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**SEX EDUCATION AND CONDOM DISTRIBUTION:  
JOHN, SUSAN, PARENTS, AND SCHOOLS**

JEFFREY F. CARUSO\*

I. INTRODUCTION

John, a high school freshman, walked down the corridor, passed several classrooms, and entered the boys' restroom on a Friday afternoon. He fished into his pocket for a few quarters, inserted them into the vending machine, and pulled out a condom. As he completed the transaction, he reminded himself of how glad he was that his parents did not know how he spends his extra lunch money. He knew he'd still have to concoct another story for when they'd ask him where he was going that night, but he quickly assured himself that he'd have plenty of time to think of something.

A few miles down the road, Susan, a seventh-grader, sat in her sex education class. The teacher briefly warned the students that abstaining from sexual activity is the only sure way to keep from contracting AIDS or for girls to keep from becoming pregnant. One of Susan's friends rolled her eyes, other students smirked, and a few started to laugh. Susan wondered why they weren't taking the lecture seriously and even started to think maybe she was the only one in the class who hadn't had sex yet. The teacher then announced that, for the next few class periods, he would discuss the role of contraceptives<sup>1</sup> in preventing dis-

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\* B.A., 1993, The Pennsylvania State University; J.D., 1996, Notre Dame Law School; Thomas J. White Scholar, 1994-1996. The author thanks Professors John Robinson and Charles Rice and fellow White Scholars Matthew Schechter, Mark Woodmansee, Victoria Esposito-Shea, and Stephen Wolf for assistance with this article.

1. It is useful at the outset of this note to define contraceptive. A contraceptive is "a means to prevent conception." Charles Rice, *Natural Law, the Constitution, and the Family*, 1 LIBERTY, LIFE AND FAM. 77, 118, n.136 (1994). Many contraceptives, such as Norplant, IUD, and most forms of the birth-control pill, are not just contraceptives; instead, in cases where they have failed as contraceptives, they become abortifacients, acting "to prevent the fertilized

eases and pregnancy and would distribute condoms to those who requested them. Susan hoped her parents wouldn't ask her later that evening what she had learned in school that day.

At over 160 schools<sup>2</sup> in the United States, these situations are surprisingly realistic, and parents and students have raised a number of objections. This note will compare two judicial cases dealing with the issue of parental due process rights in the context of sex education and condom distribution in public schools. It will then explore the question of what role schools should assume regarding sex education and prevention of unwanted teen pregnancies, HIV/AIDS, and other sexually transmitted diseases.

## II. ALFONSO V. FERNANDEZ<sup>3</sup>

### A. *Facts and Basic Holding*

In September 1987, the New York State Commission of Education established mandatory instruction in all public elementary and secondary schools on the Human Immuno-deficiency Virus (HIV), which causes Acquired Immune Deficiency Syndrome (AIDS), as part of health education programs.<sup>4</sup> In February 1991, the New York City Board of Education voted to establish an expanded HIV/AIDS Education Program in New York City public high schools. The expanded program had two components — classroom instruction and condom distribution. The classroom instruction component stressed abstinence but also required teaching other methods of avoiding AIDS and pregnancy. This part of the program included a parental opt-out provision. The second component allowed for distribution of condoms by trained professionals to students who requested them. Unlike the first component, this part of the program did not include a provision for parental consent or opt-out.<sup>5</sup> Parents of some New York City public school students sought to prohibit implementation of the condom-distribution component, contending that implementing this part of the program:

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ovum (the developing human being) from implanting itself on the mother's uterine wall." *Id.*

2. *Do School-Based Clinics Work?*, FAM. POL'Y (Family Research Council, Washington, D.C.), Mar. 1991, at 1 [hereinafter FAM. POL'Y] (citing *The Facts: School-Based Clinics* (Center for Population Options), June 1990.).

3. 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

4. *Id.* at 261.

5. *Id.* Under the opt-out provision for the classroom component, parents could choose to have their children excused from classroom instruction upon assurance that they would provide their children with such instruction. *Id.*

- (a) violate[d] Public Health Law § 2504, because it constitute[d] "health service" to unemancipated, minor children without the consent of their parents or guardians, and therefore [was] not authorized by law,
- (b) violate[d] their due process rights to direct the upbringing of their children, and
- (c) violate[d] their rights to the free exercise of their religion as guaranteed by the First Amendment of the U.S. Constitution and the N.Y. Constitution, Article 1, § 3.<sup>6</sup>

In agreeing with the first two of the parents' three contentions,<sup>7</sup> the New York Supreme Court, Appellate Division,<sup>8</sup> held that school officials "are prohibited from dispensing condoms to unemancipated minor students without the prior consent of their parents or guardians, or without an opt-out provision."<sup>9</sup>

### B. Health Service Issue

As to the first issue, the petitioners argued that the condom-distribution component was a health service and that therefore parental consent was required.<sup>10</sup> School officials, on the other hand, claimed the distribution program was merely an "adjunct to an education program"<sup>11</sup> or an "aspect of instruction in disease prevention."<sup>12</sup> In siding with the parents, the court reasoned:

The distribution of condoms is not, as contended by [school officials], an aspect of education in disease prevention, but rather is a means of disease prevention. 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.<sup>13</sup>

The court then asserted that

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6. *Id.* The Fourteenth Amendment's due process clause says that no State is permitted to "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The First Amendment's free exercise clause prevents Congress from validly making any law that prohibits the free exercise of religion. U.S. CONST. amend. I.

7. This note will not address the free exercise issue, which the court held was not violated. *Alfonso*, 606 N.Y.S.2d at 267.

8. *Id.* at 259. The parents appealed to the Appellate Division after the Supreme Court, Richmond County, dismissed their proceeding. *Id.*

9. *Id.* at 260.

10. At common law, parental consent is required for health services in New York. *Id.* at 262.

11. *Id.* at 263.

12. *Id.*

13. *Id.*

[t]he primary purpose of the Board of Education is not to serve as a health provider. Its reason for being is education. No judicial or legislative authority directs or permits teachers and other public school educators to dispense condoms to minor, unemancipated students without the knowledge or consent of their parents.<sup>14</sup>

Thus, based upon its finding that the distribution of condoms is a health service, the court concluded that parental involvement was required.

### C. *The Due Process Issue*

The parents' second argument was that distributing condoms without requiring parental consent or an opt-out provision violated their constitutional rights as parents to "direct the upbringing of their children."<sup>15</sup> The court held that such a program

violate[d] the civil rights of the parent petitioners and similarly-situated parents or guardians under the substantive due process clauses [sic]<sup>16</sup> of the Fourteenth Amendment of the United States Constitution and New York Constitution, article I, § 6.<sup>17</sup>

In reaching this decision, the court emphasized that parents have the right "to regulate their children's sexual behavior as best they can"<sup>18</sup> and "to influence and guide the sexual activity of their children without State interference."<sup>19</sup> Because parents have this fundamental right, the court determined that parental consent or an opt-out provision is required unless (1) a compelling State interest is involved, and (2) the program excluding parental involvement is necessary to meet that interest.<sup>20</sup> In applying

14. *Id.* at 265. Actually, according to the program, trained professionals (not necessarily teachers or educators) were to dispense the condoms. *Id.* at 261.

15. *Id.* at 261.

16. There is no substantive due process clause in the federal Constitution, although the due process clauses of the Fifth and Fourteenth Amendments have been substantively understood. See, e.g., John H. Robinson, *Physician Assisted Suicide: Its Challenge to the Prevailing Constitutional Paradigm*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 345, 350-51 (1995).

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

18. *Id.* at 265.

19. *Id.* at 266.

20. *Id.* at 265-66. As the court noted,

[t]he petitioner parents are being compelled by State authority to send their children into an environment where they will be permitted, even encouraged, to obtain a contraceptive device, which the parents disfavor as a matter of private belief. Because the Constitution gives

these criteria, the court stated that, although the State clearly has a compelling interest in controlling AIDS, excluding parental involvement was not necessary to accomplish this State objective.<sup>21</sup> The court noted that minors could still acquire condoms at publicly funded nonschool programs, drugstores, and convenience stores without difficulty; therefore, the court reasoned, excluding parental involvement was not essential.<sup>22</sup>

### III. CURTIS V. SCHOOL COMMITTEE OF FALMOUTH<sup>23</sup>

#### A. Facts

Beginning on January 2, 1992, a condom-availability program went into effect in Falmouth (Mass.) schools. At Lawrence Junior High School, the school nurse would provide free condoms to students upon request. Before receiving condoms, the students would be counseled. The nurse was also to provide students with pamphlets on HIV/AIDS and other sexually transmitted diseases. At Falmouth High School, students could obtain condoms either by requesting them from the school nurse or by purchasing them for \$0.75 from vending machines in school restrooms. Counseling would be provided to students who requested it, and informational pamphlets were also available. The condom program did not contain an opt-out provision whereby parents could exclude their children from having con-

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parents the right to regulate their children's sexual behavior as best they can, not only must a compelling State interest be found supporting the need for the policy at issue, but that policy must be essential to serving that interest as well.

*Id.* at 265.

21. *Id.* at 266-67 (citations omitted).

22. *Id.* at 267 (citations omitted). In the same vein, the court also asserted: "We do not find that the policy is essential. . . . [B]y excluding parental involvement, the condom availability component of the program impermissibly trespasses on the petitioners' parental rights by substituting the respondents *in loco parentis*, without a compelling necessity therefore [sic]." *Id.* at 265.

In one study cited later, adolescent involvement in birth-control oriented programs was associated with an increase in pregnancies. *See infra* note 65. This study suggests that using condoms is not the best way to prevent unwanted teenage pregnancies. (For evidence that abstinence programs are more effective than contraceptive-oriented programs, *see infra* note 57 and the sources noted therein.) Therefore, at least arguably, the position advanced by the *Alfonso* court that excluding parental involvement was not necessary *because* minors could acquire condoms elsewhere without difficulty is irrelevant. If it is not necessary, or even desirable, to distribute condoms to minors at all, the *Alfonso* parental-rights decision can pass constitutional muster *regardless* of the availability of condoms elsewhere.

23. 652 N.E.2d 580 (Mass. 1995).

doms made available to them or a provision by which parents could be notified of their children's requests for condoms.<sup>24</sup>

In 1995, students and parents of students in the Falmouth public school system sought to enjoin the Falmouth school committee from continuing to make condoms available to students without including both a provision permitting parents to opt out of the program and a system of parental notification of their child's requests for condoms.<sup>25</sup>

### B. *Due Process and Familial Privacy Issues*

The Supreme Judicial Court of Massachusetts,<sup>26</sup> in denying the parents' request for an injunction, addressed their due process arguments, which it characterized as follows:

The plaintiffs argue that the condom-availability program violates their substantive due process rights, protected by the Fourteenth Amendment, to direct and control the education and the upbringing of their children. In the same vein, they argue that the program invades the constitutionally protected "zone of privacy" which surrounds the family. Further, they claim the program intrudes on these rights because it allows their minor children unrestricted access to contraceptives without parental input and within the compulsory setting of the public schools. They claim that in these circumstances parents have the right to intervene and prohibit their children from obtaining the condoms (by an opt-out provision in the program), and that they have a right to parental notification if their child requests and obtains a condom.<sup>27</sup>

In its analysis, the court recognized that parents have a fundamental liberty interest under the Fourteenth Amendment to be free from unnecessary governmental intrusion in rearing their children.<sup>28</sup> It noted that "[a]spects of childrearing protected from unnecessary intrusion by the government include the inculcation of moral standards, religious beliefs, and elements of good citizenship."<sup>29</sup> However, the court then stated that, although the parents do possess this protected interest, they failed to demon-

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24. *Id.* at 582-83.

25. *Id.* at 582.

26. Plaintiffs (students and parents) appealed from a grant of summary judgment in favor of the school committee and three individual defendants. The Supreme Judicial Court of Massachusetts granted the school committee's application for direct appellate review. *Id.*

27. *Id.* at 584-85.

28. *Id.* at 585 (citation omitted).

29. *Id.* (citations omitted).

strate that the condom-availability program burdened these interests to an extent constituting unconstitutional State interference. Because this threshold requirement was not met, the court said that it need not inquire into the State's interest in establishing the program.<sup>30</sup> In supporting this assertion, the court stated, "The type of interference necessary to support a claim based on an alleged violation of parental liberty appears to be that which causes a coercive or compulsory effect on the claimants' rights."<sup>31</sup>

The court found that there was no coercive or compulsory effect on parents' rights in this case, noting that students are free to refrain from participating altogether in the program and that parents are free to tell their children not to participate.<sup>32</sup> Without an analysis of the State's interest in establishing the program, the court then held:

Because we conclude the program lacks any degree of coercion or compulsion in violation of the plaintiffs' parental liberties, or their familial privacy, we conclude also that neither an opt-out provision nor parental notification is required by the Federal Constitution.<sup>33</sup>

#### IV. ANALYSIS OF PARENTAL CONSENT, OPT-OUT, AND NOTIFICATION

The *Alfonso* and *Curtis* courts both conducted their analyses using the guidance of a line of United States Supreme Court cases that vindicated parental rights. This succession of cases began with *Meyer v. Nebraska*,<sup>34</sup> which stated that the liberty guaranteed under the Fourteenth Amendment's due process clause includes "the right of the individual to . . . establish a home and bring up children."<sup>35</sup> Basing its decision upon this right, the *Meyer* court held that the right of parents to have a school instructor teach German to their children is within the liberty guaranteed by the Fourteenth Amendment; therefore, a Nebraska state law prohibiting such teaching was unconstitutional.<sup>36</sup> In a continuation of this reasoning, *Pierce v. Society of Sisters*<sup>37</sup> recognized

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30. *Curtis*, 652 N.E.2d at 585 (citations omitted).

31. *Id.*

32. *Id.* at 586. However, if some parents were not even aware that the program existed, they could not have specifically told their children not to participate in it.

33. *Id.* at 587.

34. 262 U.S. 390 (1923).

35. *Id.* at 399.

36. *Id.* at 400-03.

37. 268 U.S. 510 (1925).

"the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>38</sup> As *Pierce* acknowledged, "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>39</sup> More recently, in 1972, the Court in *Wisconsin v. Yoder*<sup>40</sup> labelled the *Pierce* holding "a charter of the rights of parents to direct the religious upbringing of their children."<sup>41</sup> In *Yoder*, which addressed whether Amish parents had the right to refuse to send their children to school after the children had completed the eighth grade,<sup>42</sup> the Court recognized "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children."<sup>43</sup> As the Court then explained: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."<sup>44</sup>

The *Alfonso* and *Curtis* courts, which both cite *Meyer*, *Pierce*, and *Yoder*, agreed on this much: Parents have a fundamental liberty interest under the Fourteenth Amendment to be free from unnecessary governmental intrusion in rearing their children.<sup>45</sup> However, *Alfonso* and *Curtis* reached opposite decisions regarding the constitutional necessity of parental involvement in the context of condom-distribution programs. In *Alfonso*, the court held that distributing condoms at schools without requiring parental consent or an opt-out provision violated parents' constitutional rights under the due process clause, substantively understood, to direct their children's upbringing.<sup>46</sup> The *Curtis* court, on the other hand, held that the Constitution does not require that school condom-distribution programs include an opt-out provision or parental notification where students are not coerced or compelled to participate.<sup>47</sup> There, the court did not reach the questions of whether there was a compelling State interest or

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38. *Id.* at 534-35.

39. *Id.* at 535.

40. 406 U.S. 205 (1972).

41. *Id.* at 233.

42. *Id.* at 207-09.

43. *Id.* at 232.

44. *Id.*

45. *Curtis*, 652 N.E.2d at 585; *Alfonso*, 606 N.Y.S.2d at 265.

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

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

whether the exclusion of parental involvement was necessary to meet that interest. Rather, it concluded that the State interference, if any, was not unconstitutional, stating that “[t]he type of interference necessary to support a claim based on an alleged violation of parental liberty *appears to be* that which causes a coercive or compulsory effect on the claimants’ rights.”<sup>48</sup> After acknowledging that courts have not explicitly stated that the standard is “coercion,” the *Curtis* court proceeded to use that standard, relying upon *Doe v. Irwin* and other cases.<sup>49</sup>

Of the cases upon which the *Curtis* court relied, only *Doe* involved condom distribution to minors. *Doe*, however, is much different from *Curtis* since *Doe* involved the distribution of contraceptives to minors, without parental notice, by a publicly operated clinic, rather than public school.<sup>50</sup> The *Alfonso* court, which held in favor of parents on the due process issue, addressed the issue of coercion. That court stated unequivocally that “the Constitution gives parents the right to regulate their children’s sexual behavior as best they can.”<sup>51</sup> School condom-distribution programs that exclude parental involvement prevent, to a significant degree, objecting parents from regulating the sexual behavior of their children (who are required to attend school), at least where these parents cannot afford private education for their children. Such parents may have a particularly difficult time adequately regulating their children’s sexual behavior, when, as in the Falmouth schools, students see their peers purchasing condoms from restroom vending machines.<sup>52</sup> Indeed, such parents are “being *forced* to surrender a parenting right — specifically, to influence and guide the sexual activity of their children without State interference.”<sup>53</sup> Furthermore, the *Alfonso* court stated:

Through its public schools 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 petitioners’ constitutionally protected right to

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48. *Id.* at 585 (emphasis added).

49. *See id.* at 585-86. This note does not provide a formal analysis of coercion theory. If the coercion standard is the correct standard to apply, the conclusion in this part of the note that *Curtis* should have reached the decision *Alfonso* reached is based upon application of the everyday meaning of the word “coercion.” For an analysis and critique of coercion theory, see generally Betty Chang, *Coercion Theory and the State Action Doctrine As Applied in NCAA v. Tarkanian and NCAA v. Miller*, 22 J.C. & U.L. 133 (1995).

50. *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980).

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

52. *See id.* at 266.

53. *Id.* (emphasis added).

rear their children, and then has *forced* that judgment on them.<sup>54</sup>

If the *Alfonso* reasoning is correct, condom-distribution programs excluding parental involvement can be said to have a coercive effect on *parents* even if there is no coercion upon the children,<sup>55</sup> and the constitutional right at issue is a *parental* right. Hence, the *Curtis* court not only lacked explicit authority to apply the coercion standard, it may have applied that standard incorrectly. *Curtis* should have considered, as *Alfonso* did, whether there was a compelling State interest and whether the program excluding parental involvement was necessary to meet that interest. Had it proceeded in this manner, that court could well have reached the same decision the *Alfonso* court reached on the crucial constitutional issue.

## V. THE PROPER ROLE OF SCHOOLS

Beyond the parental involvement issue, the proper role of schools in sex education and in the prevention of sexually transmitted diseases merits discussion. Indeed, the facts of *Brown v. Hot, Sexy and Safer Productions, Inc.*<sup>56</sup> illustrate quite vividly that merely requiring some form of parental consent or notification is insufficient; rather, parents need to be given enough information to make truly informed decisions regarding their children's education, and schools must choose their sex education programs carefully.<sup>57</sup> The facts of *Hot, Sexy and Safer*, as alleged in

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54. *Id.* (emphasis added).

55. One could argue that peer pressure is coercive. See, e.g., *Alfonso*, 606 N.Y.S.2d at 267; see also *Curtis*, 652 N.E.2d at 588: "The plaintiffs also argue that peer pressure may add to the coercive effect of the program." Courts and legislatures ought to carefully consider the possible effects of peer pressure in the context of condom-distribution programs.

56. 68 F.3d 525 (1st Cir. 1995) [hereinafter *Hot, Sexy and Safer*].

57. *Curtis* stated that, according to a memorandum issued by the Falmouth Superintendent of Schools to the teaching staff, the Superintendent's presentation of the condom-availability program to the student body would emphasize abstinence as the only way to be certain of avoiding sexually transmitted diseases. *Curtis*, 652 N.E.2d at 583. However, abstinence is not really being emphasized when school programs mention it but then discuss the merits of condom use and even offer free condoms.

Instead of paying mere lip-service to the importance of abstinence, schools should consider replacing condom-distribution programs with abstinence programs. There has been growing evidence that abstinence programs can significantly reduce unwanted teenage pregnancies. For example, in a study of Fertility Appreciation for Families, a program promoting abstinence, respect for life, moral values, and discussion with parents, teen pregnancy rates among those participating were 95 percent less than the national norm; among 15- to 19-year-olds after participation, the number of pregnancies was only four per

the complaint and taken as true for purposes of appeal, are as follows.<sup>58</sup>

Plaintiffs Jason P. Mesiti ("Mesiti") and Shannon Silva ("Silva"), fifteen-year-old Chelmsford High students, attended a mandatory, school-wide "assembly" on April 8, 1992. During that time, they observed a ninety-minute presentation characterized as an AIDS awareness program. The program was performed by defendant Suzi Landolphi ("Landolphi"), contracting through defendant Hot, Sexy and Safer, Inc.

According to Mesiti and Silva, Landolphi "gave sexually explicit monologues and participated in sexually suggestive skits with several minors chosen from the audience."<sup>59</sup> In their complaint, Mesiti and Silva alleged that Landolphi:

- 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 oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex;
- 4) simulated masturbation;
- 5) characterized the loose pants worn by one minor as "erection wear";
- 6) referred to being in "deep sh—" after anal sex;
- 7) 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;
- 8) encouraged a male minor to display his "orgasm face" with her for the camera;
- 9) informed a male minor that he was not having enough orgasms;
- 10) closely inspected a minor and told him he had a "nice butt"; and
- 11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.<sup>60</sup>

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1,000 as opposed to the national average of 100 per 1,000. FAM. POL'Y, *supra* note 2, at 5 (citing Dinah Richard, *Has Sex Education Failed Our Teenagers? A Research Report*, FOCUS ON THE FAM., (Pomona, Cal.), 1990, at 26.). Also, a sex education program in South Carolina promoting premarital abstinence has shown a large decrease in pregnancy rates. In this study, there was no evidence that "family planning" information or activities played a role in the observed decrease in pregnancy rates. FAM. POL'Y, *supra* note 2, at 5 (citing S. DuBose Ravenel, *Letter to the Editor*, PEDIATRICS (1989).). Even a study published in *Family Planning Perspectives*, the Planned Parenthood journal, showed that participants in abstinence programs are five times less likely to engage in premarital sex than those not receiving abstinence counseling. FAM. POL'Y, *supra* note 2, at 5 (citing M. Howard and J.B. McCabe, *Helping Teenagers Postpone Sexual Involvement*, 22 FAM. PLAN. PERSP. at 21-26 (1990)).

58. *Hot, Sexy and Safer*, 68 F.3d at 529.

59. *Id.*

60. *Id.*

One problem parents could encounter in situations like the one that led to *Hot, Sexy and Safer* is receiving a consent form that fails to describe the content of sex education programs in a way that would allow them to make an informed parental decision.<sup>61</sup> For example, the Chelmsford School Committee adopted a policy requiring “[p]ositive subscription, with written parental permission” before allowing “instruction in human sexuality.”<sup>62</sup> To many parents, “instruction in human sexuality” is hardly synonymous with “approv[ing] oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex.”<sup>63</sup> Furthermore, very few, if any, parents would consider “simulated masturbation” and the use of “profane, lewd, and lascivious language to describe body parts and excretory functions” as an appropriate part of instruction in human sexuality.<sup>64</sup> Without a more detailed explanation of the instruction’s content, parents could easily be misled. Schools, therefore, have a duty to assist, rather than hinder, parents in carrying out their primary role in their children’s upbringing by sufficiently informing parents of *how* their children will be taught sex education.

Beyond the issue of informed parental consent, much of the Chelmsford program’s content, at least as alleged in the complaint, is highly inappropriate, *even if* some parents had knowingly consented to it. Any school system with such a program, or with any condom-distribution program, must reconsider the message it is sending to impressionable adolescents — namely, that sexual activity before marriage, even if promiscuous, is permissible and can be made safe.<sup>65</sup> Indeed, it is not unlikely that

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61. The parents of Mesiti and Silva alleged that they did not receive *any* advance notice of the program’s content or an opportunity to have their children excused from attending the assembly, despite the school policy of requiring their permission before their children received “instruction in human sexuality.” *Id.* at 530.

62. *Id.* The School Committee’s policy may or may not have required a description of the specific content of “instruction in human sexuality”; the *Hot, Sexy and Safer* opinion is unclear on this matter.

63. *Id.* at 529 (allegations made in complaint).

64. *Id.*

65. See *Curtis*, 652 N.E.2d at 588. Making condom use sound like a safe way to avoid disease might have disastrous consequences. Studies have suggested the negative consequences of programs promoting contraception. For instance, researchers Stan Weed and Joseph Olsen investigated claims made by Planned Parenthood and the Alan Guttmacher Institute that pregnancy rates increase when not enough teens use contraception and that teen birth rates have decreased slightly where “services” are provided. Weed and Olsen found that greater involvement by adolescents in “family planning” programs was associated with significantly higher teen pregnancy rates and that lower birth rates were due instead to substantially increased abortion rates.

some young people interpret the content of sex education programs advocating condom use as endorsing premarital sexual activity and as assuring that the unwanted consequences of such activity can be avoided. Also, it is not unreasonable for students in that environment to draw such inferences, at least where there is insufficient parental involvement. In fact, by permitting students to obtain condoms, one could argue that states funding condom-distribution programs have taken the position that neither premarital sexual activity nor the use of contraceptives is immoral.<sup>66</sup> The primary role of parents in raising their children, articulated in *Yoder*,<sup>67</sup> includes taking primary responsibility for the formation of their children's consciences on moral issues like sexual activity before marriage and the use of contraceptives.<sup>68</sup> Therefore, although, according to *Curtis*, "[p]arents have no right to tailor public school programs to meet their individual religions or moral preferences,"<sup>69</sup> neither can states displace parents by assuming the primary role in raising their children with regard to sex education.<sup>70</sup>

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FAM. POL'Y, *supra* note 2, at 3 (citing Stan E. Weed and Joseph A. Olsen, *Effects of Family Planning Programs for Teenagers on Adolescent Birth and Pregnancy Rates*, 20 FAM. PERSP. 190 (1985).); *see also* FAM. POL'Y, *supra* note 2, at 2: "A reduction in birth rates does not necessarily mean a drop in pregnancy rates. It could, in fact, be due to an increase in the number of abortions." In fact, from 1971 to 1981, the federal government spent nearly two-billion dollars on family planning programs to reduce unwanted pregnancies. However, during that period, teen pregnancy rates increased 48.3 percent, and teen abortions increased 133 percent. *Id.* at 3 (citing Dinah Richard, *Has Sex Education Failed Our Teenagers? A Research Report*, FOCUS ON THE FAM. (Pomona, Cal.), 1990, at 18, 22.).

66. *See supra* note 54 and accompanying text.

67. *See Yoder*, 406 U.S. at 232-33.

68. The Catholic Church, for example, teaches: "Parents have the first responsibility for the education of their children in the faith, prayer, and all the virtues. They have the duty to provide as far as possible for the physical and spiritual needs of their children." CATECHISM OF THE CATHOLIC CHURCH ¶ 2252 (English Ed. 1994). *See also id.* ¶¶ 2223, 2225, 2226, 2228 & 2229. According to Church teaching, premarital sexual activity and contraception are morally illicit. *See, e.g., id.* ¶¶ 2370 & 2391. Also, *see generally* POPE PAUL VI, HUMANAE VITAE (1968). Therefore, as those first responsible for the education of their children in the Catholic faith and in virtues, Catholic parents have the duty to explain this teaching to their children to ensure that their children will be in an educational environment consistent with this teaching. *See, e.g.,* CATECHISM ¶ 2229.

69. *Curtis*, 652 N.E.2d at 589.

70. *See supra* note 22 (first paragraph).

## VI. CONCLUSION

That parents have a fundamental liberty interest under the Fourteenth Amendment to be free from unnecessary governmental intrusion in raising their children is beyond dispute. In the same vein, it is also beyond dispute that parents have the primary role in the upbringing of their children. After agreeing upon these basic premises, the *Alfonso* and *Curtis* courts reached opposite conclusions about whether condom-distribution programs at public schools required some form of parental involvement. The *Curtis* court held that parental involvement was not required, relying upon its dubious analysis under the coercion standard. In applying this standard, the court failed to adequately consider that *parents* were being forced to surrender their right to regulate their children's sexual activity without State interference, instead emphasizing that the students were not forced to participate. The *Alfonso* court avoided that error because it realized that *parental* rights, not children's rights, were at issue.

If, as comparison of the two courts' analyses suggests, *Alfonso* is correct in ruling that the due process clause requires a school implementing a sex education program including condom distribution to give parents prior notification of this program, the notification must describe the program in such a way as to enable parents to make an informed decision. Insisting upon parental notification and an adequate description of the program's content is necessary if parents really are, as the Supreme Court has said, essential to the upbringing of the young rather than hostile to it. Slipping children condoms behind their parents' backs is not the answer, nor is a vague, generally worded "consent" form. Parents are not the problem; they are an essential part of the *solution*.

For their part, if parents really are a key to the solution, they must act like it. Parents must embrace their primary role in educating their children, become acutely aware of what schools are teaching, and provide suggestions regarding the content of schools' sex education programs. Regardless of whether state laws promote the family values upon which the United States was founded, parents themselves have tremendous power to reduce HIV/AIDS and unwanted teen pregnancy and to build moral virtue. Parents, like the ones in the *Alfonso*, *Curtis*, and *Hot, Sexy and Safer* cases, must accept the challenge and reclaim their power. Only then can John, Susan, parents, and schools move forward.