form and the child promptly returns it to her teacher. Conversely, in an opt out program, a school will distribute condoms *unless* a parent objects. Thus, it would be analogous to a teacher assuming a child is permitted to go on a field trip because the teacher never received or was never notified of any objection from the parent.

Parental consent versus parental opt out provisions arises frequently in statutes requiring parental consent for minors' abortions. The difference between parental consent and parental opt out in abortion statutes is as follows:

A "consent requirement" is a law that requires one or both parents give actual consent to the minor's decision to have an abortion. A "notification requirement" statute does not require the consent of the parents but it does require the physician, or in some states another health care provider, to notify one or both of the parents of the minor female at some time prior to the abortion. Notification requirement statutes often require the minor female to wait for 24 or 48 hours after the notification before she can have the abortion. . . . The rulings of the Supreme Court allow the state to require a minor to receive the consent of one parent prior to having the abortion if, but only if, the state has established a judicial bypass procedure. . . . When courts refer to a "judicial bypass procedure," they are referring to a process by which the minor female may avoid the consent or notification requirement by seeking a ruling from an adjudicatory tribunal.

JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.29 (4th ed. 1991).

At least one commentator has likened the abortion judicial bypass procedure to a student's receipt of condoms at school. Sanders, *supra* note 11, at 1511 n.184. Based on the Supreme Court's decision of *Planned Parenthood v. Casey*, 505 U.S. 842 (1992), a parental consent provision

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schools send notification forms to each student's parents, informing them that the school will be distributing condoms to all students.⁶⁸ The notice will also state that parents who are opposed to condom distribution can send in written objection, exempting their child from the program.⁶⁹ Otherwise, the school will assume that each child's parent has consented to condom distribution.⁷⁰ To enforce the parental opt out provisions, students are required to go to the school health facility and request condoms.⁷¹ The health care provider will then check a master list of students to determine if a particular student's parents have objected to the program.⁷² Distribution in these districts generally accompanies counseling on condom usage, as well as distribution of literature regarding AIDS and other sexually transmitted diseases.⁷³

In the remaining districts, parental consent is required before condoms will be distributed.⁷⁴ Parental consent provisions are the most rigid because they require written permission from parents that their individual child may receive condoms.⁷⁵ Once a child's parent has consented, the procedures are generally identical to those of parental opt out provisions.⁷⁶

in an abortion statute is constitutional so long as a judicial bypass procedure is included. *Id.* The Court reasoned that this requirement did not place an "undue burden" upon a woman's fundamental right to receive an abortion. *Id.* In comparison,

it is arguable that an opt out provision in the context of public school condom distribution programs would not place an "undue burden" upon a minor's "right" to receive contraceptives; in essence, the local drugstore serves the same function as a judicial bypass procedure. That is, the student is not denied total access to contraceptives.

Id.

68. *Alfonso*, 606 N.Y.S.2d at 261.

69. *See, e.g.*, *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995); *Parents United for Better Schs., Inc. v. School Dist. of Phila. Bd. of Educ.*, 646 A.2d 689 (Pa. Commw. Ct. 1994).

70. *See Curtis*, 652 N.E.2d at 583; *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 262 (N.Y. App. Div. 1993); *Parents United*, 646 A.2d at 691.

71. *See, e.g.*, *Parents United*, 646 A.2d at 690. The policy in this case included a provision for the availability of condoms to students at school-based health clinics.

72. *Id.*

73. *Id.*

74. Currently, 21% of schools that distribute condoms require parental consent. *See SMITH & SAMUELS, supra* note 58, at 9. Forty-one percent use parent opt out. *Id.* In comparison, 39% do not require any parental opt out or consent. *Id.*

75. Bjorklun, *supra* note 16, at 12. "[P]arental consent is more stringent as the consent must be in writing. Intentionally or unintentionally, it may exclude a large number of students from the program." *Id.*

76. *See supra* notes 67-73 and accompanying text for a discussion of the procedure by which students receive condoms under a condom distribution plan that includes either parental consent or parental opt out.

Illustrations of condom distribution programs are found in New York, California⁷⁷ and Massachusetts.⁷⁸ In Boston, Massachusetts, students are receiving condoms without parental notification.⁷⁹ In Los Angeles and New York City, however, public school districts are dispensing condoms with parental opt out safeguards in place.⁸⁰ In 1993, a New York state court struck down a condom distribution plan that did not provide for parental consent, yet stated that the condom plans could continue if, at the very least, a parental opt out provision was employed.⁸¹ In response to this ruling, the Chancellor of New York City Schools drafted a new program that conformed to the court's decision.⁸² The policy consisted of a form letter that would be sent to all parents of high school students explaining that parents could complete the form

77. Cities in California, such as Los Angeles and San Francisco, distribute condoms. Henry Chu, *supra* note 58, at B1.

78. Approximately 20 communities in Boston, Cambridge, and Somerville, Massachusetts distribute condoms in school. Ellement, *supra* note 58, at 1.

79. This is in response to *Curtis v. School Committee of Falmouth*, 652 N.E.2d 580, 587-88 (Mass. 1995), which ruled that condom distribution plans in school do not implicate basic rights of parents due to the program's lack of coercion or compulsion; thus no parental notification is required.

80. Chu, *supra* note 58, at B1. This article gives an example of a typical condom "transaction":

A few times each week, between visits for scraped knees and headaches, school nurse Ben Torres rises from his squeaky metal chair, walks a few feet to a refrigerator, extracts a plain white envelope marked "secret ballot" and hands the packet to a student. But what lies inside is neither secret nor a ballot. The envelopes—leftovers from some campus election—contain two latex condoms. And the student, usually a boy and one of Torres' "regulars" shoves the prophylactics into a pocket and casually strolls away.

Id. The Los Angeles Unified School District is the nation's second largest school system. *Id.* The district began distributing free condoms to its 127,000 high school students in 1992. *Id.* Part of the reason for condom distribution plans in public schools is that AIDS is the leading cause of death among young men ages 25 to 44 in Los Angeles County. *Id.* With AIDS having an 8 to 10 year latency period, these men may have contracted AIDS while in high school. See *supra* note 3.

81. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 280 (N.Y. App. Div. 1993). The *Alfonso* court expressly stated that if the condom distribution program at issue would have called for parental opt out, the program would not have interfered with parental rights, thus allowing the distributions to continue. *Id.* at 259. As a result of this litigation, Joseph Fernandez, then Chancellor of New York City's public schools, was ousted. See *infra* note 246 for a discussion of the circumstances surrounding Fernandez's ouster. He prompted and encouraged the idea of condom distribution in New York City's public schools. *Id.* Note that the newly inducted Chancellor, Rudy Crew, seeks to limit instruction on condoms in New York City's public schools. Maria Newman, *School Seeks to Limit Condom Instruction*, N.Y. TIMES, Dec. 9, 1995, at 1.

82. Bjorklun, *supra* note 16, at 13. The original New York City condom distribution program actually consisted of two phases. *Alfonso*, 606 N.Y.S.2d at 260. First, a student would receive classroom instruction on the various aspects of HIV/AIDS. *Id.* This phase of the program was mandatory, but included a parental opt out provision whereby parents could opt their children out of the classroom instruction. *Id.* The second phase was the actual condom distribution that, ironically, did not include a provision for parental opt out. *Id.*

if they did not wish for their child to participate in the program.⁸³ The form was to be kept on file, and school personnel would be required to make sure a child's parent had not opted out of the plan before receiving condoms.⁸⁴

In conclusion, schools have differing means of distributing condoms. Irrespective of individual procedures, schools are continuing to advocate condoms as the only way to sufficiently slow the spread of AIDS and other diseases among teenagers.⁸⁵ This interest in AIDS education is sufficiently compelling.⁸⁶ Parents' rights to rear their children, however, are also compelling.⁸⁷ The clash occurring between parental rights and school boards continues in the particularly sensitive area of condom distribution in public schools.

III. PARENTAL RIGHTS TO RAISE CHILDREN

Parents' rights to raise children have been implicitly recognized as a fundamental liberty interest, even though⁸⁸ parental authority to raise children as they see fit is not specifically enumerated in the United States Constitution.⁸⁹

83. Bjorklun, *supra* note 16, at 12.

84. *Id.*

85. The former Surgeon General to the United States cited condoms as the best protection against the sexual transmission of the HIV virus. *Alfonso*, 606 N.Y.S.2d at 263.

86. *Id.* It cannot be disputed that

the State has a compelling interest in controlling AIDS, which presents a public health concern of the highest order. Nor can there be any doubt as to the blanket proposition that the State has a compelling interest in educating its youth about AIDS. Education regarding the means by which AIDS is communicated is a powerful weapon against the spread of the disease and clearly an essential component of our nationwide struggle to combat it.

Id. at 263 (citation omitted). See *infra* section III.

87. See *infra* section III.

88. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (striking down a state law forbidding instruction in certain foreign languages in part because it arbitrarily interfered with the "right of parents" to procure such instruction for their children); see also *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (nullifying a state statute requiring public school attendance and thus precluding parochial school attendance because it "unreasonably interfered with the liberty of parents or guardians to direct the upbringing and education of children under their control."). Subsequent courts have interpreted the *Meyer* and *Pierce* decisions as recognizing that, under our Constitutional Scheme, "the custody, care and nurture of the child reside first in the parents." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). See also *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972).

89. See generally this section. The United States Supreme Court has not yet determined whether a parental right to raise a child is a fundamental liberty interest. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The Fourteenth Amendment provides that no "[s]tate [shall] deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1. The Ninth Amendment asserts that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend IX.

The right of parents to raise their children has been historically upheld.⁹⁰ In addition, parental rights are considered superior to the rights of children and the interests of the state.⁹¹

In the 1920s, the Supreme Court initially acknowledged parents' rights in directing the educational upbringing of their children.⁹² The Court did so in a trilogy of cases dealing with compulsory education laws.⁹³ In the first of these, *Meyer v. Nebraska*,⁹⁴ the Supreme Court established the notion that the Due Process Clause of the Fourteenth Amendment protects parental authority to raise children as they see fit.⁹⁵ Specifically, the Supreme Court held that parents could provide for their children's education without unreasonable state interference.⁹⁶

Both of these amendments are looked to in establishing fundamental rights.

An expansion of these rights is not without its critics. In terms of the Ninth Amendment, it was originally added to the Constitution for the purpose of protecting the people in the states from "assaults on their retained rights as federal judges, with the blessing of the Supreme Court, were committing." HERMINE HERTA MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT* 231 (1st ed. 1977). Meyer believes, however, that federal judges have taken this power too far by taking what was intended to be a protection of people against a powerful central government, and turning it into a "bottomless pit out of which they could fish forever more 'rights' to protect individuals against the people of their own states." *Id.* Meyer further notes that there is no right to privacy in the Constitution. *Id.* Finally, he explains that the Fourteenth Amendment does not guarantee any liberty, but instead expressly allows states to deprive a citizen of freedom, but not without due process of law, that is, without a fair trial. *Id.*

90. See generally this section.

91. Brown, 68 F.3d at 532-33.

92. Daniel J. Rose, Note, *Compulsory Education and Parent Rights: A Judicial Framework of Analysis*, 30 B.C. L. REV. 861, 879 (1989).

93. *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

94. *Meyer*, 262 U.S. at 390.

95. *Id.* at 400.

96. *Id.* at 399 ("[T]he liberty [guaranteed by the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to . . . bring up children.").

For many years before the Supreme Court decided *Meyer*, courts had already been upholding the idea that parents reserved the right to excuse their children from educational programs that they found offensive. See, e.g., *Hardwick v. Board of Sch. Trustees*, 205 P. 49, 54 (Cal. Dist. Ct. App. 1921) ("[Any other holding] would be to give sanction to a power over home life that might result in denying to parents their natural as well as their constitutional right to govern or control, within the scope of just parental authority, their own progeny."); *Trustees of Schs. v. People ex rel. Allen*, 87 Ill. 303, 308 (1877) ("[N]o attempt has hitherto been made in this State to deny, by law, all control by the parent over the education of his child. Upon the contrary, the policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated . . ."); *Rulison v. Post*, 79 Ill. 567, 573 (1875) ("Law givers in all free countries . . . have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent . . ."); *State ex rel. Kelley v. Ferguson*, 144 N.W. 1039, 1043 (Neb. 1914) ("[B]ut we should be careful to avoid permitting our love for this noble institution [the public school] to cause us to regard it as an 'all in all' and destroy both the God-given and constitutional right of a parent

In *Meyer*, the state of Nebraska had enacted a statute prohibiting the teaching of a foreign language to any pupil who had not passed eighth grade.⁹⁷ Robert T. Meyer, a teacher, violated the statute by reading a German passage to a ten-year-old student.⁹⁸ He was convicted and fined in accordance with the statute.⁹⁹ While the Supreme Court of Nebraska upheld Meyer's conviction,¹⁰⁰ the United States Supreme Court reversed, holding that the statute violated parents' Fourteenth Amendment right to choose a suitable curriculum for their children.¹⁰¹ The Court stated that liberty included the right to raise children.¹⁰² The Court also recognized the state's interest in promoting American values and citizenship through a prescribed curriculum.¹⁰³ However, the Court noted that the foreign language statute impermissibly interfered with the basic right of parents to choose appropriate school subjects for their children.¹⁰⁴

to have some voice in the bringing up and education of his children."); State *ex rel.* Shebley v. School Dist. No. 1, 48 N.W. 393, 395 (Neb. 1891) ("The right of the parent . . . to determine what studies his child shall pursue is paramount to that of the trustees or teacher [N]o pupil attending the school can be compelled to study any prescribed branch against the protest of the parent"); *Morrow v. Wood*, 35 Wis. 59, 66 (1874) ("[The] powers and duties [of the school board] can be well fulfilled without denying to the parent all right to control the education of his children.").

97. *Meyer*, 262 U.S. at 403. The statute reads as follows:

Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language. Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides. Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars (\$25), nor more than one hundred (\$100) or be confined in the county jail for any period not exceeding thirty days for each offense.

Id. at 396-97 (quoting an "[A]ct relating to the teaching of foreign languages in the state of Nebraska, approved April 9, 1919" (Laws 1919, c. 249)).

98. *Id.* at 396.

99. *Meyer v. Nebraska*, 262 U.S. 390, 396-97 (1923).

100. *Id.* at 397.

101. *Id.* at 403. The Court also held that the right of foreign language teachers to have access to gainful employment was protected by the Fourteenth Amendment. *Id.*

102. *Id.* at 399. "Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life." *Id.* at 400. *Meyer* was upheld in *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (stating that children hold a unique status under the law, and the Supreme Court has recognized that many minors are less capable than adults in making important decisions).

103. *Meyer*, 262 U.S. at 402 (noting also that "[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned").

104. *Id.* at 403 (holding that "[w]e are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state").

The second in the trilogy of cases, *Pierce v. Society of Sisters*,¹⁰⁵ upheld the parental rights detailed in *Meyer*. In *Pierce*, the Court found unconstitutional an Oregon statute which compelled public school attendance and prohibited any other form of education.¹⁰⁶ Society of Sisters was a Catholic institution that cared for and educated children, and Hill Military Academy was an institute that provided military training and education to children.¹⁰⁷ The state enforced the statute against these two non-public education entities.¹⁰⁸ The Court, recognizing the interests of the state and rights of parents, found the statute to be an unreasonable interference with parents' Fourteenth Amendment liberty interest to guide the upbringing of their children.¹⁰⁹

The *Pierce* Court noted that the state had an important interest in deciding which educational institutions and curricula met the state's high standards for suitable education.¹¹⁰ However, the Oregon statute went too far by mandating only public education as a means of suitable education.¹¹¹ The Court found that the statute was too burdensome on parents' rights to direct the educational upbringing of their children.¹¹² In its reasoning, the Court acknowledged that the child is "not the mere creature of the State."¹¹³ Parents are vested with the greater authority in nurturing and directing a child's destiny.¹¹⁴ Thus, the

105. 268 U.S. 510 (1925).

106. *Id.* at 530-31. *Pierce* recognized important individual rights—specifically, the rights of parents and guardians who desire to send their children to parochial schools. *Id.* at 518. The Court further noted that

[t]he statute in suit trespasses, not only upon the liberty of the parents individually, but upon their liberty collectively as well. It forbids them, as a body, to support private and parochial schools and thus give to their children such education and religious training as the parents see fit, subject to the valid regulations of the State. In that respect, the enactment violates the public policy of the State of Oregon and the liberty which parents have heretofore enjoyed in that State.

Id. at 519.

The *Pierce* Court's finding that a statute providing for no alternative means to public education is unconstitutional still applies. It is important to note, however, that unless certain criteria is met by parents of students, public school attendance remains compulsory. See *infra* notes 191-206 and accompanying text for examples of alternative forms of education and exemptions from compulsory public school attendance.

107. *Pierce*, 268 U.S. at 519.

108. *Id.* at 531-33.

109. *Id.*

110. *Id.* at 535. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Doe v. Irwin*, 615 F.2d 1162, 1167 (6th Cir. 1980), citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

111. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

112. *Id.* at 534-35.

113. *Id.*

114. *Id.* at 535.

Court noted that parents' rights are fundamental to notions of liberty and fair justice.¹¹⁵

The final case in the trilogy, *Farrington v. Tokushige*,¹¹⁶ involved a Hawaiian statute which regulated the characteristics of every private school within the state.¹¹⁷ The Court struck down the statute, noting that it would most likely destroy all of the affected school districts.¹¹⁸ Like the analysis used in *Meyer* and *Pierce*, the Court's analysis focused on the interests of the state and parents. Similarly, as the Court found in *Meyer* and *Pierce*, the *Farrington* Court found that the interest of the state reached too far into the protected zone of parents' liberty interest in providing for their child's education.¹¹⁹

This trilogy of cases pioneered parents' fundamental liberty interest in providing for their child's education. This liberty interest continues to be upheld by the courts.¹²⁰ One case arising fifty years after the trilogy was *Wisconsin v. Yoder*.¹²¹ *Yoder* involved parents' claims of a religious exemption from compulsory education laws.¹²²

The *Yoder* Court examined Wisconsin's compulsory school attendance law which required students to attend school until the age of sixteen.¹²³ Amish parents were convicted of violating the statute when they did not allow their children to continue schooling after eighth grade.¹²⁴ The Amish parents contended that their children's attendance in high school was contrary to the Amish religion and way of life.¹²⁵ The state countered by asserting its constitutional interest in providing for the establishment and maintenance of an educational system.¹²⁶

115. *Id.*

116. 273 U.S. 284 (1927).

117. *Id.* at 291-96.

118. *Id.* at 298-99.

119. *Id.* See also *Bright v. Isenbarger*, 314 F. Supp. 1382, 1390-92 (N.D. Ind. 1970) (upholding *Farrington* by noting that the rights of parents and children to establish and attend private and parochial schools is a constitutionally protected right).

120. "[Since the trilogy] [c]ourt[s] [have] continue[d] to hold that parents' right to guide the education of their children is important to the very fabric of our society." Rose, *supra* note 92, at 879.

121. 406 U.S. 205 (1972).

122. Rose, *supra* note 92, at 879.

123. *Yoder*, 406 U.S. at 205.

124. *Id.* at 207-08.

125. *Id.* at 209. The Amish also "believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of the children." *Id.*

126. *Id.* at 213.

Faced with both the school's and the parents' interests in this case, the Supreme Court found that the statute violated parents' First and Fourteenth Amendment rights to raise children.¹²⁷ Borrowing language from *Pierce* and *Meyer*, the Court reasoned that the role of parents in raising their children is firmly rooted in American tradition and beyond debate.¹²⁸ The Court also found the state's interest to be important, but not absolute, when compared to parents' liberty interest in rearing children.¹²⁹ Thus, the Amish were granted an exemption from sending their children to high school.¹³⁰ *Wisconsin v.*

127. *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

128. *Id.* at 232. While the Court focused on the Amish parents' religious objections to the statute under the First Amendment, it nonetheless upheld the parents' Fourteenth Amendment right to raise children as they see fit, reasoning that parents are primarily responsible for the raising of their children. *Id.*

129. *Id.* at 234.

[A] state's interest in universal education, [however highly ranked,] is not totally free from a balancing process when it impinges on other fundamental rights [and interests,] such as those specifically protected by the [f]ree [e]xercise [c]lause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children.

Id. at 205. Although the *Yoder* Court balanced the rights of parents and the state, in more modern times the Supreme Court has applied strict scrutiny to any infringement on parents' rights to raise their children:

[Strict scrutiny is the standard of review which means] that the [Supreme Court] Justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end. The Court will not accept every permissible government purpose as sufficient to support a classification under this test, but will instead require the government to show that it is pursuing a "compelling" or "overriding" end. Even if the government can demonstrate such an end, the Court will not uphold the classification unless the Justices have independently reached the conclusion that the classification is necessary, or narrowly tailored, to promote that compelling interest Under the due process guarantee, the Court often employs the strict scrutiny compelling interest test in reviewing legislation which limits fundamental constitutional rights.

NOWAK & ROTUNDA, *supra* note 67, at § 14.3. If a right is not considered fundamental, the Court employs the rational basis test. *Id.* at 601. Under a rational basis analysis, no fundamental right is at stake, so the Court only requires that a legislative classification bear a rational relationship to any legitimate government interest. *Id.* The interest need not be compelling. The Court employs a final test of intermediate scrutiny to cases involving gender classifications and cases involving illegitimacy classifications. *Id.* at 602. Under the intermediate standard of review, the justices will not uphold [legislation] unless they find that the [legislation] has a 'substantial relationship' to an 'important' government interest." *Id.*

Although the Supreme Court has not yet explicitly deemed a parental right to raise children "fundamental," it has used strict scrutiny as the standard of review in parental rights cases. Furthermore, the fundamental nature of parents' rights has been implied in many cases. See generally this section for a discussion of parents' rights to raise children under the Due Process Clause and the rubric of right to privacy. See generally section IV for an example of state courts' application of strict scrutiny to parents' rights and condom distribution in public schools.

130. *Yoder*, 406 U.S. at 232.

Yoder hallmarks the last case that the Supreme Court has decided regarding compulsory education laws.¹³¹ Parental authority to rear children as established in *Pierce* and *Meyer* has, however, extended to areas outside the boundary of compulsory education.¹³²

The Supreme Court has continued to recognize a right to raise a child as parents see fit. The Court has clearly demonstrated that the Due Process Clause includes the parental right to privacy in rearing children.¹³³ In *Prince v. Massachusetts*,¹³⁴ the Court relied on *Meyer* and *Pierce*, stating that family life is a private realm into which the state may not trespass.¹³⁵ Further, in *Moore v. City of East Cleveland*,¹³⁶ the Court found unconstitutional an intrusive local zoning ordinance that limited the number and relationship of family members who could live in a single dwelling.¹³⁷ The idea of family privacy as paramount to the state's interest was reiterated in the Court's reasoning.¹³⁸

131. Rose, *supra* note 92, at 879.

132. See also NOWAK & ROTUNDA, *supra* note 67, at § 14.28. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (holding that a state cannot force the breakup of a natural family over the objection of the parents and their children, for the sole reason that to do so was thought to be in the children's best interests, without some showing of unfitness, because the Due Process Clause would clearly be violated); *Moore v. City of East Cleveland*, 431 U.S. 494, 505 (1977) (equating the right to familial privacy with "[d]ecisions concerning child rearing, which *Yoder*, *Meyer*, *Pierce* and other cases have recognized as entitled to constitutional protection"); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (citing *Pierce* and *Meyer* when noting that the Supreme Court "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting that "[t]he rights to conceive and to raise one's children have been deemed 'essential'"); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (stating "we affirm the principle of the *Pierce* and *Meyer* cases").

Additionally, courts have followed *Pierce* and *Meyer* in asserting that the state is a poor substitute for a parent in rearing children. Robert B. Keiter, *Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 69 MINN. L. REV. 459, 490 (1982). "In the early *Meyer* decision, Justice McReynolds explicitly rejected the notion of state-supervised child rearing as inconsistent with the philosophical underpinnings of the American constitutional scheme and Western cultural tradition." *Id.* (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923))). Even though some children may be abused or neglected, governmental authority is still not an acceptable replacement for parental mandates. *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (noting that "[t]he statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to the American tradition"). *Id.* See also *Secretary of Pub. Welfare of Pa. v. Institutionalized Juveniles*, 442 U.S. 640 (1979); NOWAK & ROTUNDA, *supra* note 67, at § 13.4.

133. Rose, *supra* note 92, at 881.

134. 321 U.S. 158 (1944).

135. *Id.* at 166.

136. 431 U.S. 494 (1977).

137. *Id.* at 499.

138. *Id.*

Finally, as demonstrated in dicta in *Roe v. Wade*,¹³⁹ a parental right to privacy extends to education as well.¹⁴⁰ A parental right to privacy in an educational setting was upheld by the Michigan Court of Appeals in the case of *Lepp v. Cheboygan Area Schools*.¹⁴¹ In *Lepp*, a student's mother submitted a written request to the Cheboygan County school board in order to obtain her son's file.¹⁴² The school refused, however, because under the Freedom of Information Act (FOIA), an exemption states that disclosure is impermissible when it would constitute an unwarranted invasion of the student's privacy.¹⁴³ The court held that it would be an "absurd result" to deny disclosure to the child's mother making the request.¹⁴⁴ The court reasoned that since a minor has no capacity to make the request himself, the student's mother, acting on behalf of the minor, was authorized to receive the file.¹⁴⁵ The court further reasoned that a disclosure to the mother constituted a disclosure to the son. Thus, the disclosure did not fall under the privacy exemption of the FOIA. The above cases demonstrate how integral and inherent parental guidance is in

139. 410 U.S. 113 (1973).

140. *Id.* at 152-53. In *Roe*, the Supreme Court recognized a mother's right to abort a fetus as a fundamental right within the right of privacy. *Id.* at 166. In reaching its decision, the Court stated that its past decisions reflected similar protections for those personal rights deeply rooted in our society, citing both *Pierce* and *Meyer*. *Id.* at 152-53.

141. *Lepp v. Cheboygan Area Schs.*, 476 N.W. 2d 506, 509-10 (Mich. Ct. App. 1991).

142. *Id.* at 508.

143. *Id.* at 509.

144. *Id.*

145. *Id.* This case also demonstrates that while minors' rights to privacy or "individual autonomy" are upheld in many areas of the law such as abortion, minors do not possess other inherently fundamental rights such as the capacity to enter into contracts. The Seventh Circuit has noted that

[i]t is widely known and accepted that minor children are incapable of making informed, mature, well-reasoned decisions during their formative years. For example, in the State of Illinois only a mature minor legally declared emancipated in an Illinois state court proceeding "shall have the right to enter into valid legal contracts"

Zbaraz v. Hartigan, 763 F.2d 1532, 1548 (7th Cir. 1985) (Coffey J., dissenting) (quoting ILL. REV. STAT. ch. 40, § 2205(a) (1983)). This dissenting judge points out an "anomaly in the Illinois statutory scheme." *Id.* An unemancipated pregnant minor is legally capable of consenting to abortion, a medical procedure, whereas an unemancipated minor (who is not pregnant) cannot legally enter into binding contracts. *Id.* The right to enter into contracts is guaranteed under the Contracts Clause in the United States Constitution. U.S. CONST. art. 1, § 10. (enumerating that "No State shall . . . impair . . . the Obligation of Contracts."); the "right to privacy" or, specifically, to receive an abortion, is also constitutional through a penumbra to the Fourteenth Amendment. Ironically, a minor possesses one right and not the other.

For an example of minors' rights to receive an abortion and to receive contraceptives, see *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); and *Doe v. Irwin*, 615 F.2d 1162 (1980). In response to the abortion cases, many states have codified parental consent requirements for minors' abortions. See, e.g., ALA. CODE § 26-21-1 (b)(1) (1987) (noting that "immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences"). These statutes are upheld as long as a judicial bypass procedure is in place. *Casey*, 505 U.S. at 899.

raising children, particularly in an educational setting. Parents have traditionally possessed a due process right, which includes a right to privacy, in rearing and educating their children. Parents continue to assert this right in condom distribution litigation. State courts, however, are currently deciding differently on the issue of whether parental involvement in condom distribution is constitutionally mandated. Section IV describes this conflict among the state judicial rulings in condom distribution cases.

IV. JUDICIAL RULINGS ON CONDOM DISTRIBUTION IN PUBLIC SCHOOLS: AN EXAMPLE OF THE COURTS' CONFUSION

Parental rights in educating children continue to be litigated. This includes the area of condom distribution in public schools.¹⁴⁶ Parental rights to raise their children have been treated differently in two state condom distribution cases.¹⁴⁷ The first of these was *Alfonso v. Fernandez*.¹⁴⁸ In *Alfonso*, the

146. See generally this section.

147. A third case has been litigated involving condom distribution in public schools, but it only involved a standing issue. See *Parents United For Better Schs., Inc. v. School Dist. of Phila. Bd. of Educ.* 646 A.2d 689 (Pa. Commw. Ct. 1994). In this case, the court further explored the parental notification issue in condom distribution programs. *Id.* at 690. The plaintiffs were a group of parents, collectively known as Parents United for Better Schools ("PUBS"). *Id.* PUBS brought suit against the Philadelphia Board of Education because parental consent was not required in the schools' condom distribution programs. *Id.* at 690-91. The court maintained that PUBS had identified a substantial interest—prior consent to medical treatment. *Id.* at 693. The schools, instead, had an opt out provision in place. *Id.* at 690-91. Based on the parents' arguments, the Commonwealth Court of Pennsylvania found that they had standing to sue the school board because most minors' activities required express parental consent, rather than parental opt out, under Pennsylvania state law. *Id.* at 691-92. In its reasoning, the court noted that the legislature has recognized express parental consent in many forms, including minors' health services and their receipt of a driver's license. *Id.* at 692 n.4. The court also noted that parental consent is required before a minor obtains a marriage license or waives Miranda warnings. *Id.* Additionally the *Parents United* court noted that:

Parental consent is further recognized by the exceptions which have been carved out by the legislature, most notably the Minor's Consent to Medical, Dental and Health Services, Act of February 13, 1970, P.L. 19, 35 P.S. §§ 10101-10105, which enumerates the specific circumstances where express parental consent is not necessary for the administration of medical treatment. See also Section 1 of the Act of December 9, 1969, P.L. 333, as amended, 35 P.S. § 10001 (a minor under the age of seventeen cannot donate blood without the prior consent of a parent); Section 12 of the Pennsylvania Drug and Alcohol Abuse Control Act, Act of April 14, 1972, P.L. 221, as amended, 71 P.S. § 1690.112 (parental consent is not necessary for the treatment of substance abuse); Section 14.1 of the Disease Prevention and Control Law of 1955, Act of April 23, 1956, P.L. (1955) 1510, as amended, 35 P.S. § 521.14a (no liability attaches for the treatment of a minor for venereal disease).

Id. at 692.

The court further recognized parental consent as a long standing and substantial right that may be protected. *Id.* at 691. Additionally, it is for the parent in the first instance to decide what is actually necessary for the protection and preservation of the life of his or her child. 59 AM. JUR. 2D *Parent*

court found that in the absence of parental involvement, condom distribution plans impermissibly intrude on parents' rights to raise their children as they see fit.¹⁴⁹ The second case was *Curtis v. School Committee of Falmouth*,¹⁵⁰ where the court held that due to the voluntary nature of the program for students, parents could not show that their rights to raise their children were burdened.¹⁵¹

Two central issues emerge from these cases. The first one is whether parental involvement in condom distribution plans is constitutionally required. The second issue is whether condom distribution in schools is considered a health service. This Section examines the *Alfonso* and *Curtis* rulings individually, demonstrating the competing interests and differing results in each case. After an examination of the cases, the confusion is evident. School districts today have no clear guidance on whether condom distribution plans require parental involvement.

A. *Alfonso v. Fernandez*:¹⁵² *Parental Opt Out Required*

In 1990, the New York City Public School Board implemented greater measures for AIDS education within its schools, which included condom distribution.¹⁵³ Public high schools were to establish health resource rooms in which trained professionals would distribute condoms and provide health counseling and instruction on condom usage.¹⁵⁴ Students were not required to participate in the plans and were not sanctioned for failure to do so.¹⁵⁵ Most importantly, the condom distribution programs did not provide for parental opt out or consent.¹⁵⁶

Parents brought suit against the school board based on (1) a violation of New York's health statute which made it an infraction to render health services to minors without parental consent; (2) a violation of their due process rights to direct the upbringing of their children; and (3) an infringement upon their rights to free exercise of religion as guaranteed by the First Amendment of the

and Child § 48 (1987); 67A C.J.S. *Parent and Child* § 11 (1978).

148. 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

149. *Id.* at 267.

150. 652 N.E.2d 580 (Mass. 1995), *cert. denied*, No. 95-617, 1995 WL 625541 (U.S. January 8, 1996).

151. *Id.* at 586.

152. 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

153. *Id.* at 261.

154. *Id.*

155. *Id.*

156. *Id.*

United States Constitution and the New York Constitution.¹⁵⁷ The court found a violation of the health service statute as well as of the parents' rights to raise their children as they saw fit.¹⁵⁸

In its reasoning of the parental due process issue, the court examined the condom distribution plans under a strict scrutiny analysis.¹⁵⁹ When strict scrutiny is the standard applied by the courts in Fourteenth Amendment cases, the plaintiffs must first meet a threshold burden of showing that their rights have been burdened.¹⁶⁰ In *Alfonso*, the court found that without parental notice, the condom distribution plans intruded upon parents' rights to make decisions in a particularly sensitive area.¹⁶¹ School, the court reasoned, is a compulsory environment, with parents having enjoyed a well-recognized liberty interest in educating their children within these schools.¹⁶² Although the condom distribution program was itself voluntary, the court reasoned that parents were inevitably required to surrender their parenting rights of educating their children in the area of sexual relations if an opt out provision was not included.¹⁶³ Thus, the court found that the parents met their initial burden of proving an infringement upon their rights.

To overcome this fundamental liberty interest, the school district had to demonstrate a compelling interest for its infringement upon parents' rights.¹⁶⁴ The court conceded that the state had a compelling interest in preventing the spread of AIDS.¹⁶⁵ However, the second prong of a strict scrutiny analysis requires a showing that the means used to carry out this compelling interest are

157. *Id.* The court found no violation of the parents' rights to free exercise of religion due to the lack of "coerciveness" in the programs. *Id.* at 267. There was no coerciveness because the programs did not coerce the students into acting contrary to their religious beliefs. *Id.*

158. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 263, 265 (N.Y. App. Div. 1993).

159. *Id.* at 265.

160. *Id.* at 266 ("[The] parents have demonstrated an intrusion on their constitutionally-protected right to rear children as they see fit.").

161. *Id.* (stating that "the City of New York has made a judgment that minors should have unrestricted access to contraceptives, a decision which is clearly within the purview of the [parents'] constitutionally protected right to rear their children, and then has forced that judgment on them").

162. *Id.* at 265 (citing U.S. CONST. amend. XIV; *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

163. *Alfonso*, 606 N.Y.S.2d at 266.

164. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 263 (N.Y. App. Div. 1993).

165. *Id.* "It cannot be disputed that 'the State has a compelling interest in controlling AIDS, which presents a public health concern of the highest order.'" *Id.* Furthermore, New York City teenagers comprise 20% of the nation's adolescent AIDS cases, although they only account for 3% of the nation's teens. *Id.* at 261.

necessary.¹⁶⁶ Due to the availability of condoms in drug stores and at federally funded clinics, the court reasoned that schools are not the necessary forum in which condoms should be distributed.¹⁶⁷ Thus, the court held that the school district policy did not pass strict scrutiny analysis because parental involvement was not factored into the policy.¹⁶⁸

Addressing the issue of whether condom distribution to minors in schools fell within the health service statute, the court first determined that condoms were a health service for which parental consent was required.¹⁶⁹ New York's health statute requires parental consent for medical treatment, with limited enumerated exceptions.¹⁷⁰ Based on expert testimony,¹⁷¹ the court in *Alfonso* found that condom distribution was a health service and did not fall into any exception in the statute for which parental consent was not required for

166. *Id.* at 265 (stating that “[n]o matter how laudable the [condom distribution plan] purpose, by excluding parental involvement, the condom availability component of the program impermissibly trespasses on the [parents’] rights by substituting the [school board] in loco parentis, without a compelling necessity therefore”).

167. *Id.* at 267.

168. The court in *Alfonso* specifically stated that the distribution of condoms in New York City Schools could continue without interfering with parents’ rights by allowing interested and concerned parents to opt out of the program by instructing the school not to distribute condoms to their children. *Id.* at 267. In fact, the school boards did just that after the ruling in *Alfonso*. Sharon Pomeranz, *Condoms Overturned on Appeal: Teens Stripped of Their Rights*, 4 AM. U. J. GENDER & L. 216, 229 n.61 (1995) (noting that the new Chancellor of New York City Schools, Ramon C. Cortines, “changed the program to conform to the court’s dictates. A letter is now sent to all parents, describing the condom distribution program, along with an opt-out form.”) (citation omitted).

169. *Alfonso*, 606 N.Y.S.2d at 265.

170. See N.Y. PUB. HEALTH LAW § 2504 (McKinney 1972). Parental consent is required for minors’ medical, dental, health, and hospital services. *Id.* However, in the following five enumerated instances, parental consent is not required: 1) a child is eighteen years or older; 2) any person who has been married or who has borne a child; 3) any person who is pregnant; 4) in the case of emergency, whereby attempt to secure consent would delay treatment; and 5) a representative of the parent gives consent. *Id.*

171. The *Alfonso* court concluded, based on a regulation of the Commissioner of the New York State Department of Education, that condoms are a health service. *Alfonso v. Fernandez*, 606 N.Y.S. 2d 259, 263 (N.Y. App. Div. 1993). The Commissioner defined the term health service to include “the several procedures . . . designed to . . . guide parents, children and teachers in procedures for preventing and correcting defects and diseases.” *Id.* The Acting Commissioner of the New York City Department of Health also said that the condom plan was “a strong and medically sound program that is responsive to critical health needs.” *Id.* (emphasis original). Finally, Dr. Robert A. Meyers, former president of the New York State Medical Society stated that “[t]he purpose of [condom distribution] could only be prophylaxis, and there is no way that it could be considered education.” *Id.*

treatment.¹⁷² Thus, the *Alfonso* court would not allow the condom distribution programs to continue until, at the very least, parental opt out provisions were included in the plans.

B. *Curtis v. School Committee of Falmouth*:¹⁷³ *No Parental Involvement Required*

In *Curtis*, as in *Alfonso*, the availability of condoms in the junior and senior high schools was at issue.¹⁷⁴ The Falmouth School Committee (FSC) did not provide an opt out for parents to exclude their children from receiving condoms at school.¹⁷⁵ Nor was there a parental notification procedure whereby the FSC would be required to notify and receive consent from students' parents before dispensing condoms.¹⁷⁶ Plaintiffs, parents of Falmouth students, brought suit alleging a violation of 1) their parental liberty and familial privacy;¹⁷⁷ and 2) their right to free exercise of religion.¹⁷⁸

Unlike the *Alfonso* court, the *Curtis* court found that parents could not prove that their rights were coercively burdened, due to the voluntary nature of the program.¹⁷⁹ Students were not required to participate in the program and did not receive punishment for refusing to do so.¹⁸⁰ The court reasoned that the compulsory nature of the school environment was not the determinative factor; rather, the program itself was wholly voluntary, demonstrating no coercion of parents' rights. The court further reasoned that the judiciary does

172. *Id.* Supplying condoms to students upon request has absolutely nothing to do with education, but rather is a health service occurring after the educational phase has ceased. Although the program is not intended to promote promiscuity, it is intended to encourage and enable students to use condoms if and when they engage in sexual activity. This is clearly a health service for the prevention of disease which requires parental consent. *Id.*

173. 652 N.E.2d 580 (Mass. 1995).

174. *Id.* at 582.

175. *Id.* at 583.

176. *Id.*

177. *Id.* at 582. Parents asserted the right as to familial privacy guaranteed under the United States Constitution, U.S. CONST. amend. XIV, as well as under the Massachusetts Constitution. MASS. CONST. pt. 1, art. 10. In *Curtis*, the parental liberty and familial privacy analyses collapsed into one. See *supra* section III for a discussion of parental liberty as extended to familial privacy.

178. *Curtis*, 652 N.E.2d at 582. This right is guaranteed by the United States Constitution, U.S. CONST. amend. I, and the Massachusetts Constitution, MASS. CONST. art. 46, § 1. The *Curtis* court held, as the *Alfonso* court held, that parents could not prove that practice of their religious beliefs was substantially burdened by having a voluntary condom distribution plan in public schools. *Curtis*, 652 N.E.2d at 588-89.

179. *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580, 586 (Mass. 1995).

180. *Id.*

not and cannot interfere with everyday conflicts in school systems when the conflicts do not sharply and directly implicate constitutional values.¹⁸¹

The *Curtis* court, using the same case law as the *Alfonso* court, reasoned that in other instances where parents' rights were burdened, they were deprived of a right, or prohibited from exercising their parental role in raising their children as they see fit.¹⁸² However, the court reasoned, with condom distribution there was no element of coercion.¹⁸³ Therefore, the court concluded that parents' rights were not burdened by condoms in schools. The court also concluded that condom distribution was not a health service,¹⁸⁴ thereby differing with the *Alfonso* court on this issue as well. Thus, the court allowed the condom distribution plans to continue without parental consent or opt out provisions.¹⁸⁵

In summation, state courts have ruled differently on the constitutionality of parental involvement in condom distribution in public schools. Specifically, the central issues of whether parental opt out should be employed in condom distribution plans, and whether condoms should be treated as health services, are in dispute. Section V will analyze the differing opinions in *Curtis* and *Alfonso* regarding parental notification, and conclude that parental notification is required for schools who are distributing condoms, based on judicial and policy concerns.

181. *Id.* Having asserted that no "coercion" was present, the court did not utilize a strict scrutiny analysis. *Id.* at 585. Since parents did not reach their threshold burden of proving that their rights were coerced by a voluntary program, the court did not require the school board to show a compelling interest for the distribution of condoms, with no lesser means available besides distribution in schools, to further this interest.

182. *Id.* at 586-87.

183. The court relied on *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923). See *supra* section III for a full discussion of these decisions. The Court also relied on other cases where opt out provisions were upheld, noting that these involved compulsory classroom activities, not those outside of the classroom. *Curtis*, 652 N.E.2d at 586 (noting *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 124 Cal. Rptr. 68 (Cal. Ct. App. 1975); *Medeiros v. Kiyosaki*, 478 P.2d 314 (Haw. 1970)). *Alfonso*, the court noted, was the only case where opt out has been required for a non-compulsory activity in school. *Curtis*, 652 N.E.2d at 586-87.

184. *Curtis*, 652 N.E.2d at 586. The court reasoned that the *Alfonso* decision was more directly decided on a State health law that required parental consent for medical treatment. *Id.* However, the *Alfonso* court also decided the issue based on parents' fourteenth amendment rights to raise their children as they deem appropriate. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265 (N.Y. App. Div. 1993). The *Curtis* court further concluded that condoms were not medical services. *Curtis*, 652 N.E.2d at 586. However, the court provided no data or sources to support this conclusion, whereas the *Alfonso* court cites scientific data, as well as New York Commission Reports. *Alfonso*, 606 N.Y.S.2d at 263.

185. *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580, 586 (Mass. 1995).

V. PARENTAL RIGHTS AND CONDOM DISTRIBUTION

The right of parents to raise and educate their children as they see fit is the most heavily debated issue surrounding condom distribution plans.¹⁸⁶ The *Alfonso*¹⁸⁷ and *Curtis*¹⁸⁸ courts ruled differently on the issue of whether parental liberty interests in raising children are implicated by condom distribution plans in a public school environment. The *Alfonso* court held that due to the compulsory nature of the school environment, parents' due process rights were burdened by condom distribution plans that did not include parental opt out provisions.¹⁸⁹ Conversely, the *Curtis* court held that due to the voluntary nature of the programs, parents' rights were not coercively burdened by the lack of an opt out provision.¹⁹⁰

Several factors motivate the inclusion of parental opt out provisions in condom distribution programs in public schools. First, based on the reasoning of *Alfonso*, other courts could reasonably find condom distribution plans unconstitutional if, at the very least, parental opt out provisions are not in place. Conversely, under the reasoning of *Curtis*, a court could find no burden on parents' rights when schools do not provide for opt out provisions in their condom distribution programs. Due to increased litigation and other policy factors, however, parental rights to raise children should not be ignored in these programs. One such policy factor is that some health professionals classify condoms as a health service, requiring parental consent under many state statutes. Additionally, current sex education and AIDS curriculum statutes require parental opt out provisions, demonstrating that the state, by mandating opt out provisions in other "sensitive areas," should do so in condom distribution plans. This Section analyzes parental rights in the context of condom distribution in public schools. Ultimately, this Section concludes that parents' rights to raise their children as they see fit should be accounted for in condom distribution programs in public schools.

186. Sanders, *supra* note 11, at 1479. See also Comment, *Supreme Judicial Court Holds That School-Based Condom Program Does Not Violate Parents' Rights*, 109 HARV. L. REV. 687, 687 (1996) (noting that "[i]n perpetual tension with these parental rights are the interests of the state and of the child. Nowhere is this tension more evident than in the context of sexual relations.").

187. *Alfonso*, 606 N.Y.S.2d at 259.

188. *Curtis*, 652 N.E.2d at 580.

189. *Alfonso*, 606 N.Y.S.2d at 266.

190. *Curtis*, 652 N.E.2d at 587.

Parents' rights to raise their children have generally been upheld, particularly in the context of a compulsory environment.¹⁹¹ Compulsory school attendance laws are in force in all states, and the District of Columbia, requiring parents, with limited exception, to send their children to public schools.¹⁹² These statutes usually impose punitive action against the parent and the child if the child is not enrolled in an approved educational forum.¹⁹³ The Supreme Court has recognized that a state has the authority to enforce and enact these statutes in order to protect the health and safety of children.¹⁹⁴

Obtaining an exemption from compulsory education laws requires a unique showing that the statute imposes a burden on parents' free exercise of religion.¹⁹⁵ *Wisconsin v. Yoder*¹⁹⁶ recognized and upheld the long-standing parental right to educate children by exempting the Amish from compulsory attendance, due to the coercive burden it placed on their religious practices.¹⁹⁷

191. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (holding that "the custody, care and nurture of the child first reside in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (noting that the state plays a limited role in educating children, and undeniably, parents have a right to raise and direct the education of their children); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the right of parents to raise their children absent state interference is an unwritten liberty protected by the Due Process Clause of the Fourteenth Amendment).

192. *Rose*, *supra* note 92, at 869.

193. *Id.* See Alma C. Henderson, *The Home Schooling Movement: Parents Take Control of Educating Their Children*, 1991 ANN. SURV. AM. L. 985, 985-86 (1993) ("In seeking control over the education of their children, parents often have risked criminal charges, fines and jail sentences."). See also Patricia M. Lines, *Private Education Alternatives and State Regulation*, 12 J.L. & EDUC. 189, 192 (1983) (noting that some public interest groups estimate that around 10,000 families are currently illegally educating their children at home); Brendan Stocklin-Enright, *The Constitutionality of Home Education: The Role of the Parent, the State and the Child*, 18 WILLAMETTE L. REV. 563, 570-71 (1982) (stating how "[t]he Old Order Amish had been prosecuted by many states . . . for refusing to send their children to school beyond the eighth grade").

194. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923). The Supreme Court has recognized that the state's authority to provide for compulsory education flows from the Tenth Amendment. *Rose*, *supra* note 92, at 870-71. The relevant part of the Tenth Amendment reads as follows: "the powers not delegated to the United States . . . are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Supreme Court recognized that "[t]he power of the State to compel attendance at . . . school and to make reasonable regulation for all schools, . . . is not questioned." *Meyer*, 262 U.S. at 402.

195. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972). While the Supreme Court in *Yoder* recognized parental rights to raise children under the Fourteenth Amendment, it is the leading case on parental free exercise rights in an educational environment. *Sanders*, *supra* note 11, at 1491. See *supra* section III for a discussion on parents' rights to raise children under the Fourteenth Amendment as recognized in *Yoder*.

196. 406 U.S. 205 (1972).

197. *Id.* at 218-19.

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It should be noted, however, that *Yoder* has been limited to its facts.¹⁹⁸ Most lower courts have rejected parental free exercise claims of exemption from compulsory attendance laws due to the state's overriding compelling interest in education.¹⁹⁹ Thus, in the absence of an unusually strong exemption for a particular religious belief, parents must send their children to a state-approved, educational forum.

In lieu of public school education, however, states allow alternative means of education for children.²⁰⁰ Certain rigorous requirements must be met in order to benefit from these alternative means.²⁰¹ For example, private institutions are acceptable alternatives to public schools. However, only those

198. Malcolm Stewart, *The First Amendment, The Public Schools, and the Inculcation of Community Values*, 18 J.L. & EDUC. 23, 78 (1989) (stating that *Yoder* does not stand for the proposition that "the state may not insist on standards of education which contravene parents' religious convictions . . ."). The *Yoder* Court noted that the Amish presented an exceedingly strong case, "one that probably few other religious groups or sects could make." *Yoder*, 406 U.S. at 235-36. The Amish religion is premised on the belief that "salvation requires life in a church community separate and apart from the world and worldly influence." *Id.* at 210. Amish objections to secondary education included its emphasis on intellectual and scientific accomplishments and competitiveness, rather than on "goodness," "wisdom," and "community welfare." *Id.* at 211.

199. Stewart, *supra* note 198, at 79.

200. Rose, *supra* note 92, at 875 (noting that parents who choose unauthorized alternative means of schooling do so for a variety of religious, social and political reasons).

201. See ALASKA STAT. § 14.30.010 (Michie 1987) (allowing for "an academic education comparable to that offered by the public schools in the area"); CONN. GEN. STAT. § 10-184 (1986) (providing alternative means that are "equivalent instruction in the studies taught in the public schools"); D.C. CODE ANN. § 31-401 (1993) (calling only for alternative instruction satisfying "Board requirements to govern acceptable credit for studies at . . . private schools and private instruction"); IOWA CODE ANN. § 299.1 (West 1996) (stating that students must attend "public schools, an accredited non public school or competent private instruction"); ME. REV. STAT. ANN. tit. 20-A, § 5001-A(3) (West 1993) (detailing that alternative schooling is appropriate if a child "obtains equivalent instruction in a private school or in any other manner arranged for by the school . . . board and approved by the commissioner"); MD. CODE ANN., EDUC. § 7-301 (1996) (requiring public school attendance unless the child "is otherwise receiving regular, thorough instruction during the school year in the studies usually taught in the public schools"); MASS. GEN. LAWS ch. 76, § 1 (1982) (mandating public education "or being otherwise instructed in a manner approved by the superintendent or the school committee . . . that the instruction in all studies . . . equals in thoroughness and efficiency"); MICH. COMP. LAWS § 15.41561 (1987) (requiring that a "state approved nonpublic school . . . teaches subjects comparable to those taught in the public schools to children of corresponding age and grade"); NEV. REV. STAT. § 392.070 (1986) (noting that alternative education is adequate when "the child is receiving at home or in some other school equivalent instruction of the kind and amount approved by the state board of education"); N.C. GEN. STAT. § 115C-378 (Supp. 1985) (allowing "such nonpublic schools as have teachers and curricula that are approved by the State Board of Education . . . and maintain such minimum . . . standards as are required of public schools"); R.I. GEN. LAWS § 16-19-2 (1981) (stating that "a private school, or at-home instruction, shall be approved . . . when . . . the period of attendance . . . is substantially equal to that required by law in public schools; . . . [subjects are] to be taught in the English language substantially to the same extent as these subjects are required to be taught in the public schools").

who can afford private education may exercise this form of alternative education.²⁰²

Additionally, home-schooling is an acceptable alternative to public education only if certain conditions are met.²⁰³ Many states require prior approval by the school, in addition to home-school registration, standardized testing for home-schooled children, and on-site visitation requirements.²⁰⁴ Some states even require that the home-schooling parent hold a valid teaching certificate.²⁰⁵ Other states mandate that the mode of instruction must be similar in length and subject matter to that of the public school curriculum.²⁰⁶ Thus, home-schooling is available only to those parents who can meet the enumerated criteria.

Essentially, state statutes require parents to send their children to public schools. Because of this lack of choice, many parents believe that their input is required when a school distributes contraceptives.²⁰⁷ Compare this reasoning to the case of *Doe v. Irwin*²⁰⁸ where the Sixth Circuit opined on condom distribution in federally-funded, public health centers. In *Doe*, parents claimed that distribution of contraceptives in a public health center violated their Fourteenth Amendment rights to raise their children as they see fit.²⁰⁹ The court found, however, that there was no violation of these rights because the voluntary nature of the health clinic's distribution of contraceptives imposed no compulsory prohibition or restriction on parental rights.²¹⁰ Thus, there was no burden on parental rights to raise their children as they see fit.²¹¹

The *Alfonso* and *Curtis* courts applied the reasoning in *Doe*, resulting, however, in contrasting outcomes. *Alfonso* focused on the environment factor;

202. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 266 (N.Y. App. Div. 1993).

203. Henderson, *supra* note 193, at 986 (noting that "education laws outline requirements that parents must satisfy in order to teach their children at home").

204. *Id.* at 993.

205. *Id.* See, e.g., *People v. DeJonge*, 449 N.W.2d 899, 905 (Mich. Ct. App. 1989) (holding that teacher certification requirements did not unconstitutionally burden parents' Fourteenth Amendment rights to control their child's education); *State v. Patzer*, 382 N.W.2d 631, 639 (N.D. 1986) (reaching decision that teacher certification requirement did not unconstitutionally burden parents' free exercise rights).

206. See, e.g., *supra* note 201.

207. *Alfonso*, 606 N.Y.S.2d at 265 (noting that "[p]arents must send their children to school, . . . [thus], that school must be one controlled by [parents]"). This, the *Alfonso* court reasoned, is the fundamental difference between a voluntary health clinic and a compulsory school environment. *Id.* (citing *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980)).

208. 615 F.2d 1162 (6th Cir. 1980).

209. *Id.* at 1163.

210. *Id.* at 1168.

211. *Id.*

specifically, the difference between a voluntary health clinic and a compulsory public school.²¹² *Curtis*, however, applied *Doe* in a different fashion, noting that voluntary condom distribution in a public health clinic and voluntary distribution in a public school were identical.²¹³ The *Curtis* court agreed with the *Doe* court's finding that parents are free to instruct their children not to participate in a voluntary condom distribution program, whether the voluntary distribution occurred in a public clinic or a public school.²¹⁴ Conversely, the *Alfonso* court noted that *Doe* occurred in a non-compulsory environment, and that condom distribution in the compulsory school environment may "force" parents to surrender their rights to influence and guide the sexual activity of their children without state interference.²¹⁵ Specifically, the court reasoned that compulsory attendance forced parents to surrender their parenting rights when their child entered through the public school's doors.²¹⁶

Additionally, the *Curtis* and *Alfonso* courts analyzed *Meyer v. Nebraska*²¹⁷ and *Pierce v. Society of Sisters*,²¹⁸ again resulting in different conclusions regarding parents' rights to raise their children as they see fit. *Alfonso* applied *Meyer* and *Pierce*, noting that parents' rights to direct the educational upbringing of their children are protected, especially in a school environment.²¹⁹ The *Alfonso* court reasoned that the facts of *Meyer* and *Pierce* were similar to condom distribution plans because they upheld parental rights to raise children in the compulsory environment of a public school.²²⁰ *Alfonso* noted that *Meyer* and *Pierce* centered upon the broader issue of parental rights involved in school-mandated curriculum, initiating the principle that parents' rights cannot be ignored when schools select curriculum. Thus, the *Alfonso* court, relying on these cases as binding precedents, stated that condom distribution could survive only with parental opt out provisions.²²¹

212. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 266 (N.Y. App. Div. 1993).

213. *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580, 586 (Mass. 1995).

214. *Id.*

215. *Alfonso*, 606 N.Y.S.2d at 266 (stating that "in *Doe* there was no State compulsion on parents to send their children into an environment where they had unrestricted access to free contraceptives, which is precisely what the petitioners [parents] in the instant matter must do").

216. *Id.*

217. 262 U.S. 390 (1923).

218. 268 U.S. 510 (1925).

219. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265 (N.Y. App. Div. 1993).

220. *Id.*

221. *Id.* *Alfonso* recognized this right by reasoning that the schools could freely educate children concerning condoms, and the students could take this knowledge and acquire condoms in a variety of ways outside of school. *Id.* Others argue that until AIDS and sex education is improved upon, condom distribution will not result in more utilization of condoms. See Sudbeck, *supra* note 12, at 92-96 (noting that schools should develop a responsible and responsive policy for addressing the issues surrounding AIDS.).

Opining on whether parental opt out was required in condom distribution plans, the *Curtis* court, however, distinguished the facts in *Meyer v. Nebraska*²²² and *Pierce v. Society of Sisters*²²³ from the facts in *Curtis*.²²⁴ Specifically, *Curtis* stated that *Meyer* and *Pierce* imposed a prohibition upon the exercise of a fundamental right, while condom distribution plans, due to their voluntary nature, did not interfere with parents' fundamental rights.²²⁵ For example, *Meyer* involved a prohibition of teaching a foreign language to school children in public schools.²²⁶ Conversely, condom distribution plans did not prohibit parents from practicing their fundamental right to raise their children because students were not required to participate.²²⁷ Based on this reasoning, the *Curtis* court did not apply *Meyer* or *Pierce* because it found that parents' rights were coercively burdened in those cases, but not when voluntary condom distribution programs were implemented in public schools.²²⁸

Thus, *Alfonso* and *Curtis* reached opposite conclusions on the issue of whether parental notification is required in condom distribution plans in public schools. Each case focused on a different application of the term "compulsory," one emphasizing that students were required to attend a public school, the other emphasizing that participation in the program was not required, yet both provided valid, constitutionally sound opinions. Since at least one of these cases has found parental due process rights burdened by condom distribution plans lacking parental opt out provisions, dissatisfied parents may continue to bring suit against school boards as implementation of these plans continues. Relying on *Alfonso*, parents have persuasive authority for their arguments. Thus, litigation in this area is likely to continue if schools do not provide for parental notification in condom distribution. In addition to a possibility of burdening parents' rights and increasing litigation, other policy concerns illustrate why parents should be included in condom distribution plans in public schools.

One such policy concern is that current sex and AIDS curricula in public schools mandate parental opt out provisions. Condom distribution in schools is

222. 262 U.S. 390 (1923).

223. 268 U.S. 510 (1925).

224. *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580, 586 (Mass. 1995) ("These cases [*Meyer* and *Pierce*] strongly imply that, in order to constitute a constitutional violation, the State action at issue must be coercive or compulsory in nature.").

225. *Id.*

226. *Id.*

227. *Id.* The *Curtis* court noted that students were not required to seek out and accept any condoms or read any literature. *Id.* Students were free to deny the programs. *Id.* Additionally, the court reasoned that parents were free to instruct their children not to participate. *Id.* *Pierce v. Society of Sisters* differed since the parents were completely denied the option of sending their children to private or parochial schools. *Id.*

228. *Id.*

most closely related to the sex education curriculum, as they both involve sensitive issues and controversial topics.²²⁹ Because parental opt out is mandated in sex education, the greater AIDS prevention measure of distributing condoms should allow for parental opt out as well. Since the implementation of opt out provisions in sex education, the subject has invoked no further litigation from objecting parents.²³⁰ Implementation of parental opt out programs in condom distribution plans is, thus, a workable solution to possible litigation, as well as a consistent supplement to state mandated sex education statutes.²³¹

Another policy reason which demonstrates why parents should be included in condom distribution decisions is that certain medical experts have classified condoms as a health service.²³² Many states statutorily prescribe parental consent for any health service rendered to a minor.²³³ Only in enumerated, limited exceptions may a minor receive health services without parental consent.²³⁴ In those states which have regulated health services to minors, if condom distribution litigation arises, state courts can easily treat condoms as a health service, thereby requiring parental consent in a school's distribution program. Furthermore, parental consent is statutorily required in many aspects of a minor's life, including obtaining a driver's license.²³⁵ Thus, since some medical experts perceive condoms as a health service requiring parental consent,

229. Sanders, *supra* note 11, at 1488.

230. *Id.* at 1482. "The courts, however, have been somewhat more amenable to claims seeking exemption from compulsory programs, rather than a declaration that such teachings are unconstitutional per se." *Id.*

231. Another factor that may require parental opt out in condom distribution plans in public schools is that some critics argue that condoms are not part of the educational process. Alfonso v. Fernandez, 606 N.Y.S.2d 259, 263 (N.Y. App. Div. 1993) (stating that "supplying condoms to students upon request has absolutely nothing to do with education, but rather is a health service occurring after the educational phase has ceased The supplying of condoms is conduct which constitutes a service separate and apart from education"). In support of this view, while the Supreme Court has accepted the view that the state has an interest in providing education to all children, neither the Supreme Court nor Congress has extended that interest beyond a basic education in schools. Rose, *supra* note 92, at 864. Rose predicts that the lack of specificity in defining "a basic education," combined with the effects of an ever-complex and growing society, ensure the continuance of claims brought to define and extend this interest. *Id.*

232. Alfonso, 606 N.Y.S.2d at 263.

233. See *supra* note 145 for an example of a state health statute requiring parental consent before medical attention may be given to a minor.

234. See *supra* note 145.

235. Parents United For Better Schs., Inc. v. School Dist. of Phila. Bd. of Educ., 646 A.2d 689, 692 (Pa. Commw. Ct. 1995). See also *supra* note 147 for an example of aspects of a minor's life where parental consent is statutorily required.

and parental consent is frequently statutorily required, state courts can avoid unclear constitutional issues concerning parents' rights by treating condom distribution as a health service.²³⁶

In conclusion, parental decision-making should be included in condom distribution programs. In future condom distribution litigation, parents' rights could be deemed "unduly burdened" by condom distribution plans that do not provide for parental opt out. At least one court has found a burden upon parental rights when no opt out scheme was employed by the school board in implementing condom distribution.²³⁷ Additionally, the Supreme Court has recently denied a writ of certiorari to the *Curtis* case, thus evoking continued litigation of parental rights in condom distribution plans. Furthermore, current sex education and AIDS curriculum statutes provide for parental opt out schemes. Since condom distribution is closely related to sex education courses, parental opt out should be employed to promote consistency among state-mandated legislation. Finally, it is urged by some health care professionals that condoms are a health service, for which parental consent is required before minors may receive condoms. Thus, as a matter of policy, states could treat condoms as a health service and subsequently require parental consent before a student receives a condom.

The next Section addresses the current, judicial confusion surrounding condom distribution in public schools by proposing a model amendment for state legislatures to add to current sex education statutes. The following model amendment mandates parental opt out provisions in condom distribution legislation.²³⁸

VI. A CALL FOR LEGISLATIVE INTERVENTION

Due to the inconsistent treatment in the courts regarding condom distribution plans, state legislatures need to regulate condom distribution in public schools. The legislature is the correct body to regulate issues within the

236. The *Curtis* court stated that the *Alfonso* decision was based on New York's public health statute. *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580, 586 (Mass. 1995). However, *Alfonso* also ruled that without parental involvement, condom distribution programs violated parents' Fourteenth Amendment rights to raise children as they see fit. *Alfonso*, 606 N.Y.S.2d at 263. The *Curtis* court disagreed with *Alfonso*, noting that condoms are not a health service. *Curtis*, 652 N.E.2d at 586.

237. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 259 (N.Y. App. Div. 1993).

238. See *infra* notes 258-64 and accompanying text for a discussion of why parental opt out rather than parental consent should be required in an amendment to sex education statutes.

reach of a public school curriculum.²³⁹ State legislatures have been given wide deference to implement curriculum and school-related programs.²⁴⁰ They have exercised this discretion by regulating sex and AIDS education curricula, which require parental opt out provisions, but have not regulated condom distribution.

Because of the expanding correlation between the use of condoms and the prevention of AIDS, schools are likely to increase the use of condom distribution programs. Consequently, condom distribution disputes will also multiply, resulting in more judicial unrest. State legislatures should take sex education curriculum statutes one step further and amend them to include the regulation of condom distribution in public schools with parental opt out schemes.

State courts have also expressly stated that they are without a constitutional mandate to legislate.²⁴¹ Furthermore, courts are reluctant to decide controversial issues in the school environment. Logically, state legislatures should be regulating such a political issue as condom distribution in public schools. When drafting this legislation, states should include parental opt out

239. While this note assumes that schools are implementing condom distribution plans, and only asserts that parental opt out provisions are required when schools implement them, state legislatures have many policy concerns before they allow for condom distribution in public schools.

Some critics of the plans believe that they are not working. See Chu, *supra* note 58, at B1. One such example is Virginia Uribe, a teacher and founder of "Project 10" (a popular drop out prevention program and gay and lesbian support group) at Fairfax High School in Los Angeles, who does not think that condom distribution programs have been effective. *Id.* The school nurse at Sylmar High School in Los Angeles believes that condom distribution is a "pretty meager effort." *Id.* He sees it mainly as a public relations ploy to encourage students to think about safe sex. *Id.* In light of existing obstacles, including embarrassment felt by some teens, which students must go through to obtain condoms at school, condom distribution programs may be ineffective and useless.

Ultimately state legislatures must decide how far to extend education beyond the "three R's" (reading, writing and arithmetic). See Rose, *supra* note 92, at 902 n.309 (noting that Researcher John Rouech found that students are "lacking [the] basic skills: the most offered courses in American community colleges are remedial reading, remedial writing, and remedial arithmetic"). Additionally, many scholars have found the condition of the American school systems to have deteriorated. *Id.* "The once proud and efficient public school system of the United States . . . has turned into a wasteland where vice shares the time with ignorance and idleness." *Id.* (quoting J. BARZRN, *TEACHER IN AMERICA* (1945)).

240. Courts do not wish to interfere in the deferential treatment the legislature has been given to regulate public schools. *Alfonso*, 606 N.Y.S.2d at 262.

In this controversy, the Court's role is a limited one. Its function is to determine whether or not the condom availability component of the program impermissibly trespasses on any of the petitioner's constitutional, common-law, or statutory rights. That role begins with its review of the record and ends with its determination of the legal issues. It is without power to legislate.

Id.

241. *Id.*

schemes based on case law and other policy reasons.²⁴² This Section proposes a model condom distribution amendment that should be added to current sex education curriculum statutes in order to effectively uphold parents' constitutional rights to raise their children as they see fit. The amendment balances the rights of parents to raise their children as they see fit and the state's interest in eradicating the spread of AIDS.²⁴³ The amendment should be added to current sex education statutes which, in most states, require parental opt out provisions.²⁴⁴ Following each subsection is a comment which details a

242. See *supra* section V for case law and policy reasons which advocate parental rights in an educational context.

243. Although minors' rights to condom distribution in school are beyond the scope of this note and the cases of *Alfonso*, *Parents United*, and *Curtis*, the proposed amendment upholds a minor's right to privacy and to receive contraceptives. For an excellent discussion of minors' and parents' rights regarding the issue of minors' access to contraceptives, see generally Susan A. Bush, Comment, *Parental Notification: A State Created Obstacle to a Minor Woman's Right of Privacy*, 12 GOLDEN GATE U. L. REV. 579 (1982).

244. The following statute is taken from California. It represents the "typical" sex education statute in place in approximately thirty-three states:

§ 51553. Sex Education classes; course criteria

(a) All public elementary, junior high, and senior high school classes that teach sex education and discuss sexual intercourse shall emphasize that abstinence from sexual intercourse is the only protection that is 100 percent effective against unwanted teenage pregnancy, sexually transmitted diseases, and acquired immune deficiency syndrome (AIDS) when transmitted sexually. All material and instruction in classes that teach sex education and discuss sexual intercourse shall be age appropriate.

(b) All sex education courses that discuss sexual intercourse shall satisfy the following criteria:

(1) Course material and instruction shall be age appropriate.

(2) Course material and instruction shall stress that abstinence is the only contraceptive method which is 100 percent effective, and that all other methods of contraception carry a risk of failure in preventing unwanted teenage pregnancy. Statistics based on the latest medical information shall be provided to pupils citing the failure and success rate of condoms and other contraceptives in preventing pregnancy.

(3) Course material and instruction shall stress that sexually transmitted diseases are serious possible hazards of sexual intercourse. Pupils shall be provided with statistics based on the latest medical information citing the failure and success rate of condoms in preventing AIDS and other sexually transmitted diseases.

(4) Course material and instruction shall include a discussion of the possible emotional and psychological consequences of preadolescent and adolescent sexual intercourse outside of marriage and the consequences of unwanted adolescent pregnancy.

(5) Course material shall stress that pupils should abstain from sexual intercourse until they are ready for marriage.

...

§ 51820. Sex Education; written notification to parent; inspection of instructional material; consensual pupil participation.

The governing board of any district maintaining elementary or secondary schools

justification for each provision of the statute.

§ 3. Condom distribution plans; criteria; written notification to parent; parental opt-out

(A) The governing board of any district maintaining elementary or secondary schools may offer condom distribution in such schools with the guidance of the State Department of Health. The grade level at which distribution is offered shall also be determined by the local governing body of the individual district.

Comment:

Section A authorizes condom distribution in schools. It does not mandate their distribution; instead, each individual district will be able to determine if the condom distribution is necessary and consistent with the goals of the

may offer units of instruction in sex education in such schools with the assistance and guidance of the State Department of Education. The grade level at which such instruction shall be given shall be determined by the governing board of the school district. . . .

If sex education classes are offered, the parent or guardian of each pupil enrolled or to be enrolled therein shall be notified in writing of the instructional program. Such notice shall be given at least 15 days prior to the commencement of the instructional program. The notice shall also advise the parent or guardian of his right to inspect the instructional materials to be used in such class and of his right to request the school authorities that his child not attend any such class.

Sending the required notice through the regular United States mail or any other method of delivery which the school district commonly uses to communicate individually in writing to all parents, meets the notification requirement of this section.

The parent or guardian may request that his child not participate in a sex education program. Such request shall be in writing, but may be withdrawn by the parent or guardian at any time. No pupil may attend any class in sex education, if a request that he not attend the class has been received by the school in the manner provided in this section.

The parent or guardian of any pupil enrolled or to be enrolled in any sex education course, shall be provided the opportunity to inspect the textbooks, audiovisual aids, and any other instructional materials to be used in such classes.

CAL. EDUC. CODE §§ 51553, 51820 (West Supp. 1996). California also has an AIDS curriculum statute requiring school districts to instruct pupils on AIDS prevention. CAL. EDUC. CODE § 51201.5 (West 1989). While this note proposes that states amend their current sex education statutes, states may also amend their AIDS curriculum statutes, with no change in the proposed amendment. The reason this note proposes sex education to be amended rather than AIDS education is simply because not as many states currently have AIDS curriculum statutes. Furthermore, some states combine their sex and AIDS curriculum into one statute. See *supra* note 12 for current sex and AIDS curriculum statutes.

community.²⁴⁵ Since the local governing body, generally a school board, is making the decisions, dissatisfied parents can take measures to vote the current board out of office.²⁴⁶ Furthermore, many school districts cannot afford to defend civil suits.²⁴⁷ Thus, local district decision-making provides an incentive to work together with parents to reach compromises. Local decision-making with parental involvement should decrease the amount of litigation when community sentiment is accounted for when regulating condom distribution. Delegating the decision on whether to distribute condoms to individual districts is consistent with sex and AIDS education curricula.²⁴⁸ In many states which mandate sex education, each district provides its own curriculum and method of instruction.²⁴⁹ Administratively, it would be too difficult and cumbersome for state legislatures to mandate and supervise instruction. Thus, since each local school governing body is granted the authority to regulate sex and AIDS

245. See, e.g., IND. CODE ANN. § 20-8.1-11-12 (West 1994) (mandating an AIDS advisory committee that "shall hold a public meeting and solicit testimony from members of the community concerning community attitudes and values on matters that affect the instruction on AIDS that is presented within the school corporation"). While the advisory committee's decisions are not binding on the local school boards, the school boards are required to consider the recommendations of the advisory council. IND. CODE ANN. § 20-8.1-11-14 (West 1994). See also IDAHO CODE § 33-1610 (1996) (noting that "[s]chool districts shall involve parents and school district community groups in the planning, development, evaluation and revision of any instruction in sex education offered as a part of this new program").

246. Parents in New York City failed to re-elect School Chancellor Joseph Fernandez, the founder of that city's condom distribution program. Nick Chiles, *Joe Must Go; Board Boots Fernandez as Some Sing His Praises*, NEWSDAY, Feb. 11, 1993, § 4 (News), at 5 (quoting one critic who noted that "He [Fernandez] did not consult with parents. He has awakened a sleeping giant."); Sam Dillon, *Board Removed Fernandez as New York Schools Chief After Stormy 3-Year Term*, N.Y. TIMES, Feb. 11, 1993, at A1 (remarking that one observer commented that Fernandez's downfall stemmed from his failure to "concentrate on the basics and involve parents in the education of their children"); *Fernandez's Ouster*, CHRISTIAN SCI. MONITOR, Feb. 12, 1993, at 20 (noting that "At a time when schools are increasingly under pressure to address a range of controversial social issues . . . it is crucial that school systems not lose sight of the importance of fostering a dialogue with parents. School heads might well take a page from President Clinton's constant efforts to keep in touch with the American people.").

247. John G. West, *The Changing Battle Over Religion in the Public Schools*, 26 WAKE FOREST L. REV. 361, 400-01 (1991) (noting that an organization's threatening to sue a school to achieve its objectives is "particularly effective with small government entities such as school districts, which cannot afford to spend enormous sums of money on litigation"). West urged Christian groups to adopt what national ACLU official Burt Neuborne called the "blackmail and bludgeon" approach, where an organization can achieve an objective simply by threatening to sue. *Id.*

248. See, e.g., IND. CODE ANN. § 20-8.1-7-21 (West 1994) (regulating AIDS literature as such that the state board of education may not distribute it to schoolchildren without the consent of the governing body of the school corporation the students attend.).

249. See, e.g., GA. CODE ANN. § 20-2-143 (Harrison 1981) (stating that while the State Board of Education mandates a minimum course of study for each school district within the state, each local board of education is authorized to supplement and tailor its exact instruction and content with "such specific curriculum standards as it may deem appropriate."). See also *supra* note 244.

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education, it follows that each district should inherently receive the individual power to implement condom distribution.

Determining the grade level at which distribution will begin is to be decided by those individual school districts that elect to distribute condoms. Again, this coincides with current sex education curriculum, which states that the curriculum shall be "age appropriate."²⁵⁰ Additionally, distributing condoms in conjunction with information from the Department of Health ensures that local districts are informed regarding condom instruction and usage.²⁵¹ Through the guidance of the Department of Health, schools will secure literature and written instructions on condom usage.²⁵² This information can be distributed to students and their parents. Condom instruction endorsed by the State Department of Health could decrease a school board's liability if someone brings suit against the school board for distribution of faulty condoms.²⁵³ In essence the Department of Health will act as an advisor to school districts in ensuring that condom instruction which is medically sound will be given to students.

(B) If condom distribution is employed by local districts, the following procedures shall be adhered to:

(1) The parent or guardian of each pupil enrolled or to be enrolled therein shall be notified in writing of the condom distribution program. Such notice shall be given at least 15 days prior to the commencement of the condom distribution. The notice shall also advise the parent or guardian of her right to inspect the condoms to be distributed and of her right to make

250. See *supra* note 244 for a typical sex education statute which allows for instruction to be "age appropriate."

251. In *Alfonso v. New York*, health educators were required to be trained in condom use and education before they could distribute condoms to students. *Alfonso v. New York*, 606 N.Y.S.2d 259, 262 (N.Y. App. Div. 1993).

252. Many current sex education statutes require instructional materials to be approved through the Department of Health. See, e.g., 105 ILL. COMP. STAT. ANN. § 130/3 (West 1996) (mandating a "sex advisory board" to recommend which instructional materials are appropriate for the school setting. The Director of Public Health must serve as an ex officio member.); MICH. COMP. LAWS ANN. § 380.1169 (West 1988) (requiring the department of public health to supply trainers for teachers in the area of sex education and HIV). Logically, this approval procedure should extend to condom distribution plans.

253. Condoms are sometimes defective. In 1995, New York recalled thousands of defective Chinese-made Olympus brand condoms sent to 250 state organizations for distribution to the less fortunate in order to prevent infection from the AIDS virus. Carrie Dowling & Paul Leavitt, *The Nation*, USA TODAY, Dec. 1, 1995, at A3. In attempting to "cure" the problem of defective condoms, some argue that a school should be free from products liability suits if it makes condoms available to students, unless the school has reason to know that the condoms were defective. Oswald, *supra* note 33, at 456. Others, argue, however, that schools should be subject to strict liability claims if they choose to distribute condoms, and a condom fails to work properly. Witham, *supra* note 34, at A3.

a request to the school authorities that her child not receive such condoms.

(2) No child shall receive condoms if a parent or guardian has notified the school that her child may not participate in condom distribution programs.

Comment:

The procedures set forth in section B of the amendment denote the only state mandated guidelines for individual districts. These guidelines indicate the method of distribution and the level of parental involvement. They also reinforce the notion that parents' rights should not be ignored in condom distribution in public schools.

In terms of parental involvement, sections B(1) and B(2) delineate the procedure by which parents are notified of a school's condom distribution program. These procedures are identical to those found in a typical sex education statute.²⁵⁴ They are further justified based on *Meyer*,²⁵⁵ *Pierce*²⁵⁶ and their progeny.²⁵⁷

Allowing for parental opt out in condom distribution reinforces parental decision-making in school environments. As *Alfonso*²⁵⁸ held, parents' rights should be provided for in the compulsory school environment.²⁵⁹ The court in *Curtis*²⁶⁰ found, however, that parents' rights were not burdened by a voluntary program, even if it was offered in a compulsory environment.²⁶¹ The voluntary nature of the programs prompted the *Curtis* court to allow condom distribution to continue without parental involvement. While both cases present credible constitutional opinions, litigation in the area of condom distribution is likely to continue if parents' rights are not provided for in the plans. Furthermore, since at least one court has determined that parents' rights are unduly burdened when condom distribution provides no parental opt out

254. See *supra* note 244. Additionally, parental opt out seems preferable to parental consent, as opt out imposes less of an "administrative burden and excludes only those children whose parents affirmatively object to the program." Bjorklun, *supra* note 16, at 12. Additionally, Bjorklun notes that while both consent and opt out allow for exclusion of students, parental consent provisions call for more exclusion, due to their intrusive nature. *Id.*

255. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

256. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

257. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Moore v. Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968). See also *supra* note 96.

258. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

259. *Id.* at 266.

260. *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995).

261. *Id.* at 586.

provision, other courts may adopt this reasoning, resulting in less distribution and more cases of AIDS and sexually transmitted diseases.

Additionally, if condom distribution litigation continues, states' courts may be persuaded to treat condoms as a health service, thus requiring parental consent under most states' minor health statutes. As compared to parental opt out provisions, however, mandating parental consent for condom distribution plans will not effectively further the state's interest in eradicating AIDS and unwanted teenage pregnancies. Statistics have shown that the percentage of parents who opt out of condom distribution programs is very low.²⁶²

Conversely, parental consent provisions could result in a higher number of objecting parents excluding their children from condom distribution, thus making the plans less effective.²⁶³ Under consent provisions, students will have to approach their parents to ask them to sign a permission slip so that the student may receive condoms. An offended parent can easily refuse to consent to distribution. In an opt out only scheme, however, parents will only be notified that a particular school district is distributing condoms. Parents will not know if their individual child is receiving condoms. Thus, opt out procedures are more feasible because a child will not have to ask for permission, yet parents are given the first option to exclude their child from participation. Opt out schemes, rather than parental consent, better promote the state's interest in curbing AIDS, based on their lack of intrusiveness between the parent-child relationship.

Finally, as previously noted, parental notification is required in many current sex education curriculum statutes.²⁶⁴ If parents object to sex education in schools, they may opt their child out of the classroom instruction. Parents do not have to sign a permission slip to allow their child to participate. Instead, a school district will assume that all students are allowed to participate until instructed otherwise.

Condom distribution plans should be implemented in the same manner. By assuming that all children are able to participate, the distribution will reach more

262. See *supra* note 74 and accompanying text.

263. See *supra* note 74 and accompanying text for a discussion of how parental opt out statistically allows for more student participation than parental consent.

264. See *supra* note 12 for states which have statutorily regulated sex education curriculum. Prior to this statutory mandate, lawyers who were consulted by individual school boards that were contemplating an adoption of sex education curriculum were advised to "make the board aware that, if [a] provision is made for excusing students whose parents object, defense of the program should not be difficult if a court attack is mounted." Laurent B. Frantz, Annotation, *Validity of Sex Education Programs in Public Schools*, 82 A.L.R.3D 584, 584 (1978). See also *supra* note 244 for a typical sex education statute that employs parental opt out provisions.

students. However, parents are still given the first option to exclude their child from these programs. Thus, the state's interest and parents' rights in educating their children are both soundly provided for in this legislation.

(3) The individual districts shall only distribute condoms through the school health facility. If so requested, a student must receive literature and/or oral instruction regarding condoms and their use.

Comment:

The school health center is the most suitable place to distribute condoms. Schools will not have to create a condom distribution center, and health-facilitated distribution enables an inquisitive student to receive pamphlets regarding condom use and instruction, as well as oral advice or instruction.²⁶⁵ The counseling and instruction offered to students is optional, based on the fact that the programs may be less effective due to the embarrassment or intimidation that students may feel every time they receive a condom.²⁶⁶ A viable alternative would be to have students fill out a questionnaire regarding their knowledge on condom usage. If a student's knowledge is lacking, the health care official could counsel and distribute literature along with the condoms. These measures should enable the student to obtain information, while furthering the state's interest in eradicating AIDS and related diseases. Additionally, parents can be assured that condom instruction is available for their teenagers. This may help reduce potential liability if parents bring legal action against a school board because their teenagers are pregnant or have contracted a sexually

265. Students in the case of *Alfonso v. Fernandez* received a pamphlet from the health administrator when requesting condoms and were also asked if they had any questions. Nick Chiles, *Lines Form for School Condoms; Students Back the Program*, NEWSDAY, Nov. 27, 1991, § 4 (News), at 5. The pamphlet read as follows:

RISKS AND BENEFITS OF THE USE AND MISUSE OF CONDOMS: The only 100 percent effective way to prevent the sexual spread of HIV and other sexually transmitted diseases is not to have sexual intercourse (abstinence). If you do have sexual intercourse of any kind, the only way to help protect yourself is to use a condom. The main reason a condom may not provide protection is because it is not used correctly. If you use condoms, you can help protect yourself by reading and learning how to use them properly. The person making condoms available in your school can answer questions or can refer you to other people who can give you additional information on condom usage. There are two reasons why a condom may not protect you.

1. It may break.

2. It may slip and leak.

Knowing how to use a condom properly can reduce these risks. If you have additional questions, you can ask the person who is making condoms available in your school.

Id.

266. Embarrassment is cited as the number one reason why students do not want to receive condoms at school. Chu, *supra* note 58, at B1.

transmitted disease while using a school-endorsed condom.²⁶⁷

- (4) Condoms shall not be distributed via condom vending machines.

Comment:

In allowing for parental opt out provisions in condom distribution plans, school districts may not use condom vending machines as a method of distribution. Practicality assumes that schools will not be able to "police" the machines to ensure that those students whose parents have opted them out of the program will not receive condoms. Thus, condoms must be distributed through a school or health official.

- (5) All in-class instruction on condoms shall be conducted in accordance with sections 1 and 2 of this statute.²⁶⁸

Comment:

This section leaves the classroom instruction and language regarding condoms intact. Thus, each individual district may determine the sufficient amount of language regarding condom instruction needed in the classroom. This provision is important because it does not mandate increased class discussion and instruction on condoms. It will not interfere with current legislation. Each district will be able to independently discern if any increased instruction on condoms needs to be addressed in sex education class.

The proposed amendment considers both the state's interest in education and preventing AIDS and related diseases, and the parents' liberty interest in providing for their child's education. If adopted, it will answer many of the judiciary's unanswered questions regarding parental rights and condom distribution plans. State legislatures are in the most unique position to address condom distribution—the position of making laws that directly affect children.

267. See *supra* note 253 for a discussion of how schools may be liable for distribution of faulty condoms. Schools are sometimes liable in other areas of school-related activity. The state of Colorado requires school districts to procure accident insurance for injuries sustained by any student riding a bus to and from school. COLO. REV. STAT. ANN. § 22-32-110 (West 1995). Conversely, school athletic program instructors generally require athletes and their parents to sign a waiver, absolving the school from liability for the student's sports-related injuries. Andrew Manno, Note, *A High Price to Compete*, 79 KY. L.J. 867, 867 (1991). However, many times liability waivers are void as contrary to public policy or because a minor has no ability to waive his right in a contract, thus resulting in the school being liable for an injury. *Id.* at 871, 874-75.

268. For an illustration of what section 1 and 2 represent in a typical state education statute see CAL. EDUC. CODE §§ 51552, 51820 (West Supp. 1996). See also footnote 244 and accompanying text.

VII. CONCLUSION

Condom distribution plans in public schools should include parental opt out provisions. Courts currently disagree over the breadth of parental involvement required in condom distribution. Regulation of public schools, however, is not an issue for the judicial branch of government. Conversely, state legislatures possess fundamentally great deference in providing for education in public schools. They have exercised this right by regulating sex education curriculum. State legislatures' exercise of regulation of sexual relations should be extended to include condom distribution in public schools. Having demonstrated that AIDS is a compelling interest, and parents' substantive due process rights to raise their children are not violated when opt out provisions are employed, state legislatures should implement condom distribution plans in public schools with opt out provisions—now. AIDS waits for no one.

Camille Waters