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ABSTINENCE-ONLY SEX EDUCATION ON TRIAL

Kendall Orton¹

In 2002, Kathryn Grossman was hired by South Shore School District to be a guidance counselor at South Shore Elementary and Secondary School in the small Wisconsin town of Port Wing (population: 420).² Her duties on this three-year contract included working with students from kindergarten to twelfth grade and acting as a career coach and an academic advisor. As a trusted adult, she helped some students work through emotional distress. On one of her first days on the job, Kathryn found literature in her office about contraceptives, (i.e., condoms and birth control pills) including instructions on how to use them. Kathryn threw away the literature and replaced it with abstinence-only pamphlets, later citing her religious convictions about contraceptives as her reason, all without talking to any of the other members of school administration. After three years, during which Kathryn withheld information on contraceptives while counseling students, the district supervisor decided not to renew her contract. He cited six teenage pregnancies at South Shore Elementary and Secondary School as one of the reasons.

In a K–12 school in a town of less than five hundred, six teenage pregnancies stand out.

Kathryn sued, insisting the school district had not hired her again because they were discriminating against her religious beliefs,

1 Kendall Orton is a junior studying economics at Brigham Young University and plans to attend law school in 2019. He would like to thank Jacob Healy, Brady Davis, and Kyle Burgess for their constructive criticism and editing expertise—their various viewpoints and research made this paper what it is. His special thanks to Professor Kris Tina Carlston and the review board for their advice and encouragement.

2 *American Fact Finder*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>.

which she cited as the reason she promoted abstinence-only without the approval of her employers. Both the trial court and the United States Court of Appeals for the Seventh Circuit disagreed and held that her decision about what information about sex should be available was a viable reason for her dismissal, pointing out that most of the school board members were also Christian and still condemned her actions.³ The court of appeals even cited a study which notes that programs that exclusively advise teenagers to abstain from sex are not effective.⁴

This is just one story of the effects of abstinence-only sex education in the U.S. Although abstinence is demonstrably the best way to avoid pregnancy and has been the driving principle behind U.S. sexual education on both the state and federal levels since the 1980s, a growing body of research shows that teaching abstinence-only models does not actually promote abstinence. Many of these programs limit the conversation about sex. For example, Utah law prohibits teachers from answering organic questions from their students and does not allow the discussion of anything other than heterosexual orientation.⁵ While many states have changed their laws and policies to meet precedent and science, both of which favor comprehensive sexual education, in 2016 the federal government granted \$50 million through legislation such as Title V of the Social Security Act to fund abstinence-only education programs.⁶

The U.S. government currently offers funding for both abstinence-only and comprehensive sexual education models, each with the goal

3 Grossman v. South Shore Public School District, 507 F.3d 1097, 1097–1100 (7th Cir. 2007).

4 Christopher Trenholm, *Impacts of Four Title V, Section 510 Abstinence Education Programs*, MATHEMATICA POLICY RESEARCH INC. (2007), <https://www.mathematica-mpr.com/our-publications-and-findings/publications/impacts-of-four-title-v-section-510-abstinence-education-programs> (click the black “download publication” button).

5 UTAH ADMIN. CODE R. 277-474-3 (2016); see also *Sex and HIV Education*, GUTTMACHER INSTITUTE (2017), <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> (includes the law in every state about what is and is not required in teaching sex in schools).

6 Social Security Act, Pub. L. No. 101–193 § 510(b) 2353, 2353–2355.

of reducing teen sexual activity and pregnancy. Since only comprehensive models have been shown to be effective, the federal government should repeal Title V to further encourage states to accept Personal Responsibility Education Program (PREP) funds and teach comprehensive sex education in public schools. In this paper, I will give a background in the history of law regarding sex education in the United States to show how comprehensive sex education was the norm until the 1980s and how only recently abstinence-only education has received public support despite the lack of scientific support. Next, I will present the research regarding abstinence-only and comprehensive sexual education models to compare their relative efficacy. Finally, I will defend repealing Title V against Establishment Clause claims.

I. HISTORY OF SEX EDUCATION

In the past, sex education used to be almost entirely comprehensive by modern standards—teenagers and adults were taught about sexual function, sex in relationships, and sexual decision-making for years before the 1980s, when the first concerted attempt to withhold such information from students developed.

Sexual education in the United States can be traced back to the First World War, when thousands of men returned from Europe with sexually transmitted diseases (STDs). This caused Congress to pass the Chamberlain-Kahn Act in 1919, which set aside funds to educate soldiers about these diseases and fund treatment research.⁷ At the time, sexual education was holistic, including physical, social, and ethical aspects in addition to instructing about hygienic issues such as the avoidance of STDs. The whole purpose was to encourage healthy attitudes about sex.⁸ Sexual education was included in a manual for high schools published by the Public Health Service as

7 The Chamberlain-Kahn Act of 1918, 56 U.S.C § 886–888 (1919).

8 Valerie Huber, *A Historical Analysis of Public School Sex Education in America Since 1900*, MASTER OF EDUCATION THESES & PROJECTS (2009) 16, http://digitalcommons.cedarville.edu/education_theses/21/.

part of “character formation.”⁹ By 1927, 45 percent of schools taught some sort of sexual education.¹⁰ In 1981, during the HIV/AIDS scare, Senators Orrin Hatch (R-UT) and Jeremiah Denton (R-AL) sponsored the Adolescent Family Life Act (AFLA), which redirected \$17 million a year from comprehensive sexual education grants to abstinence-only models.¹¹ AFLA was implicated in a Supreme Court case for granting funds predominantly to conservative religious groups who were teaching against abortion; legislators argued that the practice broke the Establishment Clause of the First Amendment. The court ordered an oversight committee to check curriculum in any hopeful program for medical accuracy and religious promotion.¹² AFLA fell out of sight after President Clinton reduced its funding by 70 percent in 1993. In 2005, a government performance review report gave AFLA programs a “poor” rating and concluded that results were “not demonstrated.”¹³

In response to the opposition to AFLA, lawmakers introduced Title V of the Social Security Act in 1996. Title V introduced eight exclusive funding requirements restricting sex education curriculum and is currently the main federally funded abstinence-only sexual education program. Two congressional staffers who wrote the language of the eight requirements asserted that they were “intended to align Congress with the social tradition that . . . sex should be confined to married couples.”¹⁴

9 *Id.* at 33.

10 *Id.* at 34.

11 There are also funds going through Community-Based Abstinence Education (CBAE) programs; while those are the most restrictive and bypass the need for state approval, they are focused on community functions, not schools.

12 *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988).

13 Marcella Howell, *The History of Federal Abstinence-Only Funding*, ADVOCATES FOR YOUTH (2007), <http://www.advocatesforyouth.org/storage/advfy/documents/fshistoryabonly.pdf>.

14 Ron Haskins & Carol Statuto Bevan, *Abstinence Education Under Welfare Reform*, 19 CHILDREN AND YOUTH SERVICES REV. 465, 465–484 (1997).

In 2010, the Personal Responsibility Education Program (PREP) was introduced as part of the Affordable Care Act, and it has been the main source of comprehensive sexual education funding ever since.

More recently, Congress heard a bill that would reallocate \$75 million from Title V to PREP.¹⁵ This bill is still under review by the senate. During his service as president, Barack Obama proposed cutting funding to Title V, including his proposed budget for 2017.¹⁶ This current debate is only the continuation of decades of conversation.

II. DIFFERENCES BETWEEN THE PROGRAMS

The eight points of Title V abstinence-only education center on the benefits of abstaining from sexual activity until marriage and on the fact that abstinence is the only certain way to avoid pregnancy and sexually transmitted infection. Title V requires that students be taught how to reject sexual advances, how alcohol and drugs make that harder, and how self-sufficiency should be attained before engaging in sexual activity. Students are also taught that marriage is the expected and only acceptable place for a sexual relationship.¹⁷ Title V holds that the points that I have summarized here should be the “exclusive purpose” of sexual education programs.¹⁸ In other words, programs cannot receive funding through Title V unless they prove they are not teaching anything beyond this prescriptive (and restrictive) curriculum.

The federal government is also funding Personal Responsibility Education Programs (PREP). Any program that wants these funds must be designed to educate youth about the importance of both abstinence and contraception for the prevention of pregnancy and STDs and include at least three adult preparation subjects, such as healthy relationships, financial literacy, and education and career

15 S. 578, 111th Cong. (2011); *see also* H.R. 1085, 111th Cong. (2011).

16 *SIECUS Applauds President's Final Budget*, SIECUS (Feb. 9, 2016) <http://www.siecus.org/index.cfm?fuseaction=Feature.showFeature&featureid=2437&pageid=611>.

17 Social Security Act, Pub. L. No. 101–193 § 510(b) 2353 Stat. 2353–2355.

18 *Id.*

success. Programs are also required to be medically accurate and complete (which, surprisingly, is not a requirement mentioned in Title V), include activities to educate those who are already sexually active about responsible sexual behavior (including *both* abstinence *and* contraceptives), and be age appropriate.¹⁹ PREP also implicitly allows information about minority sexualities, which can help teenagers develop appropriate and understanding attitudes towards each other. In other words, PREP does everything Title V programs do but opens the conversation to include everyone.

Now that I have established what abstinence-only and comprehensive sexual education models entail, I will explore the relative impact of each within the United States.

III. ABSTINENCE-ONLY SEX EDUCATION ON TRIAL

Title V allocates \$50 million every year for abstinence education and requires that every \$4 of federal money must be matched by \$3 from whatever state is applying, which adds up to \$87.5 million each year.²⁰ With that amount of money being spent on education programs, it is worthwhile to look into the relative outcomes of these programs. This section will deal with contemporary opinion concerning abstinence-only and comprehensive sex education policies, explain why sexual education is necessary, and address the research concerning the comparative effectiveness of abstinence only and comprehensive sex education, examining such indicators as rates of safe sex, STD infection, sexual postponement, and pregnancy.

As I delve into some of the research of the outcomes of sexual education programs themselves, it is important to keep in mind there is no standard sexual education program; only the grants given to programs that meet current standards. Not all programs are created equal; methods, teachers, and demographics are diverse.

19 42 U.S.C § 713, 349–350 (2010).

20 CENTERS FOR DISEASE CONTROL AND PREVENTION, HHS FUNDING FOR ABSTINENCE EDUCATION, EDUCATION FOR TEEN PREGNANCY AND HIV/STD PREVENTION, AND OTHER PROGRAMS THAT ADDRESS ADOLESCENT SEXUAL ACTIVITY (2008).

Some programs work while others do not, but on the whole, comprehensive programs show results that abstinence-only sexual education programs have not.

A. Contemporary Opinion, Policy, and the Need for Sexual Education

While most schools are teaching a comprehensive model, fully a third of students are receiving incomplete information: 58 percent of public secondary school principals described their school's program as "comprehensive," while 34 percent reported an "abstinence-only" model (the remaining 8 percent of the questionnaire did not respond).²¹

If policymakers listened to their constituents, modern policies would likely mirror the comprehensive attitudes of the past. In 2008, researchers found that 89 percent of high school parents thought that sexual education should include information on both abstinence and contraceptives.²² In addition, 93 percent of parents of junior high students thought that sex education should be included in seventh to ninth grade.²³ However, popular opinion is poorly reflected by the laws that govern sex education: 34 states require HIV education, 24 require sex education, just 22 require both, and only 13 states specifically require that sexual education programs use "medically accurate" information.²⁴

There is an obvious need for comprehensive sex education in the United States these days. According to the latest data from the

21 *Sex Education in the U.S. Policy and Politics*, KAISER FAMILY FOUNDATION (2013), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/sex-education-in-the-u-s-policy-and-politics.pdf>.

22 Marla Eisenberg, *Support for Comprehensive Sexuality Education: Perspectives from Parents of School-Age Youth* 42:4 JOURNAL OF ADOLESCENT HEALTH, 352, 352 (2008).

23 *Sex Education in the U.S.: Policy and Politics*, KAISER FAMILY FOUNDATION (2002), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/sex-education-in-the-u-s-policy-and-politics.pdf>.

24 *Sex and HIV Education*, GUTTMACHER INSTITUTE (2017), <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education>.

Centers for Disease Control and Prevention (CDC), 41 percent of youth ages 15–19 say they have had sex. Of these youth, 43 percent said they did not use a condom the last time they had sex, 21 percent had consumed alcohol the last time they had sex, and only 10 percent had been tested for HIV.²⁵ Youth ages 15–24 were at the highest risk for sexually transmitted infections, and although they made up only 25 percent of the sexually active population, they accounted for two-thirds of all newly reported cases in 2014.²⁶ The United States still has the highest teen birthrate in the industrialized world—almost 250,000 babies were born to teenage women ages 15–19 in 2014, which adds up to 24.2 births per 1,000 girls.²⁷ This is the landscape that sexual education is working in, with goals of lowering the rates of teenage pregnancy and slowing the spread of STDs. So how do abstinence-only models affect students compared to comprehensive models? From the above information, it is apparent that public opinion is against abstinence-only sex education, and there is a need for sex education, so what do studies have to say about its overall effectiveness?

B. Safe Sex

Do Title V programs reduce the use of contraceptives? One common attack against Title V programs is that they keep teens from using contraceptives, leading to increased risk of STDs and pregnancy. In 1996, the federal government set aside \$6 million to study the effects of Title V programs. Three years later, Mathematica, an independent public policy research group, designed a study controlled for race and income across four states involving two thousand youth

25 CENTERS FOR DISEASE CONTROL AND PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE—UNITED STATES, 2015 (2016) (2015 survey of U.S. teenagers about sexual behavior).

26 CENTERS FOR DISEASE CONTROL AND PREVENTION, SEXUAL RISK BEHAVIORS: HIV, STD, & TEEN PREGNANCY PREVENTION (2016).

27 *Id.*

randomly assigned to four Title V programs.²⁸ Researchers followed up with study participants four to six years after the programs and reported back in 2007. The Mathematica report showed that these Title V programs had no effect on the rate of unprotected sex among youth.²⁹ Students who had taken the programs were just as likely as students who had not to engage in unprotected premarital sex. However, those in the four programs were less likely to report that condoms are good protection against STDS and more likely to report that condoms never prevent pregnancy.³⁰ The courses had no effect upon behavior and also put false ideas about contraceptives into students' heads.

According to the Mathematica study, the idea that Title V programs prevent youth from using contraceptives does not hold. The main issue is that although abstinence-only programs don't make any measurable difference in students' behavior and possibly have negative effects on students' having safe sex, *they are still offered*.

C. Sexual Rates and Pregnancy

If Title V-funded programs do not help when it comes to safe sex, do they help lower premarital sexual activity in general? And do they reduce the number of pregnancies teenagers have?

In 2003, ten states released independent studies of Title V programs (which they were matching funds for). The states administered questionnaires three to seventeen months after the end of each program, and each involved hundreds (and sometimes thousands) of teenage students. Although four showed better *attitudes* toward abstinence and three showed more of an *intent* to abstain, *none* of

28 Christopher Trenholm, *Impacts of Four Title V, Section 510 Abstinence Education Programs*, MATHEMATICA POLICY RESEARCH INC. (2007), <https://www.mathematica-mpr.com/our-publications-and-findings/publications/impacts-of-four-title-v-section-510-abstinence-education-programs> (click the black “download publication” button).

29 Trenholm, *supra* note 4, at 33–36.

30 Trenholm, *supra* note 4, at 60.

the ten states reported reduced sexual behavior.³¹ These Title V programs, whose sole purpose was to promote sexual abstinence, did not stop kids from having sex once they wanted to have it.

One study published in the *Journal of Adolescent Health* compared abstinence-only and comprehensive models across 1,719 students (while controlling for race, income, and “family intactness”) and found

that abstinence-only programs had no significant effect in delaying the initiation of sexual activity or in reducing the risk for teen pregnancy and STD. In contrast, comprehensive sex education programs were significantly associated with reduced risk of teen pregnancy, whether compared with no sex education or with abstinence-only sex education, and were marginally associated with decreased likelihood of a teen becoming sexually active compared with no sex education.³²

Policymakers have expressed concern that comprehensive models teach youth about sex and encourage them to try it for themselves. However, this national study reports that “formal comprehensive sex education programs reduce the risk for teen pregnancy without increasing the likelihood that adolescents will engage in sexual activity, and confirm results from randomized controlled trials that abstinence-only programs have a minimal effect on sexual risk behavior.”³³ According to the National Study for Family Growth, controlling for other factors, students who were taught with the abstinence-only model are 50 percent more likely to report an unwanted pregnancy than those taught a comprehensive model.³⁴

31 Debra Hauser, *Five Years of Abstinence-Only-Marriage Education: Assessing the Impact* ADVOCATES FOR YOUTH 4, (2003) (the ten reports are summarized at <http://www.advocatesforyouth.org/publications/publications-a-z/623-five-years-of-abstinence-only-until-marriage-education-assessing-the-impact>).

32 Pamela Kohler, *Abstinence-Only and Comprehensive Sex Education and the Initiation of Sexual Activity and Teen Pregnancy*, 42 *JOURNAL OF ADOLESCENT HEALTH* 344, 344-351 (2008).

33 *Id.* at 351.

34 *Id.* at 348.

So, through this comparative study, we can see that abstinence-only programs *do not* lower the rates of sexual activity or of unwanted pregnancies in teens, while comprehensive programs *do*. If the purpose of sexual education programs is to reduce teen sexual activity and pregnancy, then why continue to fund programs that do not contribute to this cause? Abstinence-only education is not meeting its purported goals, and while comprehensive models are not perfect, they make a measurable difference.³⁵

IV. THE LEMON DOCTRINE

There is little science backing the continuation of abstinence-only programs and the funding laws behind them. What about religious concerns, like those of Kathryn Grossman. What about those who say teaching their children about sex or contraceptives is against their personal beliefs? Repealing Title V would stop the flow of funding to abstinence-only programs that are built around those beliefs,³⁶ which would make all sex education comprehensive. Parents have sued about their children being taught contrary to their religious beliefs about sex before. In this section, I will look into this matter in depth in order to determine whether repealing Title V would violate the Establishment Clause. I will do so by applying the Lemon Test.

The Establishment Clause of the First Amendment of the U.S. Constitution prohibits Congress from establishing a state religion and prohibits actions that favor one religion over another, or religion over secularism and vice versa. The Free Exercise Clause is a corollary to the Establishment Clause and states that Congress “shall make no law prohibiting the free exercise of religion.”³⁷ These two clauses

35 For more nationally representative data to support these arguments, see Douglas Kirby, *Emerging Answers 2007: Research Findings on Programs to Reduce Teen Pregnancy and Sexually Transmitted Diseases*, 10 (2007), https://thenationalcampaign.org/sites/default/files/resource-primary-download/EA2007_full_0.pdf.

36 Huber, *supra* note 8.

37 U.S. Const. art. I § 1.

protect religious observance but also make sure the U.S. government does not force any religion or belief on citizens of the United States. These clauses are the focus of several court cases that involve sexual education and what can and cannot be taught at public schools. In 1971, the Supreme Court decided *Lemon v. Kurtzman*, a case about pay of teachers at religious schools,³⁸ and established a test to determine whether a statute violates the Establishment Clause:

Three . . . tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.³⁹

While the Lemon Test has been questioned at times for being too “controlling”⁴⁰ and there is some talk of replacing it,⁴¹ it ultimately remains the Supreme Court standard for determining whether statutes violate the Establishment Clause. It has been applied to other sex education court decisions, which I will discuss next, in favor of comprehensive sex education. If our motion to reallocate Title V funding to PREP passes the Lemon test, then there is no constitutional argument against it.

In *Smith v Ricci*, a New Jersey school district planned to implement a family life and sex education course for ninth through twelfth graders in response to some worrisome statistics about rates of teen sexual activity and pregnancy in New Jersey. The program included information about contraceptives and put sex in the context of relationships. Parents came and filed for an injunction against the class,

38 *Lemon v. Kurtzman* 403 U.S. 602, 612.

39 *Id.*

40 Marcia S. Alembik, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis Notes*, 40 GA. L. REV. 1171, 1174 (2006).

41 See Roald Mykkeltevd, *Souring on Lemon: The Supreme Court’s Establishment Clause Doctrine in Transition* 44 Mercer L. Rev. 881 (1992-1993) and Cart H. Esbeck, *The Lemon Test: Should it be Retained, Reformulated, or Rejected*, 4 NOTRE DAME J.L. ETHICS & PUB’Y 513 (1990).

saying the curriculum would infringe on their rights of privacy and their right to choose how and what their children were taught about human sexual activity, citing the Establishment Clause to say that some of the subjects they would discuss were against their religious views.⁴²

In *Medeiros v. Kiyosaki*, parents of fifth and sixth grade students filed an injunction against a similar family life and sex education course that would involve a series of videos called *Time of Your Life*. This series involved subjects on self-awareness, interpersonal relationships, and decision-making as well as sex education.⁴³ In this case, the parents of students were allowed and given the opportunity to excuse their children from the days where sexual health was discussed.

In both *Smith* and *Medeiros*, the court argued that “accepting the argument that public schools may not offer curricula that offend the religious or moral views of a particular group would be tantamount to enshrining that group’s views as state policy, thereby violating the Establishment Clause.”⁴⁴ In both cases, the court applied the Lemon Test, struck down the religious arguments against the proposed sexual education programs and affirmed those programs.

It is simple to apply the three prongs of the Lemon Test to the law I propose, which will reallocate funding from Title V to PREP. The first prong of the Lemon Test is that to be constitutional, a law needs a specific secular legislative purpose. The secular purpose of PREP is to promote comprehensive sexual education, reduce teen pregnancy and STDs, and train youth to manage healthy relationships. The second prong of the Lemon Test is that a law must neither promote nor inhibit religion. PREP was not designed to interfere with or override religious teaching but to promote sexual health in youth. PREP’s programs do not teach what is right in a religious sense when it comes to sexual activity, but provide the necessary facts and instruction for teens to be able to make informed choices for themselves. The third prong of the Lemon Test is that a law must not result in an “excessive government entanglement” with

42 Smith v. Ricci, 89 N.J. 514, 518 (Sup. Ct. N.J. 1982).

43 Medeiros v. Kiyosaki, 52 Haw. 436, 437 (1970).

44 Smith v. Ricci, 89 N.J. 514, 522 (Sup. Ct. N.J. 1982).

religious affairs. Comprehensive sexual education programs have been shown to not violate constitutional rights of religion. Per *Smith v. Ricci* and *Medeiros v. Kiyosaki*, comprehensive sexual education has been shown not to legally interfere with the education of students in grade or high school. Teenagers can apply the facts they learn within their moral perspectives, religious or otherwise. In addition, the fact that parents can opt out of having their children take comprehensive sexual education classes protects the rights of those that honestly oppose what is discussed and how it is presented in such classes. While not every state has this caveat right now, exclusively funding comprehensive programs would likely bring up this debate, which in turn would let the people decide the issue.

V. CONCLUSION

The truth is that abstinence is the best way to avoid the dangers of sex, but that does not stop many teenagers from having sex and most young adults are sexually active by their early twenties. This reality simply is not going to change. Merely telling teenagers to not have sex and listing the benefits is *not* working—we need to adopt comprehensive models that teach about contraceptives and sexual minorities *as well as* abstinence. If the government is going to promote sexual education, then it should promote programs that work, that help answer questions about STDs, contraceptives and minority sexualities, and that help students get a full picture of what sex is all about, like PREP. We should not support programs, like Title V, that do not show results and that withhold information. While repealing Title V would lead to only one source of sexual education funds, we have established through the Lemon Test that exclusively funding comprehensive sexual education is indeed constitutional. The single option for government funding would not violate the Free Exercise Clause. I submit that we repeal Title V funding for abstinence-only programs and reallocate that money into PREP to help American youth make healthy decisions regarding their sexual life.