NOTES

PUBLIC SCHOOL SEX EDUCATION: DOES IT VIOLATE PARENTAL RIGHTS?

I

INTRODUCTION

Since the beginning of this century, public schools have been teaching children about sexuality. By the 1940's, some form of sex education was prevalent in most American public schools.[1] Only during the last fourteen years, however, have parents waged a constitutional battle against public school sex education courses.[2]

Perhaps the impetus to the parents' legal struggle was the gradual metamorphosis in sex education curricula. Through the 1940's, sex education affirmed the traditional values of most parents. Courses concentrated on sex within the traditional family unit and moralistically mapped out proper and improper sexual behavior.[3]

By the early 1970's, sex education had been transformed into its present nonjudgmental and individualistic form.[4] Rather than focusing solely on sex within the marital unit, sex educators were providing information on a wide range of sexual alternatives. Students were encouraged to make their own moral decisions based on the information provided in the classroom. Traditional parents might have been antagonized by the diversity and free moral choice emphasized in modern sex education curricula.[5]

In the 1970's, parents, sensing that the courses had drifted from their traditional moorings, took to the courts to challenge them. Most of the parents' complaints alleged that sex education violated their rights of parenthood and the free exercise of their religion. They demanded that the curricula be abolished.[6] Although these challenges have consistently been rejected, only the free exercise claims have received a full and searching

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1. Penland, Sex Education in 1900, 1940 and 1980: A Historical Sketch, 5 J. Sch. Health 305 (1981).

2. The first recorded challenge was Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), aff'd, 428 F.2d 471 (4th Cir.), cert. denied, 400 U.S. 942 (1970).

3. See Penland, supra note 1, at 307.

4. Id.

5. See J. Hottois & N. Milner, The Sex Education Controversy 3-5 (1975).

6. See, e.g., Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), aff'd, 428 F.2d 471 (4th Cir.), cert. denied, 400 U.S. 942 (1970); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 12, 124 Cal. Rptr. 68 (1977); Medeiros v. Kiyosaki, 52 Hawaii 436, 478 P.2d 314 (1970).

review by the courts.[7] In fact, one recently reported suit alleged only violation of religious rights,[8] perhaps in response to this cursory treatment of parental rights. Yet the parental right is of constitutional dimension.

The Constitution protects a parent's right to raise her children. In 1923, the United States Supreme Court recognized that parents have a constitutional right to "establish a home and bring up children."[9] Although the constitutional source of this right is unclear, the modern Court has consistently reaffirmed the cardinal constitutional right of parenting. Courts have grounded the rights of parenthood in the fourteenth amendment's guarantee of due process,[10] the penumbras of the Bill of Rights,[11] or more generally, in the right of privacy derived from these sources.[12]

Whatever its source, this right allows parents to direct the "education of children under their control."[13] Parental rights thus prevent the state from prohibiting the teaching of German,[14] requiring public, rather than private, school attendance,[15] and prosecuting parents who teach a Sunday-school sex education course.[16] The parental right is not absolute, however. The state has a substantial interest in the welfare of children.[17] Consequently, parents' rights have given way to state interests in using audio-visual equipment[18] and corporal punishment[19] in schools. On some occasions, parental rights must also be curtailed in the face of countervailing interests of the child.[20] Thus, parent, state, and child share sometimes competing interests in the child's welfare.

This Note will attempt a more thorough and sensitive analysis of a claim that sex education violates parental rights. Until recently, all parents' suits sought to eliminate the curricula entirely.[21] Recently, some parental

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7. See cases cited in note 6 supra.

8. Smith v. Ricci, 89 N.J. 514, 446 A.2d 501, appeal dismissed sub. nom. Smith v. Brandt, 103 S. Ct. 286 (1982).

9. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (statute prohibiting schools from teaching German violates parental rights); see also Pierce v. Society of Sisters, 268 U.S. 510 (1925) (statute requiring children's attendance at public schools violates parental rights).

10. *Meyer,* 262 U.S. at 399.

11. Roe v. Wade, 410 U.S. 113, 211 (1973) (Douglas, J., concurring).

12. See, e.g., Runyon v. McCrary, 427 U.S. 160, 177-78 (1976).

13. *Pierce,* 268 U.S. at 534.

14. *Meyer,* 262 U.S. at 396-97.

15. *Pierce,* 268 U.S. at 534-35.

16. Unitarian Church West v. McConnell, 337 F. Supp. 1252 (E.D. Wis. 1972), aff'd, 474 F.2d 1351 (7th Cir.), vacated on other grounds and remanded, 416 U.S. 932 (1973).

17. E.g., Bellotti v. Baird, 443 U.S. 622, 633-37 (1978); Prince v. Massachusetts, 321 U.S. 158, 166-69 (1943) (neither parental nor free exercise rights are burdened when the state forbids adults from supplying children with literature for distribution on the street).

18. Davis v. Page, 385 F. Supp. 395, 400, 405 (D.N.H. 1974).

19. Baker v. Owen, 395 F. Supp. 294, 299-301 (M.D.N.C. 1975), aff'd, 423 U.S. 907 (1976).

20. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

21. See cases cited in note 6 supra.

challenges to other public school curricula have sought only to have their children excused from specific classes.[22] Making these classes optional might be more appealing to some parents, educators, and courts than curricula abolition. Consequently, this Note will assess attempts by parents not only to abolish sex education curricula, but, alternatively, to have their children excused from such courses.

This analysis must begin with a critical evaluation of the parental right involved. The parental right, as developed by the courts, will be shown to be a collection of prerogatives and interests traditionally given constitutional status by the courts. The cases concerning these prerogatives and the extent to which each is implicated in the sex education issue, will be examined and discussed.

The analysis next turns to a delineation of the interests and rights against which those of the parents must be balanced: the interests of the state and the rights of the child. The state interests enumerated must always be weighed against the parental right. As will be seen, however, it is not always clear that a child's interests are not synonymous with its parents'. This Note will construct a threshold test to determine whether children's rights should be thrown into the calculus and will show that in the area of sex education children's rights do indeed pass this threshold.[23]

The next step is to weigh the parents' rights against these interests. The preferred standard of review is a flexible and sensitive balancing test.[24] The weight of state interests required to justify sex education increases as the weight of parental rights increases. The weight of these parental rights in turn increases as the state intrudes deeper into the crucial activities of parenthood.

Finally, this Note will examine the judicial decisions which have denied parents' challenges to sex education. This will demonstrate the inadequacy of the current treatment of the parental rights issue and suggest an alternative analysis. The suggested approach, a sensitive balancing of the interests of parent, child, and state, reveals that a parental challenge to the sex education curriculum itself must fail. However, when proper attention is paid to these constitutional parental interests, the parents' right to remove their children from sex education classes must be upheld.

II

PARENTAL INTERESTS BURDENED BY SEX EDUCATION

The first question is whether placing a child in sex education classes burdens the parent's right to raise her child. To make this determination, we

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22. See Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979).
23. See section IV infra.
24. See section V infra.

must both identify those parental interests protected by the Constitution, and determine whether compulsory sex education burdens any of them.[25]

Indeed, the failure to identify which parental interests are burdened will result in the dismissal of a suit seeking their protection. In *Davis v. Page,*[26] parents sought to have their children excused from both health and music classes. Parents alleged violation of both their religious and parental rights. The parents, however, could not identify just how the classes interfered with their parental rights. A pastor, for instance, could voice no more than distaste for some of the subject matter.[27] This was not enough to move the federal district court to hold that parental rights were burdened; the challenge was dismissed.[28] The plaintiffs must therefore be able to identify and articulate the parental interests burdened by compulsory sex education.

A. Parental Control Over Religious and Moral Values

The Constitution protects certain parental prerogatives over the raising of one's child.[29] First, parents have the prerogative to teach their children values—the principles that guide their life choices. The early Supreme Court decisions, taken together, protect this prerogative. In *Pierce v. Society of Sisters,*[30] parents successfully attacked a state statute prohibiting them from sending their children to private schools. The statute was held unconstitutional because it unreasonably interfered with the "liberty of parents and guardians to direct the upbringing and education of children under their control."[31] This parental control of the "upbringing and education" of children would seem to include the right to teach values.

Even when giving primacy to state interests, the Court has recognized this parental right to inculcate values. In *Prince v. Massachusetts,*[32] a guardian unsuccessfully attacked the constitutionality of a statute which prohibited her from supplying her child with religious pamphlets to distribute to the public.[33] The statute was held to interfere with the guardian's right to teach her child values—"the way he should go."[34] The Supreme Court thus recognizes the parent's interest in the child's training.

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25. See Note, The Constitution and the Family, 93 Harv. L. Rev. 1156, 1180-83 (1980).
26. 385 F. Supp. 395 (D.N.H. 1974).
27. Id. at 404.
28. Id.
29. Of course, these must still be balanced against state interests. But here we are only determining whether or not parental rights are burdened; that is, whether there is in fact anything to balance against state interests.
30. 268 U.S. 510 (1925).
31. Id. at 534-35.
32. 321 U.S. 158 (1944).
33. Id. at 160-63.
34. Id. at 164-65. The Court found, however, that these interests were outweighed by those of the state. Id. at 166-71.

More recently, lower federal courts have recognized that public school education often interferes with the parent's control over her child's values. In *Davis v. Page*,[35] for instance, Apostolic Lutherans unsuccessfully sought to have their children excused from class during audio-visual presentations. By compelling attendance, the school interfered with the parents' right to protect their children from a device they believed was immoral. Hence, equally powerful religious and parental rights were at stake.[36] Thus, although the parental interests were held to be outweighed by state interests, those parental interests were, at least, acknowledged.

In *Moody v. Cronin*,[37] parents successfully vindicated their right to have children excused from co-educational physical education classes. Co-educational classes, ruled the court, interfered with the efforts of the parents, Pentacostal Christians, to teach their children the value of modesty.[38] Again, both the rights of parenting and religion were burdened.[39]

In fact, as moral values in our society often have a religious base, most of the cases in this area intertwine the parental right of control with the parents' free exercise rights. However, there is authority for the proposition that parents retain control over their children's secular, as well as religious, values.[40] In what might be considered *dicta*, the Supreme Court's opinion in *Wisconsin v. Yoder*[41] recognized a secular parental right to teach values. In holding unconstitutional a statute compelling high school attendance at approved schools, the Court recognized a "cardinal constitutional right" of parenthood, independent of religious rights, which includes control over the child's values.[42] Amish parents adhere to the virtues of community welfare, separatism and spiritual rather than worldly satisfaction. By compelling high school attendance, and thus exposing impressionable youngsters to the contrary values of individualism, competition, and worldly success, the state interfered with the parent's right to control her child's value development.[43]

Admittedly, the primacy of the parents' free exercise rights may have rendered the parental control rights unnecessary to the holding. This would make the secular parental rights recognition mere *dicta*. Whether or not this

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35. 385 F. Supp. at 400-01. Again the parents' claim was rejected not because parental rights were not violated, but because state interests were paramount.

36. Id. at 399.

37. 484 F. Supp. 270 (C.D. Ill. 1979).

38. Id. at 276.

39. Id. Note that the court was considering two independent rights: the parental right to direct the child's religious and educational upbringing, and the parents' own free exercise rights.

40. See Note, supra note 25, at 1351-52. Even were this not the case, these cases are still relevant to establishing a parental right of control in the sex education context, as many of the challenges to these curricula are based on religious grounds. See, e.g., *Unitarian Church West*, 337 F. Supp. at 1253-56.

41. 406 U.S. 205 (1972).

42. Id. at 234.

43. Id. at 210-11, 235.

recognition was necessary to the holding, however, the fact remains that the Court clearly declared that the teaching of "moral standards," is an "enduring American tradition" that is constitutionally protected.[44]

Public school education inherently burdens the parent's prerogative over her child's values. In the area of sex education specifically, parents may wish to provide values to guide their children's choices between sexual involvement and restraint, openness and modesty, traditional and alternative activities. These choices influence how the child functions as an individual, a mate, and a member of society.

While advocates of sex education may contend that such classes are value-free, even those courses designed only to provide information necessarily transmit values.[45] This disturbs many parents. Simple openness about sexuality conflicts with traditional values of privacy, intimacy, and modesty which many parents espouse. In addition, nonjudgmental discussions imply that sexuality is a matter of personal free choice, unfettered by the moral taboos in which many parents still believe.[46] Finally, the courses advocate a pragmatic morality in which sexuality dilemmas are resolved by a rational consideration of the consequences.[47] This form of situation ethics is adverse to the traditional emphasis on absolute moral and religious ethics.[48] Thus, by transmitting contrary values, schools interfere with the parental prerogative over the child's moral development.

At least one federal court has recognized that sex education involves the parent's prerogative over her child's values. In *Unitarian Church West v. McConnell,*[49] parents were teaching sex education in Sunday schools, using explicit, but not obscene, materials.[50] The local district attorney threatened prosecution under the state's anti-obscenity laws. The court recognized and respected the parents' wish to educate their children in "the facts of life within a proper ethical, moral, and religious context," and it enjoined the state's prosecution.[51] By attempting to prohibit the course, the state had tried to frustrate the parents' efforts to shape their children's values, a course the court would not permit.[52]

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44. Id. at 232-33; see also Burt, The Constitution of the Family, 1979 Sup. Ct. Rev. 329, 332-41 (insisting that the "conservative justices" are preserving parental authority in a society where authority is otherwise crumbling). On the issue of parents' secular right of control, see also *Pierce*, 268 U.S. at 534-35.

45. See J. Hottois & N. Milner, supra note 5, at 3-5.

46. For example, parents may view homosexuality as objectionable. (Note that this is not necessarily the position of the author.) Many courses, in contrast, might imply that the individual is free to choose according to his individual psyche and preference.

47. J. Hottois & N. Milner, supra note 5, at 3.

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

49. 337 F. Supp. 1252 (E.D. Wis. 1972), aff'd, 474 F.2d 1351 (7th Cir.), vacated on other grounds and remanded, 416 U.S. 932 (1973).

50. Id. at 1253-56.

51. Id. at 1258.

52. See id. Again, both the rights of parenting and religion were involved.

B. Parental Control Over Behavior

A second protected parental activity is control over behavior. Whereas the values prerogative concerns the inculcation of beliefs, control over behavior allows parents to direct their children's actual physical activities. For instance, the early cases protected parental control over the languages learned,[53] schools attended,[54] and publications read by the child.[55] In some cases, the threat to parental control over the child's values rests side-by-side with a threat to parental control over behavior. In *Wisconsin v. Yoder,* the Amish parents were concerned that their children would be compelled or induced to engage in objectionable high school activities.[56] The more recent lower court cases recognize that parents who send their children to public schools do not automatically relinquish control over their behavior: parents still have an interest in whether their child dresses immodestly[57] or watches and listens to audio-visual demonstrations.[58]

The extent of parental control is effectively illustrated in another context: the commitment of children to mental institutions. In *Parham v. J.R.,*[59] the Supreme Court upheld a statute allowing parents to commit their children to mental hospitals without an adversarial hearing.[60] The child did have substantial interests in physical liberty and in not being falsely labelled unfit.[61] These rights, however, were directly limited by parental right of control.[62] Thus limited, the child's rights did not merit a full adversarial hearing prior to commitment.[63] The situation in *Parham v. J.R.* does, however, differ from the sex education cases. In *Parham,* the state and parent are allied against the child; in sex education cases, the parent opposes the state and, perhaps, the child. Despite this distinction, *Parham* serves to illustrate the extent of the parent's control over her child's behavior.

Control over behavior is demonstrated in yet another context: the challenges to statutes which restrict the minor's ability to have an abortion or to use contraceptives. Children, like adults, have a right of privacy which protects their procreative choices.[64] The child's privacy right is limited,

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53. *Meyer,* 262 U.S. at 390.
54. Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).
55. Ginsberg v. New York, 390 U.S. 629, 638 (1968).
56. 406 U.S. at 210-11.
57. *Moody,* 484 F. Supp. at 276.
58. See *Davis,* 385 F. Supp. at 399-400. Nevertheless, in this instance the state's interest and the child's interest in an education outweighed the parental right. Id. at 400.
59. 442 U.S. 584 (1979).
60. Id. at 601-04.
61. Id. at 601.
62. See id. at 603-04. These rights were further limited by the medical nature of the commitment decision.
63. Id. at 606-13. Parental control over behavior does not always override the child's fundamental liberty interest. See *Danforth,* 428 U.S. at 74 (state may not reinforce parental authority by requiring parental consent to all minors' abortions).
64. See, e.g., *Danforth,* 428 U.S. at 52, 74.

however, not only by the state's *parens patriae* function, but by the parents' right to control their child's behavior.[65] The state may reinforce this control by requiring that doctors notify parents before performing abortions on certain minors.[66] Thus, statutes may place greater restrictions on the child's procreative choices than on the adult's rights.[67] As in *Parham*, the parents' interest in controlling their children's activities may be sufficient to overcome even interests of constitutional dimension.

Mandatory sex education courses impede the parents' control over behavior, as they require that children learn about sex in school against the wishes of their parents. Despite parental objections, these courses may require children to openly discuss, listen to, and view objectionable subject matter. The school's impact on behavior in such an instance parallels the situations in *Moody*[68] and *Davis*,[69] in that the child is exposed to an environment containing what the parent considers to be objectionable material. In addition, it has been claimed that openness about sex, combined with peer pressure and the adolescent desire to explore might also influence teenagers to engage in sexual activities against their parents' wishes. But the scanty evidence available seems to refute this indirect causation theory. Moreover, parents can still exert control over their children's behavior outside of school, for example by imposing a curfew.

C. Parental Control Over Lifestyle

The Constitution also protects the prerogative over family individuality; the parents right to choose a unique family lifestyle. When the state attempts to bypass this choice by standardizing the child, it invades the parental prerogative over family individuality.[70] Family individuality safeguards the American tradition of pluralism.[71] By limiting the state's interference in the parental prerogative over family decisions, the Constitution

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65. See, e.g., *Bellotti*, 443 U.S. at 637-39.

66. H.L. v. Matheson, 450 U.S. 398, 409-10 (1981) (state may require notification to parents of their child's request for an abortion).

67. See id.; see also *Bellotti*, 443 U.S. at 637-39.

68. See 484 F. Supp. at 276.

69. See 385 F. Supp. at 399-401.

70. See, e.g., *Meyer*, 262 U.S. at 401-03 (the state's attempt to standardize children by prohibiting the foreign language instruction is an illegitimate state end); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the state is prohibited from standardizing children by compelling public school education).

71. See cases cited in note 70 supra; see also *Yoder*, 406 U.S. at 218-20, 233 (striking down compulsory high school education because statute would bypass Amish parents' choices to raise their children in the Amish traditions); *Bellotti*, 443 U.S. at 638 ("affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the state *not* to attempt in a society constitutionally commited to the ideal of individual liberty and freedom of choice"); cf. *Davis*, 385 F. Supp. at 397-400 (Apostolic Lutheran parents); *Unitarian Church West*, 337 F. Supp. at 1257-59 (Unitarian parents).

restrains the state's attempt to create a monistic, rather than pluralistic society.[72]

The Constitution offers special protection to the parental prerogative over family individuality to families who live apart from the American mainstream. For example, the Supreme Court in *Yoder* was especially careful to protect the choices of Amish parents to raise their children in a community isolated from the American cultural mainstream.[73]

Families who do not, like the Amish, seek to totally isolate their children from the American mainstream, and who thus do not remove their children from public school altogether may be hard pressed to justify a heightened protection of family individuality in the sex education classroom. Nevertheless, parents might argue that sex education uniquely invades their prerogative over family lifestyle by attempting to standardize instruction in value choices critical to the child's moral and physical development. Just as prohibiting German instruction impermissibly bypasses the family's choice to maintain individuality,[74] enforcing sex education might undermine American pluralism by countering a parent's attempt to instruct her child.

D. Presumption That Parents Act in Their Children's Best Interests

Another interest protected by parental rights is not so much a prerogative but a sociological premise. The courts have persistently presumed that parents are best equipped to raise their children.[75] They have, further, given this sociological conclusion the force of law on the assumption that parents possess greater bonds of affection for, and sensitivity to the needs of, their children.[76]

This judicial-sociological conclusion is effectively illustrated in the context of procedural due process. In *Parham v. J.R.*, the Supreme Court held that a child has no right to an adversarial hearing prior to being committed to a mental hospital by his parents.[77] The Court presumed that parents act in their children's best interests,[78] thus making the adversarial hearing unnecessary for the protection of those interests.[79]

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72. See authorities cited in notes 70-71 supra.

73. See *Yoder*, 406 U.S. at 209-13, 218-20. Chief Justice Burger seems to marvel at the continued success of the separatist community and to be concerned with its survival.

74. *Meyer*, 262 U.S. at 401-02.

75. See *Bellotti*, 443 U.S. at 637-38; *Parham*, 442 U.S. at 602; *Yoder*, 406 U.S. at 232-33; Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977); *Ginsberg*, 390 U.S. at 639; *Prince*, 321 U.S. at 165-66; see also Note, supra note 25, at 1214.

76. See cases and authorities cited in note 75 supra.

77. 442 U.S. at 617-20.

78. Id. at 602.

79. See id.

In procedural due process cases, presumptions must be rebuttable. Accordingly, in *Parham* the presumption that parents act in their child's best interest could be rebutted by a showing of neglect.[80] In substantive due process decisions the courts appear to be similarly willing to abandon the sociological premise that parents invariably act in their child's best interests. For example, the court may override a parent's refusal to consent to an immature minor's request for an abortion if it determines that the surgery is in the child's best interest;[81] thus, when the parents have actually failed to protect the child's interests, the state may act on the child's behalf.[82]

In the area of education, especially, the state serves as the primary protector of the child's best interests. Consequently, it may command that a child receive institutional rather than home education.[83] Likewise, schools may continue to employ audiovisual equipment as an aid to education, an aid parents can not match.[84] Only where parents have been unusually successful in raising well-adjusted, law-abiding children has the Court allowed those parents to take over primary responsibility for their children's education.[85] If the Amish parents in *Yoder* had been less successful in their child-rearing, the Court may have mandated compulsory education.

In the area of sex education, many parents may not be acting in their children's best interests; thus, the parental presumption in this area may have been rebutted. Indeed, many parents are incapable of helping their children cope with sexuality. Some are too embarrassed to discuss sex with their children.[86] As the American Medical Association discovered, many parents themselves are "abysmally ignorant of the basic facts."[87] In an era of changing sex roles and preferences, sexuality has become much too complex for many parents to understand, let alone explain.[88] Perhaps as a result teenage pregnancies and instances of venereal disease have soared dramatically.[89] Of course, the sociological data is open to conflicting interpretations. Nonetheless, this evidence that parents may not be acting in the child's best interests in sex instruction might influence a court to abandon its judicial-sociological support of the parental prerogative.

In sum, parental rights are burdened by compulsory sex education. In varying degrees, public school sex education interferes with the parental

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80. Id.
81. *Bellotti* 443 U.S. at 644; see also *Prince,* 321 U.S. at 166.
82. This is in keeping with the notion that the contemporary validity of values protected by substantive due process must be continually evaluated. Note, supra note 25, at 1179-80.
83. See *Yoder,* 406 U.S. at 213.
84. *Davis,* 385 F. Supp. at 400-01.
85. *Yoder,* 406 U.S. at 222.
86. American Medical Association, Human Sexuality 151 (1972).
87. Id.
88. H. Kilander, Sex Education in the Schools 14-15 (1970).
89. See notes 93-96, 100-02 and accompanying text infra.

prerogatives over the child's values, behavior, and family individuality. Sex education further threatens the presumption of parental authority, although evidence that parents are not acting in their children's best interests in obtaining sex education may weaken this last protection of parental rights.

III

STATE INTERESTS

The state has a special interest in the health and well-being of minors.[90] Because the child is both vulnerable and inexperienced, the state may intervene to safeguard her welfare.[91] Of course, even this special state interest must be weighed against the impact on parental rights.[92]

The major objective of sex education is to promote the health and safety of children, and primarily of adolescents. Teenage sexual activity has spawned alarming health and social problems. A New Jersey court recently highlighted the problem of teenage pregnancies, citing a report of the Family Life Committee of the New Jersey State Board of Education:

> In the U.S. one in five births is to a teenager between 15 and 19; in 1977 one million babies were born to girls between the ages of 10 and 18; in New Jersey in 1977, twelve thousand babies were born to girls between 15 and 19; 60% of these girls were unmarried. . . .[93]

The report also showed that children born to teenage mothers are more apt to be premature, underweight, and slow to develop. Because teenage mothers often have few means of support, their children are often born into poverty. The mothers suffer as well; eighty percent drop out of school and never return, and if they do return, they are often embarrassed and ostracized.[94] A further health problem exacerbated by the increase in teenage sexual activity is the rapid rise of veneral disease among youth.[95]

In short, teenage sexuality has resulted in severe health and social crises. Educators believe that these crises are the result of ignorance about sex. By providing information the state hopes to enable teenagers to make

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90. *Ginsberg,* 390 U.S. at 640-43; *Prince,* 321 U.S. at 165,168; accord, Keitzer, Privacy, Children and Their Parents, 66 Minn. L. Rev. 459, 499-501 (1982).

91. *Bellotti,* 443 U.S. at 634; see Note, supra note 25, at 1199-1201 (state has strong *parens patriae* power over the welfare of less capable members of society—especially true for children who lack maturity).

92. See, e.g., *Pierce,* 268 U.S. at 534-35; accord Note, supra note 25, at 1201.

93. Smith v. Ricci, 89 N.J. 514, 517, 446 A.2d 501, 503 (1982) (citing August 1979 Report of the Family Life Committee of the New Jersey State Board of Education), appeal dismissed sub nom. Smith v. Brandt, 103 S. Ct. 286 (1982).

94. Id. Some educators believe that the rise in teenage pregnancies alone justifies sex education. See, e.g., Teenage Pregnancy: The Best Argument for Sex Education, 19 Curriculum Rev. 130, 130-31 (1980).

95. *Smith* 89 N.J. at 517, 46 A.2d at 504.

educated decisions and, should they choose to become sexually active, to deal with the health consequences.[96]

The role of educators is especially important when parents themselves have failed. In *Yoder*, parents were already fulfilling the state's functions; the Amish children were being provided, at home, with an education resulting in stable, productive adults, making state interference unnecessary.[97] On the other hand, the *Davis* parents were incapable of providing their children with the audio-visual instruction provided by public schools, instruction the court had deemed necessary to these children's education.[98] The state thus had a stronger mandate to interfere with the *Davis* parents' prerogatives, as these parents were deemed to be inadequate substitutes for the state.[99]

The rise in teenage pregnancy and venereal disease indicates that parents may be incapable of countering the effects of teenage sexual activity.[100] Perhaps as a result of this lack of parental aid, students themselves are seeking information.[101] A 1977 Gallup Poll found that ninety-five percent of teenagers polled favored sex education courses. Sex education teachers have found a thirst for information among their students, especially in the areas of pregnancy and venereal disease.[102] The state has an interest in providing this information.

Further, the teaching of values important to the survival of the Republic is a well-recognized function of public education.[103] While school authorities may not attempt rigid indoctrination, they are charged with teaching values.[104]

Sex educators are primarily transmitting information in order to remedy sexual ignorance. Nonetheless, the transmission of values is a secondary, albeit inevitable, side effect of sex education. Yet the paramount value taught in sex education classrooms is freedom of choice, the very antithesis of indoctrination.[105] Sex education courses allow latitude for a wide range of choices; within the consequence-based decision, children can still consider the consequences of violating or conforming to their parents' beliefs and lifestyle. Indeed, some educators believe that "information furnished by

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96. H. Kilander, supra note 88, at 16-17, 21-34.

97. 406 U.S. at 234.

98. 385 F. Supp. at 400-01.

99. See id.; cf. Note, supra note 25, at 1201-02 (the state's interest in the child increases as the parents' ability to care for the child decreases).

100. See notes 93-95 and accompanying text supra.

101. See Brick, Sex Education Belongs in the School, 38 Educ. Leadership 390 (1981); Student Perceptions of the Need for Family Life and Sex Education, 101 Educ. 279 (1981).

102. Brick, supra note 101, at 390.

103. See, e.g., *Yoder*, 406 U.S. at 221-29; Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1305 (7th Cir. 1980).

104. *Zykan*, 631 F.2d at 1306.

105. See note 5 and accompanying text supra.

school sex educators will liberate the parents from the discomfort of furnishing this information and allow the parents to do what they do best, the inculcation of specific moral values."[106]

In addition to the strong concern for health and safety and the need to foster societal values of freedom of choice, is the state's mandate to provide education. Public education, the cornerstone of American democracy,[107] is "perhaps the most important function of state and local governments."[108] While the schools may not trammel parental rights in fulfilling this state function,[109] they nevertheless must be allowed significant freedom to perform this crucial task.[110]

Not all the interests of the state, however, militate in favor of mandating sex education classes in the face of parental objection. The state has an interest in maintaining the model of the nuclear family. According to this model, parents are the dominant family members, and exercise authority over their children.[111] In *Yoder*, for instance, Justice Burger, writing for the majority, was impressed by the strength of parental authority within the traditional Amish family.[112] By exercising this authority, the Amish raise disciplined new adults.[113] The state, claimed Burger, should not upset Amish family institutions by leading children astray from their parents' authority.[114] Likewise, in *Parham v. J.R.*,[115] the Court worked to preserve the family model. It felt that adversarial hearings would subvert the model by pitting, on equal footing, parent against child[116] and subverting parental dominance.[117] Even the dissenters in *Parham* safeguarded the family model. By requiring only post-admission hearings, the dissenters hoped to avoid

106. J. Hottois & N. Milner, supra note 5, at 7.

107. See, e.g., Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

108. Id., see also *Yoder*, 406 U.S. at 213 ("Providing public schools ranks at the very apex of the function of a State.").

109. See, e.g., *Yoder*, 406 U.S. at 213-14; *Pierce*, 268 U.S. at 534; *Moody*, 484 F. Supp. at 276. Consequently, courts are cautious about interfering with educational policy decisions. See, e.g., President's Council v. Community School Bd., 457 F.2d 289, 292 (2d Cir. 1972).

110. See cases cited in note 109 supra.

111. E.g., *Matheson*, 450 U.S. at 409-10; *Ginsberg*, 390 U.S. at 639 ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."). In some cases the state attempts to reinforce, rather than subvert, parental authority. This state objective, while protecting one parental interest, might violate a general family interest in privacy from state intrusion. See Keitzer, supra note 90, at 493. But by implementing sex education, the state is confronting, rather than reinforcing, parental authority. Thus, the state is not torn between the desire to protect parental authority while not invading the family's privacy. Rather, the state is endangering both parental authority *and* privacy.

112. See 406 U.S. at 210-13. Through the whole majority opinion Burger seems impressed with Amish parental authority. See Burt, supra note 44, at 338-40.

113. 406 U.S. at 222.

114. Id.; accord Burt, supra note 44, at 338-40.

115. 442 U.S. 584 (1979).

116. See id. at 610; accord Burt, supra note 44, at 484.

117. *Parham*, 442 U.S. at 603-04.

deterring parents from exercising their rights for fear of direct confrontation with their children.[118]

Nonetheless, the state at times chooses to sacrifice its interest in the nuclear family model in favor of some other interest. Thus, in all those cases in which the state and parent oppose one another for control of the child's activities,[119] the state has determined that some interest it has in the child outweighs its interest in the family structure. A decision that it is necessary to remove a child from her parents' custody, or an order that she receive medical treatment against her parents' wishes, or view audio-visual materials without her parents' consent, necessarily implies a decision to sacrifice whatever benefit society receives from the nuclear family model.

Mandatory sex education in public schools threatens this family model. As in *Yoder,* parental authority may be subverted when the school compels children to take sex education courses, in direct opposition to their parents' dictates. Nonetheless, the state interests furthered by sex education are deemed, by the state, to outweigh the damage to its interest in the nuclear family model. The state is providing sex education in response to a severe health crisis. This interest is heightened by the apparent inability of many parents to remedy the health crisis. These concerns have reached sufficient proportions to outweigh, from the state's view, the competing state interest in maintaining the model of absolute parental authority in such matters.

IV

THE CHILD'S INTERESTS

The early parents' rights cases did not balance the child's rights against those of her parents.[120] The Court either failed to recognize that children may assert rights against their parents, or reflexively aligned the child and parent against the state.[121] The modern Court seems increasingly willing, though still hesitant, to consider the child's separate interests when she is mature enough to understand and assert them.[122]

In *Yoder*, the majority did not consider the child's independent interests because the Amish children manifested no objection to remaining home after the eighth grade.[123] But Justice Burger cautioned that the holding did not cover situations in which children do object:

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118. Id. at 633 (Brennan, J., dissenting).

119. See, e.g., cases cited in notes 13-19 supra.

120. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

121. See cases cited in note 120 supra.

122. See Note, supra note 25, at 1383. According to the author, mature children may assert their rights against their parents in situations which are "grave" and "nondeferable," such as the decision to abort a child.

123. 406 U.S. at 230-31.

> Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question the traditional concepts of parental control over the religious upbringing and education of their minor children recognized in the Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and presented in *Pierce v. Society of Sisters.*
>
> The State's argument proceeds without reliance on any actual conflict between the wishes of parents and children.[124]

The message is ambiguous. On the one hand, the Burger opinion repeats three times that this case does not involve conflict between parent and child, implying that should children object, their interests might be considered. On the other hand, it states that conflict between parent and child would "call into question traditional concepts of parental control," indicating that parental rights would dominate the child's interests.

Dissenting in part, Justice Douglas took a different approach. He noted that while one of the children testifying agreed with her parents' position, other parents had raised claims involving the religious liberties of their children without providing any evidence of their children's views.[125] Douglas concluded that these views should be considered.[126] The evidence indicated that many Amish high school-aged children were mature enough to form their own opinions on religion and its role in their lives.[127] Because they were mature enough to comment on a statute which directly concerned a crucial element of their lives—education—the Amish children's independent interest should have been weighed.[128]

In *Davis v. Page,* the district court appeared willing to follow Douglas's lead by considering the child's interest in remaining in class during audio-visual demonstrations.[129] But the court considered the children, elementary school students, too immature to understand the implications of their parents' objections.[130] Because the children could not maturely assert their own

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124. Id. at 231-32 (citations omitted).
125. 406 U.S. at 243 (Douglas, J., dissenting in part).
126. Id. at 246.
127. Id. at 241-46.
128. Id.
129. 385 F. Supp. at 395. See also *Moody,* 484 F. Supp. at 276.
130. 385 F. Supp. at 398.

interests, the court did not consider their independent rights.[131] In *Moody v. Cronin,* the court declined to consider the interests of high school students because there was no conflict between parent and child over the propriety of physical education classes.[132]

In cases examining the procreative-choice rights of minors, the Supreme Court has drawn a more distinct line between mature and immature minors. These cases involve a conflict between parental authority, reinforced by the state, and the child's independent right to decide not to become pregnant.[133] The state may reinforce parental authority by requiring parental notice and consent to abortions performed on *immature* minors.[134] Mature minors, however, have a right to choose abortion unfettered by state-enforced parental consent.[135] The Court defines maturity only in terms of the girl's ability to make an informed decision, in consultation with her physician, independently of her parents' wishes.[136] The rest is left to ad hoc determination:

> The nature of both the State's interest in fostering parental authority and the problem of determining "maturity" makes clear why the State generally may resort to objective, though inevitably arbitrary, criteria such as age limits, marital status, or membership in the Armed Forces for lifting some or all of the legal disabilities of minority. Not only is it difficult to define, let alone determine, maturity, but also the fact that a minor may be very much an adult in some respects does not mean that his or her need and opportunity for growth under parental guidance and discipline has ended. As discussed in the text, however, the peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors.[137]

The procreative rights cases, coupled with *Davis v. Page* and *Moody v. Cronin,* indicate that, since *Yoder*, the courts have adopted Justice Douglas's position considering the independent interests of those children mature enough to assert their own rights.

This maturity threshold sensitively protects the often competing policies behind the constitutional protection of the family. To allow the immature child to stand against her parents would subvert the family interests protected by the Constitution. Parents' control over their child's values and

131. Id.
132. 484 F. Supp. at 276.
133. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52 (1976).
134. Bellotti v. Baird, 443 U.S. 622 (1979) (consent).
135. Id. at 642-43.
136. Id. at 643.
137. Id. at 643-44 & n.23. The opinion reserves the decision on such "grave" and "indelible" measures as termination of pregnancy to mature minors. Although the gravity of the decision influenced the Court, it is the maturity of the child which is the threshold between subordination to parental authority and the freedom to decide.

behavior is greatest when the child is in the early stages of development. The family model of parental authority is closer to empirical reality when the child cannot reasonably assert her own interests. In such a situation, pitting the immature child against the parents would topple the family model.[138] Likewise, the sociological premise that parents act in their children's best interests is most valid when the child is young and requires the greatest attention and care. Finally, the immature child cannot articulate her own interests; thus, the state, either judicially or legislatively, must do it for her. Yet this state interference in the family would threaten family individuality by standardizing the perceived interests of children.

In contrast, allowing the mature child to assert her interests poses a much lesser threat to constitutionally protected parental interests. First, parents have been given time, prior to this age of maturity, to control the child's development. Second, the validity of the parental model decreases as the child matures and becomes, by definition, more independent and less susceptible to her parents' authority. Third, the mature child generally needs less nurturing and attention from her parents than the immature child; thus, the consequences for the child of disrupting the parent-child relationship at this stage are less severe. Fourth, the mature child is capable of articulating her own interests. Because the state need not interfere, there is less risk of standardizing children. In sum, by considering the interests of the mature minor, the court can vindicate the rights of the child while simultaneously posing little threat to those of the parent.

Determining whether a child is mature enough to articulate her own interests in receiving sex education is no easy task, and many factors might be considered. The child's age is certainly relevant. Psychological and sociological evidence might also be considered. For instance, widespread teenage sexual activity, in defiance of many parents' desires, indicates that many youth are already making their own choices on sexual matters. Indeed, the polls indicate that most children understand their own need for information and thus most desire some form of sex education.[139] This type of objective data might be preferable to psychological evidence because of both the emotional costs of litigating each child's maturity and the threat to the parent-child relationship posed by such litigation.[140] Yet whether they rely on objective or subjective data, courts must make this judgment on an ad hoc basis.[141]

Once a court decides that a child is mature, it should consider her constitutionally protected interests. Because this Note focuses on *parental*

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138. See note 118 and accompanying text supra.
139. See notes 121-23 and accompanying text supra.
140. Note, supra note 25, at 1380.
141. See *Bellotti*, 443 U.S. at 643-44 & n.23.

rights, a detailed examination of the interests of the mature child is beyond its scope. However, such interests might include:

(1) First amendment rights of freedom of speech:[142] The first amendment protects the student's right to receive information at school.[143] Parents objecting to sex education seek to restrict the child's access to information.[144]

(2) The child's substantial interest in receiving an education: While education is not a fundamental right afforded strict scrutiny under the equal protection clause,[145] it is nevertheless undisputed that education is a crucial government function.[146] Children have a substantial interest in participating in this process.[147]

(3) The child's acute need for sex education: The health problems created by teenage sex have reached crisis proportions.[148] Sex education is designed to alleviate these problems.[149] Children themselves seem to thirst for information on sex.[150]

In sum, children have substantial interests in obtaining sex education. These interests must be weighed against the parents' interest in preventing them from receiving such education.

V

BALANCING THE INTERESTS

In many different contexts implicating parental, state, and child interests, the Supreme Court has balanced these competing interests.[151] The difficult question is how to weight the scale. In other words, how do we determine when the state's and child's interests are sufficient to override the

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142. E.g., Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 511-14 (1964) (Children have first amendment right of free speech which allows them to wear armbands to school for political protest provided they neither impinge upon the rights of others nor substantially interfere with school operations.).

143. Board of Educ. of Island Trees Union Free School Dist. Number 26 v. Pico, 457 U.S. 853 (1982).

144. But see Hirschoff, Parents and the Public Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?, 50 So. Cal. L. Rev. 871, 920-23 (1977). Hirschoff contends that the right to information is not burdened by excusal because only some children are excused. But she neglects to consider the informational rights of those children excused.

145. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

146. See notes 97-102 and accompanying text supra.

147. For whom else is education designed?

148. See notes 93-103 and accompanying text supra.

149. See note 96 and accompanying text supra.

150. See notes 100-02 and accompanying text supra.

151. See, e.g., *Bellotti,* 443 U.S. at 633-51; *Parham,* 442 U.S. at 600-17; *Yoder,* 406 U.S. at 215-34; *Prince,* 321 U.S. at 165-71.

parent's rights? At first glance, the cases seem to haphazardly use the means-ends analysis germane to equal protection claims, requiring either compelling[152] or permissible state interests to overcome parental rights.[153] By carefully examining these cases, however, we can discern a balancing test in which the degree of state interests required is adjusted by a number of factors.

One factor the Court has considered is whether the burdened activity is essential to the parenting function.[154] Protection increases as the state's interference with the parent's ability to function as a parent increases.[155] For instance, the first and most crucial parental action is deciding whether or not to give birth to a child. Consequently, the abortion decision is given maximum protection, requiring compelling state interests to overcome an individual's decision not to become a parent.[156] Similarly, when a state terminates parental rights it completely destroys the right of parenthood.[157] How can a mother or father act as a parent when the family is dismembered?[158] Parents thus receive maximum protection when the state attempts to terminate parental rights.[159] On the other hand, few would argue that teaching a foreign language is crucial to parenting. Thus, the prohibition against teaching German need only be reasonably related to legitimate state ends.[160]

Another consideration is the presence of an additional constitutionally protected right. In *Yoder,* for example, the Court indicated that even if religious interests were ignored, the secular interests of parents warrant protection against unconstitutional state interference.[161] But the right of parents to direct the *religious* upbringing of their children must receive even greater protection.[162] When religious rights are implicated, other rights take on added import.[163] Thus the parents' right to control their child's religious development is afforded special scrutiny.[164]

152. See, e.g., Roe v. Wade, 410 U.S. 113, 155, 163 (1973).

153. See, e.g., *Meyer,* 262 U.S. at 401-03.

154. Cf. Note, supra note 25, at 1179 (A right is fundamental when it is recognized that the "essential core" of the protected right should be free of state interference.).

155. Id. at 1353-57.

156. See, *Roe,* 410 U.S. at 155, 163; accord Note, supra note 25, at 1185-86.

157. See, e.g., Stanley v. Illinois, 405 U.S. 645, 651-52 (1972) (father must be provided a formal hearing when the state seeks to remove a child from his custody); Santosky v. Kramer, 455 U.S. 745 (1982) (a preponderance of the evidence standard for the termination of parental rights violates the parent's fourteenth amendment rights).

158. *Stanley,* 405 U.S. at 658.

159. E.g., *Santosky,* 455 U.S. at 748.

160. *Meyer,* 262 U.S. at 400.

161. *Yoder,* 406 U.S. at 234.

162. Id.

163. See, e.g., Murdock v. Pennsylvania, 319 U.S. 105 (1943) (free speech rights of those spreading religious beliefs are greater than those disseminating commercial information).

164. The Court also accorded greater weight to the parental rights because of the parents' religious beliefs in *Prince,* 321 U.S. at 165. The federal district court followed suit in *Moody,* 484 F. Supp. at 276.

It is difficult to determine, however, how the courts value these "strengthened" rights. Although not explicit on this point, the *Yoder* Court used a codeword of the means-ends analysis—"compelling interests."[165] Other courts faced with a combination of parental and religious rights have been similarly ambiguous in the weight given to these dovetailing interests. In *Davis v. Page,* for instance, the court determined that the parental and religious rights deserved the same degree of protection.[166]

Another crucial factor is the nexus between the legal results sought by the competing parties and their competing interests. In *Yoder,* for instance, the state's objectives would not be significantly advanced by requiring high school attendance. The significant state interests in education, according to the Court, were already substantially fulfilled by a combination of formal elementary education and successful Amish child-rearing.[167] The endangered parents' rights outweighed the already satisfied state interests.[168] While keeping children out of high schools was crucial to the Amish parents' child-rearing methods, as long as Amish children grew into law-abiding citizens, keeping them in school was not crucial to state objectives.[169] On the other hand, in *Davis v. Page,* the use of audio-visual aids was essential to fulfilling the educational goals of the state, and thus effectuating a crucial government function.[170] Parents could not substitute for the state's activities.[171] In contrast, the parents' interests in raising their children was not dependent upon keeping those children from viewing audio-visual demonstrations.[172]

In conclusion, to resolve the sex education question the courts must carefully balance the interests of child, parent and state. To determine whether the state's and child's interests justify interference with parental rights, they must consider these factors: (1) the importance of the burdened activities to the ability of mothers and fathers to exercise their parental rights; (2) the possible presence of additional constitutional rights; and (3) the nexus between the legal result sought and the objectives desired.

VI

THE SEX EDUCATION CASES

The sex education cases decided to date have failed to carefully balance the interests of parent, child and state. The first reported challenge to sex

165. Note, Parental Rights: Educational Alternatives and Curriculum Control, 36 Wash. & Lee L. Rev. 277, 284 (1979).

166. *Davis,* 385 F. Supp. at 395.

167. 406 U.S. at 221-31.

168. Id.

169. See id. at 218-19.

170. 385 F. Supp. at 400-01.

171. Id.

172. Compelling Amish children to attend high school threatens the entire effort to keep the children as members of the separatist society. See 406 U.S. at 218-19. On the other hand, the use of audio-visuals threaten but one tenet of the parent's faith, albeit an important one.

education was dismissed on the ground that plaintiff had offered no case law in support of her theory that parents have an exclusive right to teach their children about sex.[173] Another early challenge, *Medeiros v. Kiyosaki,*[174] further demonstrates the inadequate attention to parents' rights which characterizes these decisions. In *Medeiros,* the Hawaii Supreme Court could discern no parental right of control.[175] According to the court, the seminal parents' rights cases—*Meyer v. Nebraska*[176] and *Pierce v. Society of Sisters*[177]—protect only "the explicit freedoms of speech and press."[178] Thus, sex education courses do not violate a constitutional right to parenthood since, according to the court, no separate right of parenthood exists.[179]

Yet it is clear that *Meyer v. Nebraska* and *Pierce v. Society of Sisters* do indeed stand for the protection of parental rights. In both of those cases, the Supreme Court expressly upheld a parent's right to raise her children. The *Medeiros* court's construction of *Meyer* and *Pierce,* in contrast, is based on Justice Douglas's assertion in *Griswold v. Connecticut*[180] that these cases might be viewed as first amendment cases, prohibiting the state from contracting "the spectrum of available knowledge."[181] But in a subsequent right to privacy case, *Roe v. Wade,*[182] Douglas himself recognized that the right to raise children is independent of freedom of information concerns.[183] Indeed, in still other cases, the Court has held that the state may reinforce parental authority by restricting the flow of information to minors.[184] If *Meyer* and *Pierce* indeed rest solely on free speech grounds, parents would not be allowed to restrict the child's access to information.

In *Medeiros,* the Hawaii Supreme Court also determined that, even if a parental right of control did exist, the Hawaii sex education program posed no threat to that right,[185] since parents could withdraw their children from the program by submitting a written excuse.[186] Also, parents could prescreen the films used in the course and withdraw their children from specific classes.[187] Because these policies enabled parents to limit or prevent their

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173. *Cornwell,* 314 F. Supp. at 342.
174. 52 Hawaii 436, 478 P.2d 314 (1970).
175. 52 Hawaii at 441, 478 P.2d at 317.
176. 262 U.S. 390 (1923).
177. 268 U.S. 510 (1925).
178. 52 Hawaii at 441, 478 P.2d at 317.
179. Id.
180. 381 U.S. 481 (1965).
181. 52 Hawaii at 441, 478 P.2d at 317 (quoting *Griswold,* 381 U.S. at 481).
182. 410 U.S. 113 (1973).
183. Id. at 211-13.
184. Ginsberg v. New York, 390 U.S. 629 (1968) (state may prohibit distribution of non-obscene offensive materials to minors).
185. 52 Hawaii at 438-44, 478 P.2d at 316-18.
186. Id. at 440, 478 P.2d at 316.
187. Id. at 440, 478 P.2d at 316-17.

children's participation in the program, the court found no interference with parental control.[188]

The opinion, however, fails to examine the possibility that the sex education program presents the parent with a constitutionally prohibited choice between the exercise of a constitutional right and the receipt of a public benefit. In *Sherbert v. Verner,*[189] for instance, the state unconstitutionally denied Verner unemployment benefits because she refused to work on Saturdays. Because the state presented a choice between her religious beliefs (which forbade work on Saturdays) and public benefits (which required work on Saturdays), the state was violating Verner's right to the free exercise of her religion.[190] This prohibition against a state-enforced choice between constitutional rights and public benefits is equally applicable to other rights, such as free speech.[191] Thus, it would seem possible to extend the unconstitutional choice prohibition to parental rights.

The Hawaii court in *Medeiros* should have considered whether the excusal policy created such a constitutionally prohibited conflict between receipt of a public benefit and exercise of a constitutional right. The *Medeiros* court should have engaged in a fact-finding analysis to determine whether the excusal policy in fact unconstitutionally compelled parents to choose between exercising the right to raise their children and the benefits of public education.

In *Citizens for Parental Rights v. San Mateo Board of Education,*[192] the California Court of Appeals engaged in a more searching, though seriously flawed, examination of a parent's challenge to sex education. Employing a novel approach, the court divided parental rights into three distinct interests and then dismissed the importance of each. First, adopting the *Medeiros* court's erroneous conclusion that the federal case law establishing parental rights protects only freedom of information, the court rejected the parental right of privacy.[193] The second interest identified, the parental right of control, was summarily dismissed.[194] Finally, the court found that the plaintiffs cited no precedent supporting an exclusive right of parents to teach sex education.[195]

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188. Id. at 440-41, 478 P.2d at 316-17.

189. 374 U.S. 398 (1963); see also Schampp v. School Dist. of Abington Township, 177 F. Supp. 398 (E.D. Pa. 1959), vacated and remanded, 364 U.S. 298 (1960).

190. 374 U.S. at 404.

191. This is especially true in light of the fact that no one constitutional right is to be given priority over any other. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

192. 51 Cal. App. 3d 12, 124 Cal. Rptr. 68 (1975).

193. 51 Cal. App. 3d at 30, 124 Cal. Rptr. at 90.

194. Id. at 31-32, 124 Cal. Rptr. at 91 (relying on the unpublished opinion of the court below).

195. Id. at 32-33, 124 Cal. Rptr. at 91-92.

The California court's divide-and-conquer approach, however, is misguided. Admittedly, there is disagreement on the constitutional source of parental rights.[196] But in the leading parental rights cases, the United States Supreme Court has found no reason to divide parenthood and privacy.[197] Whatever its defined source, the boundaries of the right are the same.[198] Parental privacy rights do exist; their parameters are found in the parental control cases. Thus, parental rights of privacy and parental rights of control must be examined together. Indeed, in the Supreme Court's one attempt at bifurcation, it intimated that parental privacy and control were but one right.[199] Thus, *Citizens for Parental Rights* is flawed both because it unnecessarily divides parental rights into three separate categories and because it adopts the mistaken reasoning of *Medeiros* in defining the limits of those rights.

The remaining sex education cases shed no brighter light on parental rights. Some parental challenges have relied solely on free exercise of religion,[200] while others have alleged that the statutes authorizing sex education illegally delegated power to local school boards.[201] Parental rights, however, merit far greater attention than these cases, or those previously discussed, give them.

VII

RESOLUTION

A. Suing to Abolish the Program

As this Note has explained, public school education significantly burdens the parental prerogatives over a child's value development and behavior. Both prerogatives are important to effective parenting. Sexual values are especially important to the child's development, and thus to the child's parents. Any choice in the area of sexual lifestyles is necessarily personal, making family individuality in this choice another interest significant to parenting.

The abolition of sex education, however, is not crucial to these parental interests. Admittedly, preventing children from receiving sex education and thus giving the parents exclusive control over the child's sexual values and

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196. See notes 10-12 and accompanying text supra.

197. See, e.g., *Yoder,* 406 U.S. at 213-34. But see *Runyon,* 427 U.S. at 176-79 (federal statute prohibiting private schools from denying admission to blacks does not violate parental rights).

198. *Runyon,* 427 U.S. at 176-79.

199. Id. at 178, n.15; accord Note, supra note 165, at 280 n.24.

200. See Smith v. Ricci, 89 N.J. 514, 446 A.2d 501 (1982); Valent v. New Jersey State Bd. of Educ., 114 N.J. Super. 63, 274 A.2d 832 (1971).

201. Id.; Hobolth v. Greenway, 52 Mich. App. 682, 218 N.W. 2d 92 (1974).

behavior is one way of achieving parents' objectives. But even if children attend the classes, parents can instruct children in what they consider to be the proper values and family lifestyle, and control their children's behavior outside the classroom. Sex education leaves room for children to follow their parents' guidelines.[202]

On the other end of the balance, sex education is crucial to the state's pressing concerns in the health and welfare of its children. Sex education provides the single most effective way to remedy the severe health crises resulting from teenage sex. The courts should not second-guess the public educators' conclusion that sex education will aid in remedying these problems.[203] The judiciary is justifiably reluctant to impose its views of educational policy upon the experts entrusted with this complicated task.[204] In addition, courts avoid superceding the representative body, be it a state legislature or a local school board, which produced the curriculum.[205] While the sex education problem involves constitutional rights rather than just policy, courts should still grant the educational process and educators breathing room.

The independent interests of the child further weigh against parental rights.[206] The child's interests in education, particularly in sex education, certainly bolster the state's interests in providing such education. This additional interest should give courts even greater pause in disturbing the established public school curriculum.

Yet another significant interest militates against abolishing public school sex education programs. American society values the free flow of information,[207] and has given constitutional voice to that value in numerous first amendment decisions.[208] To restrict the flow of information by abolishing sex education programs violates this value. Consequently, courts weighing challenges to sex education are right in refusing to close off this source of information to the majority of students to protect the minority whose parents object to it.[209]

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202. See notes 103-04 and accompanying text supra.

203. See Note, supra note 165, at 294.

204. See Epperson v. Arkansas, 393 U.S. 97, 104 (1968). Some contend that deference to educators reflects the belief that "parents are no longer considered to be the primary judges of their child's educational interests." Note, supra note 165, at 294. This conclusion, however, is too broad. Rather, it reflects the notion that once the parents' right of education is outweighed by state interests, the state should be free to pursue those interests.

205. Accord *Epperson*, 393 U.S. at 104 ("By and large, public education in our Nation is committed to the control of the state and local authorities"); Note, supra note 165, at 295 (citing Cary v. Board of Educ. Adams-Arapahoe School Dist., 427 F. Supp. 945, 952 (D. Colo. 1977)).

206. See generally text accompanying notes 142-47 supra.

207. See U.S. Const. Amend. I.

208. See, e.g., *Epperson*, 393 U.S. at 105; *Citizens for Parental Rights*, 51 Cal. App. 3d at 31, 124 Cal. Rptr. at 90; *Medeiros*, 52 Hawaii at 441-42, 478 P.2d at 317-19.

209. See, e.g., *Medeiros*, 52 Hawaii at 441-42, 478 P.2d at 317-19.

Finally, courts should be extremely reluctant to abolish these programs when a less drastic alternative exists. While giving parents the option to remove their children from sex education classes does not entirely remove the interference with parental rights, it does, as noted below, reduce it significantly.[210] The availability of an alternative which reduces interference with the parental right, while having but a limited effect on the state's and children's interests, must defeat an attempt by parents to abolish sex education.

B. Suing to be Excused from the Program

In *Moody v. Cronin,*[211] a federal district court allowed students to be excused from physical education classes despite the state's interest in promoting health and fitness.[212] Similarly, parents who so desire should be allowed to have their children removed from sex education classes.

Excusal is an appealing alternative because it protects minority interests without burdening the majority. On one hand, the majority will continue to benefit from the state's efforts to advance its crucial interest in providing sex education. On the other, those parents who feel that their parental role is seriously undermined by these classes may insulate their children from them. them.

Admittedly, this solution will completely satisfy neither the parent's, the child's, nor the state's interests. State interests are frustrated in that many parents who themselves are incapable of providing sex education[213] may remove their children from the classes, in effect denying those children the benefits of such education and thwarting the state's interest in providing those benefits.[214] Parental interests suffer as well; the parent is now faced with the difficult task of removing a child from class and thus subjecting her to possible stigmatization by her peers. And, as has been noted, the excusal right may force upon parents a Hobson's choice between the right to have one's children educated and the right of parental control. Finally, children who are removed may have their own interests in receiving sex education stymied.

But the courts must adjudicate among these three independent sets of interests, rather than simply allowing one interest to ride roughshod over the others. The Constitution mandates that the interests be sensitively balanced.[215] Nothing in the Constitution requires that the state be allowed to

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210. See *Medeiros,* 52 Hawaii at 441-42, 478 P.2d at 317.
211. 484 F. Supp. 270 (C.D. Ill. 1979).
212. Id. at 277.
213. See notes 98-102 and accompanying text supra.
214. See note 97 supra. Children who receive adequate instruction from their parents are by definition in less need of sex education classes.
215. See notes 151-72 and accompanying text supra.

attain all of its goals. Some, like the sex education of those children who are removed, may have to be sacrificed. Likewise, nothing in the Constitution guarantees parents complete control over the children's education. In some instances parental interests in the child's values, individuality, and behavior, may have to be compromised. Excusal allows both state and parent to pursue their goals, while sacrificing as little of their interests as possible.

VIII

CONCLUSION

As this Note has shown, serious parental rights are implicated by mandatory sex education courses. Current case law gives short shrift and improper analysis to these rights. Their importance merits attention by the courts.

When these parental rights are examined and weighed against the competing state interests and possible interest of the child, it is clear that they are insufficient to overcome the state and child interests in having sex education curricula. They do, however, mandate a removal right for parents who do not wish to have their children participate in mandatory sex education classes. It is time that these interests were raised by claimants and addressed by the courts.

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