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# Deep Purple: Religious Shades of Family Law

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Deep Purple: Religious Shades of Family Law

Naomi Cahn and June Carbone\*

[N]o analysis of religious-liberty claims can take place in a vacuum. If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.<sup>1</sup>

Much of the nation is moving toward an "abstinence-only" approach to sex education, which emphasizes the advantages of confining sex to marriage. But school systems in liberal communities are heading in the opposite direction, teaching more about sexual orientation, as well as contraception and abstinence, in what is termed "comprehensive" sex education.<sup>2</sup>

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<sup>1</sup> Wisconsin v. Yoder, 406 U.S. 205, 241, 242 (1972)( Douglas, J. (dissenting),

<sup>2</sup> Daniel de Vise, Board Approves Lesson on Sexual Orientation, Wash. Post, June 13, 2007, at p. B5.

## I. Introduction

In *Wisconsin v. Yoder*, the Supreme Court considered whether Amish parents could be convicted for failing to send their adolescent children to school as required by the state's mandatory education law.<sup>3</sup> The Court held that the parents' religious free exercise claims protected them from prosecution, notwithstanding Justice Douglas's warning that this would allow parents to impose their religious views on their children. The Court disingenuously explained, "our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents."<sup>4</sup>

Abstinence education in contemporary America presents the issue the Supreme Court explicitly did not decide in *Yoder*: the extent to which parents' religious views may appropriately foreclose their children's life choices. Abstinence education in the context of public education does so in a way that is importantly and subtly different from the much more direct issue in *Yoder* of mandatory education laws. For the public school population as a whole, it reinforces a cultural script that encourages early marriage and reproduction, perpetuates traditional attitudes about sex and gender, and forecloses greater autonomy in the creation of family life. Moreover, abstinence only education, which is strongly rooted in religious beliefs, has been shown to be of limited effectiveness in delaying teen sexual activity, and counterproductive to the extent it discourages contraceptive use.

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<sup>3</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>4</sup> *Yoder*, supra note \_\_, at 231; see generally Emily Buss, What Does Frieda Yoder Believe?, 2 Pa J Const L 53, 67 (1999). For more recent Supreme Court statements concerning parental control over their children's education, see *Elk Grove v. Newdow*, 542 U.S. 1, 14-15 (2004).

So long as secular and religious beliefs about the propriety of premarital sex coincided, and so long as a secular justification for abstinence education existed, such teachings posed no constitutional issue. As age of family formation increasingly reinforces class advantage, however, and as the secular justifications for abstinence only programs become increasingly attenuated, the issue becomes much more direct. Can – and should – the state mandate instruction whose principal effect is to reinforce religious understandings of the good life, and does so with disproportionate impact on the life opportunities of the least advantaged students? While others have explored the rights of minors to information,<sup>5</sup> this paper examines the impact of religion on the politics and jurisprudence of abstinence education in the context of the contemporary culture war between red and blue state values.

Underlying these issues are more general questions concerning the relationship between family law and religion. What role does religion play in the politics of family law? Does it play a mediating role by providing a foundation for shared values, individual discipline and social order? Or does religion, with its emphasis on divinely ordained precepts, contribute to ideological polarization?

The earliest understandings of religion and politics saw religion as a force constitutive of identity and loyalty. The rise of the nation-state itself rested on shared religious observances that identified monarchs with divine selection and national identity. Anthropologist Scott Atran, in describing the origins of his research into an evolutionary role for religion, explains, "I started looking at history, and I wondered why no society

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<sup>5</sup> See, e.g., Catherine Ross *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*. 53 *Vand. L. Rev.* 427 (2000); Hazel Beh & Milton Diamond, *Children and Education: The Failure of Abstinence-Only Education: Minors have a Right to Honest Talk about Sex*, 15 *Colum. J. Gender & L.* 12 (2006).

ever survived more than three generations without a religious foundation as its *raison d'etre*.<sup>6</sup> That religious foundation may be responsible for the growth of human societies beyond the hundred-and-fifty or so closely related individuals that tended to mark the outer limits of hunter-gatherer organization.

If religion is therefore critical in defining associations, nations and causes, does not its very role in providing cohesion also lead to conflict? Indeed, the famed primatologist Frans de Waal suggests that the development of a sense of morality, which served as a precursor to the origins of religion, developed out of the need to create communal bonds against a common adversary.<sup>7</sup> He observes, “the profound irony is that our noblest achievement – morality – has evolutionary ties to our basest behavior—warfare.”<sup>8</sup>

The most difficult issues arise, then, when religions differ on core beliefs or when religious and secular understandings collide in the definition of morality.<sup>9</sup> Successful multicultural societies have historically negotiated careful boundaries in the face of such divisions. Thus, the United States quickly decided to treat marriage as a civil issue, with secular authorities determining the all-important issues of legitimacy and inheritance, while permitting a broad array of religious and secular ceremonies to celebrate the event.<sup>10</sup> It upheld bans on polygamy, reinforcing the identification of the Judeo-Christian

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<sup>6</sup> Robin Marantz Henig, *Darwin's God*, N.Y. Times Mag., March 4, 2007, p. 37.

<sup>7</sup> Nicholas Wade, *Scientists Find the Beginnings of Morality in Primate Behavior*, N.Y. Times, March 20, 2007.

<sup>8</sup> Frans de Waal, *Our Inner Ape* 212 (2005).

<sup>9</sup> See John Rawls, *Political Liberalism* 147 (1993); June Carbone, *Autonomy to Choose what Constitutes a Family: Oxymoron or Basic Right* 19 (2006), avail. at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=935418#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=935418#PaperDownload).

<sup>10</sup> For a summary of this history, see Joel Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 *Vand. J. Transnat'l L.* 135, 143 (2006); see also Daniel A. Crane, *ABOLISHING CIVIL MARRIAGE: A "JUDEO-CHRISTIAN" ARGUMENT FOR*

emphasis on monogamy with the secular values of democracy and equality.<sup>11</sup> And it has granted parents a sphere of authority over their children that includes the ability to insist that they learn German, but not, as Barbara Woodhouse noted, the ability to send them to work at too young an age instead.<sup>12</sup> Each of these decisions involves reaffirmation of the core values that define the society of the time and a measure of leeway for religious observances that can coexist with the core.

This balancing act of religious and secular values becomes most acute, however, when societal changes pull these two sets of understandings apart. Among the many emerging divisions in the culture wars that currently pit religious fundamentalists against the secular coasts is the issue of teen sexuality. At one point in the not so distant past, the issue would have commanded consensus. A half century ago, unmarried sexuality would have been widely regarded as sinful, selfish or misguided. Parental vigilance and authority over teen activity followed accordingly. Schools, whether public or private, would have been expected to reinforce the dominant norm of premarital chastity. And, the appropriate response to an improvident pregnancy in both religious and secular circles was marriage or adoption.<sup>13</sup>

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PRIVATIZING MARRIAGE, 27 Card. L. Rev. 1221 (2006) (comparison of different religious understandings of marriage).

<sup>11</sup> See Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 Utah L. Rev. 308 (1964) (summarizing Supreme Court jurisprudence addressing federal anti-polygamy laws in the second half of the nineteenth century); Shayna M. Sigman *EVERYTHING LAWYERS KNOW ABOUT POLYGAMY IS WRONG*, 16 Cornell J. L. & Pub. Pol'y 101 (2006) (describing history of legal efforts to outlaw polygamy).

<sup>12</sup> See Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 Wm. & Mary L. Rev. 995, 1041-50 (1992). For a discussion of the line drawing between religious and secular education in a different era, see Sarah Barringer Gordon, "FREE" RELIGION AND "CAPTIVE" SCHOOLS: PROTESTANTS, CATHOLICS, AND EDUCATION, 1945-1965, 2007, 56 DePaul L. Rev. 1177 (2007) (describing the role of Catholic schools in providing public education, and the resulting Catholic-Protestant divisions over the practice).

<sup>13</sup> For a comprehensive discussion of the role of adoption in reinforcing norms of chastity, see Rickie Solinger, *Wake-Up Little Susie: Single Pregnancy and Race Before Roe v. Wade* (1992).

These views no longer follow so automatically. The average age of marriage has risen into the mid-twenties, ninety percent of adults will engage in sexual intercourse before they enter more permanent unions, and the length of time between the beginning of sexual activity and marriage has reached seven years for women, more for men.<sup>14</sup> Managing sexuality has accordingly become more critical in many parts of the country than deterring intercourse and, indeed, a majority of adults and a supermajority of those between 18 and 29 no longer object to extramarital intercourse at all.<sup>15</sup> Moreover, a marriage prompted by an improvident teen pregnancy is unlikely to endure or, if the effect is to derail the parents' formal education, to provide a solid financial foundation for childrearing. Accordingly, introduction to effective contraception has become an important part of the transition to adulthood, and, for many, abortion rather than marriage or adoption is the necessary fallback.

These shifting views, however, directly threaten the religious teachings that once underlay the secular as well as sectarian approaches to family values. If sex outside of marriage is immoral, and marriage is the institution designed by heavenly mandate for procreation, how can society tolerate divergent views on beliefs so central to the definition of a "good life?" The differences go to the core of the views that mark adherence to faith, and the stakes include the ability to influence the life patterns and beliefs of the next generation. As a result, the deeply religious and secular part of the country have grown apart on such basic issues as:

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<sup>14</sup> See Naomi Cahn and June Carbone, *Red Families v. Blue Families*, avail. at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1008544](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008544).

<sup>15</sup> See *id.*

- 1) the best approach to teen parenting: assertion of authority v. open communication and negotiated solutions;<sup>16</sup>
- 2) the existence of homosexuality as a chosen (and immoral) lifestyle or innate characteristic;<sup>17</sup>
- 3) the role of sexuality as a natural activity to be managed for mutual enjoyment or as sinful pleasure necessarily restricted to marriage;<sup>18</sup>
- 4) the existence of gender differences as fixed and important to the proper ordering of family life, or as socially constructed, unnecessary and malleable;<sup>19</sup>
- 5) the acceptability of abortion as a responsible decision not to bear a child in less than ideal conditions or its rejection as the self-indulgent act of a woman unwilling to bear the consequences of “sinful” behavior;<sup>20</sup>
- 6) the role of the state as neutral among competing definitions of the good or necessary to reinforce the fragile underpinnings of the discipline necessary to realize the promise of Western civilization.<sup>21</sup>

These differences are differences of belief, culture, style, and personality. To a degree, they may reflect genetic predisposition.<sup>22</sup> They certainly involve differences in cultural teaching and inheritance. They also play out on regional and racial lines, with urban and rural variations. And they may be self-perpetuating. To continue to insist on traditional moral teachings requires marriage relatively soon, if not before, the beginning of sexual activity. Early marriage, in turn, requires emphasis on abstinence, and stigmatizing non-marital activity. Early marriage, however, may shortchange educational opportunities, and increase the risk of divorce,<sup>23</sup> which can contribute to greater poverty for the next generation. These experiences may in turn fuel greater urgency in reinforcing traditional values. And both early marriage and traditional values emphasize

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<sup>16</sup> See infra notes and accompanying text.

<sup>17</sup> See infra notes and accompanying text.

<sup>18</sup> See infra notes and accompanying text.

<sup>19</sup> Although this article focuses less on attitudes toward gender differences, they are an important component of traditionalist worldviews. See Kristin Luker, *Abortion and The Politics of Motherhood* (1985).

<sup>20</sup> See infra notes and accompanying text.

<sup>21</sup> See infra notes and accompanying text.

<sup>22</sup> See infra nn. (discussing Hibbing et al.).

<sup>23</sup> See David Popenoe and Barbara Dafoe Whitehead, *Ten Things Teens Should Know about Marriage* (2003), avail. at <http://marriage.rutgers.edu/Publications/SourcesThings4Teens.htm> (nothing that teens who marry may be 200-300% more likely to get divorced than those who marry at a later age).



gendered family roles, and deference to external authority rather than education that enhances autonomy and the ability to manage choice.

This paper examines the role of religion in reinforcing conflicting approaches to fundamental cultural values that, in turn, affect the family lives of Americans. Families who live in red and blue states are experiencing divergent life patterns, and religion affects the development of these patterns. Frequency of church attendance has been tied to likelihood of marriage,<sup>24</sup> and, as this paper shows, has been profoundly influential in approaches to teen sexuality. Religion decreases the opportunity for dialogue and compromise on these issues because, as Section Two discusses, people use underlying values -- such as religion -- as a way of helping them decide about social issues such as gay marriage and teen pregnancy. For those who interpret information through a pre-existing worldview, more information will not affect the approach to deeply contested issues. The central part of the paper examines conflicting approaches to the deeply divisive issue of abstinence education, demonstrating how religion contributes to the conflict in perspectives. Finally, the paper explores potential means for resolving these cultural tensions or at least for managing them within a federal system that maintains fidelity to the rule of law.<sup>25</sup> Ultimately, the paper argues that changing religiously influenced laws, such as those supporting abstinence education, is as much a political and social process as a legal one.

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<sup>24</sup> See, e.g., W. Bradford Wilcox, *Religion, Race, and Relationships in Urban America* (2007), available at <http://center.americanvalues.org/?p=57>.

<sup>25</sup> See Paul Callister, *Identity and Market for Loyalties Theories: The Case for Free Information Flow in Insurgent Iraq*, 25 *St. Louis U. Pub. L. Rev.* 123 (2006) (on the relationship between identity and the rule of law (SSRN). There is always the risk, of course, as with the abortion cases that to the extent citizens feel they must choose between adherence to an immoral or unjust law and their individual consciences, the rule of law itself will be the casualty. Callister makes the point that the danger is particularly great when the issue goes to the core of identity, which we will argue that it does here.

## II. RELIGION, POLITICS, AND CULTURE: A TIME OF DIVISION?

The relationship between religion and politics is historically thick and complex. In contemporary America, scholars are providing increasingly rich exploration of how religion shapes political campaigns, using sociological, demographic, and psychological data. Legislation on social issues, such as gay marriage, teenage abortion, and abstinence education has shown the influence of various religious values at both the state and federal level. Several researchers have suggested that political efforts to appeal to certain religious groups is contributing to a dichotomization of American culture, rather than mediating between extreme positions.<sup>26</sup> As this research and legislation suggest, American society may be developing two different approaches to social issues, one that claims to be grounded in religious and moral values, while another that claims to be reflecting the dramatic changes that are occurring to the American family. Social science techniques deepen understanding of the phenomenon, and these studies emphasize that the modern role of religion in American politics has changed markedly.

First, the religious divide has become much less one between religions, and much more one between traditionalists and modernists. David Campbell, in his summary of these developments, emphasizes that whereas political identification once followed religious lines – Catholics tended to vote Democratic, mainstream Protestants for the Republicans – today, the more important differences are those between the devout and

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<sup>26</sup> E.g., EDWARD L. GLAESER AND BRYCE A. WARD, MYTHS AND REALITIES OF AMERICAN POLITICAL GEOGRAPHY, HARVARD INSTITUTE ON ECONOMIC RESEARCH, Discussion Paper No. 2100, January 2006 (concluding that American political divisions have reverted to their pre-New Deal form, and have become increasingly religious and cultural). See also John W. Evans, Have Americans' Attitudes Become More Polarized?—An Update, 84 SOC. SCI. Q. 71 (2004); (concluding that activists have become more partisan and polarized on values issues); MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, CULTURE WAR? THE MYTH OF A POLARIZED AMERICA. (2004)(disputing the polarization thesis and maintaining that public attitudes have been remarkably stable).

the less observant.<sup>27</sup>

These differences have played out in the most recent elections. The Pew Forum on Religion & Public Life has found that, of people who attend religious services more than once per week, 38% voted Democratic, and 60% voted Republican, a number that remained consistent in 2002, 2004, and 2006.<sup>28</sup> Among people who never attend religious services, 67% vote Democratic, compared to 30% who vote Republican.<sup>29</sup> Among white Protestants, 37% voted Democratic, 61% Republican in 2006, a gap that narrowed from 30% Democratic and 68% Republican in 2002.<sup>30</sup>

Second, the devout may differ from others in worldviews attributable to more than time spent in church or even intensity of beliefs. James Hunter observes that traditionalists in almost all religions seek an "external, definable, and transcendent authority."<sup>31</sup> Indeed, the National Election Survey further identifies traditionalist voting patterns in accordance with responses to four statements that emphasize openness to change and attitudes toward family values:

- (1) The world is always changing and moral values should adjust to those changes.
- (2) The newer lifestyles are contributing to the breakdown of our society.
- (3) We should be more tolerant of people who choose to live according to their own moral standards, even if they are very different from our own.
- (4) This country would have many fewer problems if there were more emphasis on traditional family ties.<sup>32</sup>

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<sup>27</sup> David E. Campbell, What Social Science Has To Say About The Culture War, 15 Wm. & Mary Bill of Rts. J. 59, 64 (2006) (describing a "devotional divide" in which 67% of those who attended services once a week or more voted Republican in 2004 in comparison with 47% of those who attended services less often).

<sup>28</sup> Religion and the 2006 Elections, available at <http://pewforum.org/docs/index.php?DocID=174>.

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> James Davison Hunter, Culture Wars? The Struggle to Define America 44 (1991).

<sup>32</sup> NES 2004 Post Election Questionnaire, <http://www.umich.edu/nes/studypages/2004prepost/2004prepost.htm> (follow "Post-election" hyperlink) (last visited Aug. 27, 2007). Campbell reports that: "Only twenty-four percent of people who score in the bottom quartile of the traditionalism index voted for Bush in 2004, compared to fifty-five percent in the second quartile, seventy-three percent in the third, and eighty-four percent in the top quartile. When we compare level of traditionalism versus religious

Third, these differences in attitudes may correspond to genetic predispositions toward change and authority. Religious and political identification (Republicans v. Democrats, Protestants, Jews) is often a product of parental influence and upbringing.<sup>33</sup> The choice of more fundamentalist positions within a party or religion, however, is more likely to reflect individual preferences and personalities. In an innovative study of the relationship between genes and politics, three political scientists compared identical and fraternal twins to differentiate the effect of environment from genetics in the development of political attitudes.<sup>34</sup> The researchers concluded that: “Genetics accounts for approximately half of the variance in ideology, while shared environment including parental influence accounts for only 11%.”<sup>35</sup>

To reach this conclusion, the study used data on the responses of identical and fraternal twins to 28 different issues, ranging from school prayer to federal housing, and

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tradition, it is clearly traditionalism that makes the difference. Among Protestants, in fact, denomination makes no difference once traditionalism is taken into account. When we look at both evangelical and mainline Protestants, eighty-nine percent who scored in the highest quartile of moral traditionalism voted for Bush.”

<sup>33</sup> John R. Alford, Carolyn L. Funk, and John R. Hibbing, Are Political Orientations Genetically Transmitted?, 99 Am. Pol. Sci. Rev. 153, 157, 160 (2005)(group identification, e.g., the children of Methodists tend to be Methodists, reflects parental socialization in contrast with views on particular issues).

<sup>34</sup> Alford, et al., supra, at 164; for a mild critique, see Barry Burden, The Genetic Bases of Political Attitudes, [http://www.iq.harvard.edu/blog/pb/2005/10/the\\_genetic\\_bases\\_of\\_political\\_1.html](http://www.iq.harvard.edu/blog/pb/2005/10/the_genetic_bases_of_political_1.html) (“The process by which specific attitudes are shaped by genetics, therefore, remains largely a black box.”). See also John Hibbing and John Alford, Accepting Authoritative Decisions: Humans as War Cooperators, 48 Am. J. Pol. Sci. 62 (2004); John Orbell, et al., Machiavellian Intelligences a Basis for the Evolution of Cooperative Dispositions, 98 AM. Pol. Sci. Rev. 1 (March 2004). For an argument against their conclusions, see Why Twin Studies Are Problematic for the Study of Political Ideology: Rethinking *Are Political Orientations Genetically Transmitted?*

Elizabeth Suhay and Nathan Kalmoe, Department of Political Science, University of Michigan and Christa McDermott Department of Psychology, University of Michigan DRAFT, 1 July 2007, Paper prepared for the International Society of Political Psychology annual meeting in Portland, Oregon, July 3-7, 2007.

<sup>35</sup> Alford, Funk, and Hibbing, supra note \_\_, at 158-160. Like others who have engaged in twin research, the researchers’ basic premise is that because identical (monozygotic) twins are more genetically similar than dizygotic twins, then with respect to a “trait that is at least partly heritable the tendency for [mz] twins to share that characteristic should be stronger than the tendency for [dz] twins.” Id. at 155. See also John R. Alford and John R. Hibbing, The Origin of Politics: An Evolutionary Theory of Behavior, 2 Perspectives on Politics 707 (2004).

then coded the responses as “conservative” or “liberal.”<sup>36</sup> The researchers observe that while political issues and configurations vary considerably over time, basic divisions between liberal and conservatives perspectives are remarkably persistent.<sup>37</sup> They accordingly posit two basic – and heritable – political orientations. The first, which the researchers call “absolutist,” involves:

a relatively strong suspicion of out-groups (e.g., immigrants), a yearning for in-group unity and strong leadership, especially if there is an out-group threat (“Do not question the President while we are at war with terrorists”), a desire for clear, unbending moral and behavioral codes (strict constructionists), a fondness for swift and severe punishment for violations of this code (the death penalty), a fondness for systematization (procedural due process), a willingness to tolerate inequality (opposition to redistributive policies), and an inherently pessimistic view of human nature (life is “nasty, brutish, and short”).<sup>38</sup>

The second, more “contextualist,” orientation is characterized by:

Relatively tolerant attitudes toward out-groups, a desire to take a more context-dependent rather than rule-based approach to proper behavior (substantive due process), an inherently optimistic view of human nature (people should be given the benefit of the doubt), a distaste for preset punishments (mitigating circumstances), a preference for group togetherness but not necessarily unity (“We can all get along even though we are quite different”), suspicion of hierarchy, certainty, and strong leadership (flip-flopping is not a character flaw), an aversion to inequality (e.g., support for a graduated income tax), and greater general empathic tendencies (rehabilitate, don’t punish).<sup>39</sup>

They suggest that, to the degree that that political divisions correspond to these basic differences in orientation, they are likely to be more intractable than disagreements over policy.<sup>40</sup> Their conclusions are supported by neurobiological research on brain processes, which show that conservatives like order and consistency and are better able to

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<sup>36</sup> Alford, Funk, and Hibbing, *supra* note -, at 158 (explaining methodology), at 164-65 (describing cross-cultural packages of issues considered liberal or conservative).

<sup>37</sup> *Id.* at 164.

<sup>38</sup> *Id.* at 164-65.

<sup>39</sup> *Id.* at 165.

<sup>40</sup> *Id.* at 165-66.

block out potentially distracting information, while liberals are better able to tolerate ambiguity and are more open to new information.<sup>41</sup>

Fourth, given these differences in orientation, the rhetoric and style of political debate has the potential to diffuse or inflame divisions. Linguist George Lakoff, combining Norm Chomsky's research on the deep structure of linguistics with more recent neuroscience findings, argued in his book *Moral Politics* that liberals and conservatives view the world through different metaphors about the relationship between the state and its citizens, and that these metaphors involve deeply rooted patterns of perception. The language of political discourse then frames issues, consciously or unconsciously, in ways that trigger the metaphors, and the metaphors produce associated reactions that may have relatively little to do with the specific statement that triggered the response.<sup>42</sup>

Lakoff maintains that the contrasting metaphors track the paradigm role of parents with the family.<sup>43</sup> Conservatives celebrate the "strict father" while liberals place greater value on the "nurturing mother." Those who share the Strict Father mentality see the world as dangerous; children need to be protected, and it is the responsibility of the strict father to impose discipline on his children.<sup>44</sup> Children are born bad and learn through punishment.<sup>45</sup> By contrast, the nurturant parent mentality views the world as basically

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<sup>41</sup> See Denise Gellene, Researchers Find Left-Wing Brain, Right-Wing Brain, L.A. Times, Sept. 10, 2007, at A11.

<sup>42</sup> GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2D ED. 2002).

<sup>43</sup> GEORGE LAKOFF, *DON'T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE* (2004); *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2d ed. 2002).

<sup>44</sup> *Moral Politics*; <http://www.rockridgeinstitute.org/projects/strategic/nationasfamily/sfworldview>.

<sup>45</sup> Interview of George Lakoff (2003), [http://www.berkeley.edu/news/media/releases/2003/10/27\\_lakoff.shtml](http://www.berkeley.edu/news/media/releases/2003/10/27_lakoff.shtml).

safe, with parents responsible for nurturing their children with empathy and responsibility.<sup>46</sup>

Fifth, when political issues are framed in these terms, practically or metaphorically, they engender deeply held beliefs. Such beliefs are less susceptible to argument, logic, or facts. Indeed, cultural research suggests that within such arenas when empirical data conflicts with these beliefs, people reinterpret or deny the empirical findings rather than changes their views.<sup>47</sup> Consequently, when many people are confronted with new scientific information on issues that are “culturally disputed . . . men and women in white lab coats speak with less authority than (mostly) men and women in black frocks.”<sup>48</sup> Attitudes toward homosexuality provide a clear example of this phenomenon. Twice as many liberals as conservatives say that people are born homosexual, and 73% of committed white evangelicals think homosexuals can change their sexual orientation in contrast with two-thirds (66%) of seculars of all races who state that homosexuality cannot be changed.<sup>49</sup> The relationship between politics and the pulpit, with Protestant fundamentalist clerics emphasizing the evils of homosexuality more than mainline Protestant ministers or clergy in other religions, may reinforce cultural predispositions that are relatively impervious to change.<sup>50</sup> New information on, for example, the genetic basis of homosexuality is thus likely to reinforce the beliefs of

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<sup>46</sup> Moral Politics; <http://www.rockridgeinstitute.org/projects/strategic/nationasfamily/npworldview>

<sup>47</sup> See, e.g., Donald Braman, Dan M. Kahan, and James Grimmelman, Modeling Facts, Culture, and Cognition in the Gun Debate, 18 Soc. J. Res. 283 (2005); Dan M. Kahan and Donald Braman, Cultural Cognition and Public Policy, 24 Yale Law & Policy Rev. 147, 163 (2006). see more generally <http://research.yale.edu/culturalcognition/>.

<sup>48</sup> Kahan and Braman, supra note \_\_, at 165.

<sup>49</sup> THE PEW FORUM ON RELIGION AND PUBLIC LIFE, RELIGIOUS BELIEFS UNDERPIN OPPOSITION TO HOMOSEXUALITY (2003), <http://pewforum.org/docs/index.php?DocID=37>.

<sup>50</sup> Id. This does not necessarily mean, however, that causality is uni-dimensional. As Kristin Luker observed, parishioners may seek out churches whose “sexual teachings support their own values, especially when they feel that their values were increasingly under assault in the larger culture.”<sup>50</sup> Kristin Luker, When Sex Goes to School 95-96 (2006).

those predisposed to tolerance rather than change the attitudes of those who see the conduct as an immoral choice.<sup>51</sup>

While the tendency to filter data through existing belief systems is true of most human convictions, it may be particularly true of religious practices. Scott Atran observes that one of the keys to understanding the role of religion is recognizing that religious belief requires taking "what is materially false to be true" and "what is materially true to be false."<sup>52</sup> Rituals are critical to reinforcing such beliefs.

Anthropologist Richard Sosis maintains that while both secular and religious rituals promote cooperation, religious rituals "generate greater belief and commitment" precisely because they depend on belief – and thus emotion -- rather than logic or proof.<sup>53</sup>

Emotional commitment, Sosis believes, is deeper and longer-lasting than reason.<sup>54</sup> It is also harder to question and, once instilled, harder to alter. These qualities, of course, make religion invaluable not only in instilling partisan loyalties, but also in encouraging responsible behavior.

Finally, political scientists who study the level of polarization in American politics find that while the views of the electorate have been remarkably stable over the last forty years, activists have become more partisan and more energized by issues

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<sup>51</sup> The science on this point remains speculative, however, with intriguing suggestions about the biological basis of homosexuality that do not, at this point, provide conclusive evidence about its etiology. See Anthony F. Bogaret, et al, Biological Versus Nonbiological Older Brothers and Men's Sexual Orientation, 103 *Proceedings of the National Academy of Sciences* . 10771 (2006)(summarizing literature and concluding that birth of older brothers increase incidence of male homosexuality).

<sup>52</sup> Henig, supra note \_\_. See also Scott Atran and Ara Norenzayan, [Religion's Evolutionary Landscape: Counterintuition, Commitment, Compassion, Communion](#), 27 *Beh. and Brain Sci.* 713 (2004).

<sup>53</sup> For an empirical test of this proposition, see Bradley Ruffle and Richard Sosis, "Does it Pay to Pray? Costly Ritual and Cooperation," 7 *B.E. Journal of Economic Analysis and Policy* 1 (2007) (religious males in Israel are more likely to cooperate than secular males).

<sup>54</sup> Henig, supra note .



associated with “moral values.”<sup>55</sup> These are the issues that have become critical to the political distinctions between the devout and less devout, traditionalists and modernists, absolutists and contextualists, strict fathers v. nurturing mothers. Abortion provides a paradigmatic example.<sup>56</sup> Linguist George Lakoff explains:

There are two classical kinds of cases [of women who want abortions]. Unmarried teenage girls who have been having sex but have been careless or ignorant in the matter of birth control; women who want careers or independence lives . . . .According to Strict Father morality, an unmarried teenage girl should not be having teenage sex at all. . . . She has to be responsible for the consequence of her actions if she is to learn from her mistakes. An abortion would simply sanction her immoral behavior. In both of the classical stereotypical cases, abortion violates Strict Father morality.<sup>57</sup>

These findings suggest that issues that fall on the dividing lines between the devout and the secular, and that evoke distinctions between more authoritarian and flexible political orientations, are likely to be among the more divisive topics on the political landscape.<sup>58</sup> They are likely to be even more intense if either group finds that a

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<sup>55</sup> For a summary of the extensive political science literature on these issues, see DELIA BALDASSARRI AND ANDREW GELMAN, PARTISANS WITHOUT CONSTRAINT: POLITICAL POLARIZATION AND TRENDS IN AMERICAN PUBLIC OPINION, June 13, 2007, <http://www.stat.columbia.edu/~gelman/research/unpublished/BGpolarization4.pdf> (finding polarization on moral issues largely non-existent forty years ago, greater polarization today on moral issues among the better educated and more politically active, and polarization on moral issues increasing much more dramatically in since the mid-eighties) and EDWARD L. GLAESER AND BRYCE A. WARD, MYTHS AND REALITIES OF AMERICAN POLITICAL GEOGRAPHY, HARVARD INSTITUTE ON ECONOMIC RESEARCH, Discussion Paper No. 2100, January 2006 (concluding that American political divisions have reverted to their pre-New Deal form, and have become increasingly religious and cultural). See also John W. Evans, Have Americans’ Attitudes Become More Polarized?—An Update, 84 SOC. SCI. Q. 71 (2004); MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, CULTURE WAR? THE MYTH OF A POLARIZED AMERICA. (2004).

<sup>56</sup> Abortion, however, does not have a single, fixed political meaning. For a discussion of the transformation of the abortion use from one that primarily concerned observant Catholics to a broader symbol of changing family roles, see Robert Post and Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, \_\_ HARV. C.R.-C.L. REV. (forthcoming 2007). See also Evan, supra note \_\_, at 17 (reporting that findings of polarization on the issue of abortion in various studies since the mid-eighties).

<sup>57</sup> Lakoff, Moral Politics, supra note \_\_, at 267-68.

<sup>58</sup> David Barnhizer suggests that the law, and courts, are at the center of the “seismic” cultural conflict, and that there has been little reasoned discourse from intellectuals on these issues. David Barnhizer, Ideology, Propaganda and Legal Discourse in the Argument Culture (2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=975256](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975256). While law is central – control of national appropriations on teen education, for example, helps determine what teens actually learn – we see law as

particular issue goes to the core of its belief system. Sexuality, particularly in the context of teen education about contraception, is one such area. It thus poses difficult dilemmas in separating reasonable public policy choices from the imposition of religious – and partisan – views about the content of the good life.

The results of the 2004 election suggest that these differences in worldview have become important political markers. In 2004, President Bush’s religious supporters were far more likely to emphasize the importance of social issues, while John Kerry’s supporters focused on economic issues.<sup>59</sup> And, among Bush’s religious constituencies, most asserted that their faith was “more or about as important as other factors in their voting decision.” In contrast, “a majority of Kerry’s religious constituencies reported that their faith” was less important.<sup>60</sup> In red states, that is, the states that voted Republican, 51 percent of voters identified themselves as evangelical or born again, while the rate in blue states was 22 percent.<sup>61</sup> Indeed, one possible basis for George Bush’s win in 2004 was his appeal to traditional American values, an appeal that helped him win the red states.<sup>62</sup>

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the result, rather than the catalyst, of the conflict. The laws that exist reflect certain values; while they may promote the development of, or revolution against, those values, they exemplify the values of the winning position. Moreover, we see more reasoned analysis from within and outside of the academy than does Professor Barnhizer.

<sup>59</sup> <http://pewforum.org/docs/index.php?DocID=64>

<sup>60</sup> John C. Green et al., *The American religious Landscape and the 2004 Presidential Election: Increased Polarization* 13, avail. at <http://pewforum.org/publications/surveys/postelection.pdf>.

<sup>61</sup> Alan Abramowitz and Kyle Saunders, *Why Can’t We All Just Get Along? The Myth of a Polarized America*, 3 *The Forum* 1, 13 (2005), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1076&context=forum>. The authors used data from the American National Election Studies and national exit polls.

<sup>62</sup> The question of what determined the 2004 election, and how polarized the public is has engendered substantial commentary. See generally EDWARD L. GLAESER AND BRYCE A. WARD, *MYTHS AND REALITIES OF AMERICAN POLITICAL GEOGRAPHY* 33-34 (2006), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=874977](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=874977) (noting “the continuum of states ranging from the poor conservative places of the south and east to the rich, liberal places of the coasts . . . . [and] that American parties are increasing[sic] oriented around religion and culture rather than economics”); STEVEN ANSOLABEHERE, JONATHAN RODDEN, AND JAMES M. SNYDER, JR., *PURPLE AMERICA* 3 (2005), [http://econ-www.mit.edu/faculty/download\\_pdf.php?id=1266](http://econ-www.mit.edu/faculty/download_pdf.php?id=1266) (challenging the culture war argument and finding that most of the population can be characterized as moderate); Jacob S. Hacker and Paul Pierson, *Off-Center: The Republican Revolution and the Erosion of American*

For those voters who thought moral values were the most important issue in the election, 79% voted for George Bush.<sup>63</sup> This constituency, which carries dramatically more clout in “red state” legislatures, also determines the content of state level policies toward the always contentious issue of sex education.<sup>64</sup>

### III. RELIGION AND THE CREATION OF CULTURE: THE CASE OF ABSTINENCE EDUCATION

The regulation of sexuality has long been an area of contention,<sup>65</sup> but it has not always been an arena of political contention.<sup>66</sup> It is today. State legislatures have increasingly tended to regulate teen sexuality, prescribing sex education curricula, access to contraception, and availability of abortion. As the attached chart shows, states legislatures have been active over the last ten years, and they vary considerably in their adoption of laws regulating access to abortion, the morning after pill, parental involvement in teen decision-making, and the content and availability of sex education in

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Democracy 42 (2005)(Republican partisan tactics, not a change in concern about moral values, determined the 2004 election).

<sup>63</sup> CBS News, Moral Values: A Decisive Issue?

<http://www.cbsnews.com/stories/2004/11/03/60II/main653593.shtml>; but see David Brooks, The Value-Votes Myth,

<http://www.nytimes.com/2004/11/06/opinion/06brooks.html?ex=1257483600&en=b4613533d9a1bdde&ei=5090&partner=rssuserland>

<sup>64</sup> We take no position on the 2004 election, except to note that it helps identify differences in world view that correspond to different positions on abstinence education. For the connection, however, between the 2004 vote and religious views, see John C. Green and Mark Silk, Why Moral Values Did Count, 8 RELIGION IN THE NEWS (2005),

<http://www.trincoll.edu/depts/csrpl/RINVol8No1/WhyMoral%20ValuesDidCount.htm>.

<sup>65</sup> For a classic debate on these issues, compare Patrick Devlin, The Enforcement of Morals 11 (1972) (arguing for the enforcement of laws against homosexuality and prostitution on the ground that “every society has the right to conserve its own traditions, to preserve the practices that are distinctive to its culture”) with H.L.A. Hart, Law, Liberty, and Morality 51, 52 (1963) (maintaining that the identification of fundamental values is fraught with peril and that societies can change without disintegrating).

<sup>66</sup> E.g., the Supreme Court observed in *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986), that until 1961, all fifty states had laws banning sodomy. See Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986). When the Court reversed *Bowers* in *Lawrence v. Texas*, it did so emphasizing that the laws against sodomy were not necessarily directed at same-sex sodomy, but at all non-procreative sexual activity, 539 U.S. 558, 569-70 (2003), and that an “emerging awareness” had changed attitudes toward regulation of sexual activity between consenting adults. *Id.* at 572.

public schools. Examining the relationship between adolescent sexuality and religion makes sense on a variety of different levels. As Mark Regnerus points out: “religion— together with peers, parent, and the media—remains a primary socialization agent of children and adolescents . . . [And] sex is a sphere of human behavior high in religious applicability . . . it is a topic that has more religious relevance—or is more clearly addressed in most religious traditions – than many other topics.”<sup>67</sup>

Not surprisingly, then, sex education has become a particularly contentious issue. Comprehensive sex education (also called “abstinence-plus”<sup>68</sup>), which includes information about birth control as well as abstinence, can be contrasted with abstinence education, which is concerned with only one type of sex education. Abstinence education has been federally funded in the public schools since at least 1981, when Congress enacted the Adolescent Family Life Act (AFLA).<sup>69</sup> The AFLA, which received \$30.6 million in funding in 2006, focuses generally on adolescent sexuality issues, including pregnancy and parenting.<sup>70</sup> The AFLA itself explicitly approves of, and solicits, the involvement of religious organizations in its programs on teen sexuality.<sup>71</sup> Since 1997, notwithstanding its original mandate, all AFLA prevention have centered on abstinence education.<sup>72</sup>

Abstinence education is funded through two additional sources. Title V of the Social Security Act, enacted as part of the 1996 Welfare Reform Act, included

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<sup>67</sup> Mark D. Regnerus, *Forbidden Fruit: Sex & Religion in the Lives of American Teenagers* 6-7 (2007). J

<sup>68</sup> Abstinence-plus is the common term for comprehensive sex education (a google search on September 6, 2007 for the term abstinence-plus found 23,000 items).. See, e.g., Carmen Solomon-Fears, *Reducing Teen Pregnancy: Adolescent Family Life and Abstinence Education Programs* 6 (2004), avail. at <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS2087310042004.pdf> (CRS Report for Congress).

<sup>69</sup> P.L. 97-35, (now codified at 42 U.S.C. 300z (2007)).

<sup>70</sup> See <http://opa.osophs.dhhs.gov/titlexx/oapp.html>.

<sup>71</sup> *Bowen v. Kendrick*, 487 U.S. 589, 606 (1988).

<sup>72</sup> Solomon-Fears, *supra* note \_\_, at 3.

appropriations specifically designed for abstinence education programs, and the legislation defined abstinence education as:

an educational or motivational program that:

- (A) Has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;
- (B) Teaches abstinence from sexual activity outside marriage as the expected standard for all school age children;
- (C) Teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;
- (D) Teaches that a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity;
- (E) Teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects;
- (F) Teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society;
- (G) Teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and
- (H) Teaches the importance of attaining self-sufficiency before engaging in sexual activity.<sup>73</sup>

Congress has allocated additional funds for abstinence education through appropriations for Community-Based Abstinence Education (CBAE),<sup>74</sup> requiring that all programs teach every one of the items listed within the definition of abstinence education.<sup>75</sup> CBAE funding is provided directly to recipient organizations, unlike Title V funding, which is provided to the state.<sup>76</sup> Since 1997, all of the Adolescent and

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<sup>73</sup> 42 U.S.C. 710(b)(2), a definition that has remained virtually unchanged since 1996. [Pub.L. 104- 193, Title IX, § 912](#), 110 Stat. 2353 (1996).

<sup>74</sup> Carmen Solomon-Fears, CRS Report for Congress, Reducing Teen Pregnancy Adolescent Family Life and Abstinence Education Programs, Jan. 3, 2007; Legal Momentum, An Overview of Federal Abstinence only Funding 8 (2007), <http://www.legalmomentum.org/legalmomentum/publications/OverviewofAbs.pdf>

<sup>75</sup> Amy Bleakley, et al., Public Opinion on Sex Education in US Schools, 160 Arch Pediatric Adolesc. Med. 1151, 1151-1152 (2006).

<sup>76</sup> Christopher Trenholm et al, Impacts of Four Title Vi, Section 510 Abstinence Education Programs, Final Report 3 (2007), <http://www.mathematica-mpr.com/publications/PDFs/impactabstinence.pdf>.

Family Life prevention projects have been abstinence only projects that complied with the definition in the Welfare Reform Act.<sup>77</sup>

The amount of government funding for abstinence education increased from \$10 million in 1997 to \$167 million in 2005<sup>78</sup> to \$177 million in 2007.<sup>79</sup> This funding is having an effect, at least on what is being taught. Adolescents were far more likely to receive sex education that included only abstinence education in 2002 than in 1995.<sup>80</sup>

These programs address an issue – the regulation of adolescent sexuality – that for many of the reasons discussed above is intrinsically divisive, and they do so in a way that involves the fault line between religious and secular understandings, appeals to absolute versus contextual values, the reaffirmation of authority rather than empathy or autonomy.<sup>81</sup> Moreover, abstinence education addresses a divide not only in symbolic values, but as a practical component in the different understandings of the transition to adulthood. Accordingly, abstinence only education is a cultural flash point, and a locus for considering the role of religion in political and cultural conflicts. These conflicts play out at two levels: ideological identification along traditionalist

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<sup>77</sup> <http://www.hutchison.senate.gov/RS20873.pdf>

<sup>78</sup> Laura Duberstein Lindberg, John S. Santelli, and Susheela Singh, *Changes in Formal Sex Education: 1995-2002*, 38 *Perspectives on Sexual and Reproductive Health* (2006), available at <http://www.guttmacher.org/pubs/journals/3818206.html>.

<sup>79</sup> Carmen Solomon-Fears, *Scientific Evaluation of Approaches to Prevent Teen Pregnancy* 4 (2007), avail. at [http://openrcs.cdt.org/rpts/RS22656\\_20070501.pdf](http://openrcs.cdt.org/rpts/RS22656_20070501.pdf).

<sup>80</sup> *Id.* The authors report that the percentage of males receiving only such education increase from 9% to 24% [and for] females, from 8% to 21%.”

<sup>81</sup> Even contentious issues, however, have more versus less divisive components. As Mary Ann Glendon observed in *Abortion and Divorce in Western Law*, European legislatures tended to limit abortion to cases necessary to save the life of the mother, but permitted implementation that treated emotional distress at the prospect of carrying the child to term as a threat to the mother’s health. The result permitted extension of the practice without the “moral affront” to those who opposed abortion in principle. It can also be termed hypocritical in shielding the practice from public view.

versus contextualist lines, and geographic differences in the socialization of the next generation.

#### A. Sex as an Ideological Marker

All societies regulate sexuality, and instillation of norms channeling sexual energy requires considerable societal effort.<sup>82</sup> Nonetheless, these efforts do not always command consensus support. Kristin Luker, in her fascinating examination of the approaches of several communities to sex education, found a “chasm, wide and growing wider, between the *sexual* right and left.”<sup>83</sup> She was trying to understand why people, raised in the same general cultural environments, become sexual liberals or sexual conservatives.<sup>84</sup> She characterized sexual conservatives, who typically opposed sex education other than abstinence education, as “Old Testament types . . . [who] believe in a moral code derived from God, not man,” while sexual liberals, who favored more comprehensive forms of sex education, “have a more forgiving view of morality.”<sup>85</sup> Consequently, for sexual conservatives, nonmarital sex is “wrong because the Bible says it is,”<sup>86</sup> while liberals are more fact oriented. Sexual liberals tended to see their opposition, in non-neutral terms, as “Christian.”<sup>87</sup> Sexual conservatives were, in fact, more likely to attend church, and to attend theologically conservative churches at that,<sup>88</sup> but Luker emphasizes the complex relationship between sex and religion. She observes

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<sup>82</sup> See, e.g., Gerda Lerner, *The Creation of Patriarchy* 106-09 (Oxford University Press 1986); Sarah Blaffer Hrdy, *Mother Nature: Maternal Instincts and How They Shape the Human Species* 252 (2000) (the rise of monogamy required “elaborate modes of socialization, rituals, and whole mythologies . . . to endorse male control over the inconvenient sexual legacy that women inherited from their primate ancestors.”)

<sup>83</sup> Kristin Luker, *When Sex Goes to School* 91-91 (2006) (emphasis in original).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 184, 92

<sup>86</sup> Luker, at 156.

<sup>87</sup> *Id.* at 124.

<sup>88</sup> Luker, *supra* note -, at 144.

that sexual conservatives actively sought churches whose sexual teachings supported their own, “especially when they felt their values were increasingly under assault in the larger culture.”<sup>89</sup> In contrast, sexual liberals, even if they were church attending Christians, tended to regard the sexual conservatives as narrow-minded and intolerant<sup>90</sup> and to prefer neighborhoods and congregations closer to their own views.

Taking these differences together, Luker concluded that sex, for the conservatives, is sacred, while, for the liberals, it is natural.<sup>91</sup> Sacred sex requires formal structures such as marriage to protect it. Sexual conservatives accordingly champion the unity of sex, marriage and procreation, with marriage as the institution ordained by God to unite sexual pleasure with responsible family life and sex outside marriage sinful and profane.<sup>92</sup> Natural sex, in contrast, is to be enjoyed; it needs to be protected from the worry and anxiety that come from sexual restrictions and guilt.<sup>93</sup> For sexual liberals, it is also not a defining component of family life – that rests more heavily on commitment, companionship, communication and mutual respect.<sup>94</sup> Moreover, sexual liberals, with their emphasis on instrumental, contextual moral reasoning, “see no sense in (and are deeply skeptical about) asking young people not to be sexual for a decade or two, if not more.”<sup>95</sup> Precisely because they, too, see marriage as important to realization of a full life, they believe it should come relatively late in life, and not by accident, but by plan.<sup>96</sup>

These differences in attitudes toward sexuality, of course, correspond to more general differences between conservative and liberal, devout and secular orientations.

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<sup>89</sup> Id. at 95-96.

<sup>90</sup> Id. at 124.

<sup>91</sup> Id. at 99.

<sup>92</sup> Id. at 102.

<sup>93</sup> Id. at 100.

<sup>94</sup> Id. at 103, 105.

<sup>95</sup> Id. at 103.

<sup>96</sup> Id.



Most religions, and particularly fundamentalist ones, tend to preach against non-marital sexuality.<sup>97</sup> And if non-marital sexuality is wrong, absolutists believe that schools should take a consistent position against it. They cannot reconcile teaching abstinence with providing information about birth control. As Mark Regnerus found in his comprehensive study of sex education, parents who are “more devoutly religious” are worried that discussing contraception will encourage their children to engage in sexual activities.<sup>98</sup> Moreover, they emphasize the importance of adherence to authority, and reinforcement of the moral order.<sup>99</sup> Conservative churches, in turn, solidify support for raising the priority accorded sexual issues on the political agenda. Sexual liberals, in contrast, emphasize individual autonomy and fulfillment. They see sexual practices along a continuum of possibilities, and education designed to assist the responsible exercise of choice.<sup>100</sup> They place a higher premium on tolerance, and view sexuality *per se* as an issue best addressed outside of the political arena.<sup>101</sup>

The rhetoric surrounding the renewal of Section V funding in 2007 shows these different influences at work. One commenter rued the “seeming reluctance of Christians to speak out about premarital, extramarital and other sexual sin,”<sup>102</sup> while Rep. John Boehner, the Republican Minority Leader, in seeking to extend Title V funding, used a letter from the U.S. Conference of Catholic Bishops warning about the failure to renew

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<sup>97</sup> Gary J. Simson & Erika A. Sussman, Keeping the Sex in Sex Education: The First Amendment’s Religion Clauses and the Sex Education Debate, 9 S. Cal. Rev. L. & Women’s Stud. 265, 284-291 (2000); but see Helen M. Alvare, Saying “Yes” Before Saying “I Do”: Premarital Sex and Cohabitation as a Piece of the Divorce Puzzle, 18 Notre Dame J.L. Ethics, & Pub. Poly 7, 77-82 (2004). SIECUS has charged that “abstinence only-until-marriage” curricula are “based on religious beliefs, rely on fear and shame . . .” Sexuality Information and Education Council of the United States, SIECUS REVIEWS FEAR-BASED, ABSTINENCE ONLY-UNTIL-MARRIAGE Curricula, <http://www.siecus.org/reviews.html> (2005).

<sup>98</sup> Regnerus, Forbidden Fruit, *supra* note \_\_\_, at 204.

<sup>99</sup> Luker, *supra* note \_\_\_, at 136.

<sup>100</sup> Luker, *supra* note \_\_\_, at 104.

<sup>101</sup> *Id.* at 103.

<sup>102</sup> James Regions, Controversy over Abstinence part of Larger Purity Question, Springfield News-Leader, May 8, 2007, at 2B.

the funding.<sup>103</sup> Conversely, the National Abortion and Reproductive Rights Action League rallies opponents of abstinence education around the heading “ideology over science.”<sup>104</sup>

## B. Demography and Anxiety

Ideology and symbolism aside, abstinence education also involves different understandings of the transition to adulthood. While, as Luker underscores, conservative versus liberal divisions exist within all communities, cultural differences play out at the community level in the creation of consensus norms, and states constitute the relevant political units for the implementation of sex education policies.<sup>105</sup> The last election showed states deeply divided, culturally and politically, with the priority given to “moral values,” an important marker of the divisions.<sup>106</sup> These differences correspond, however, not just to different values, but to different underlying patterns in family formation.

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<sup>103</sup> Cheryl Wetzstein, *Abstinence-Only on Shaky Ground; Program funding Threatened Despite Parental Support in Polls*, Wash. Times, May 29, 2007, at A5.

<sup>104</sup> NARAL: Pro-Choice America, <http://www.prochoiceamerica.org/issues/sex-education/>, last visited September 5, 2007.

<sup>105</sup> For a discussion of the relationship between state family law, national constitutional norms and religion, see Vivian Hamilton, *PRINCIPLES OF U.S. FAMILY LAW*, 75 Fordham L. Rev. 31 (2006).

<sup>106</sup> Pollsters included “moral values” for the first time on a list of issues of concern to voters in the 2004 election. Moral values headed the list of voter concerns by a narrow plurality, with Bush voters dramatically more likely to list moral values as their top concern than Kerry voters. The other issues included the economy, terrorism, Iraq, taxes, education, and health care. See CNN.com, *Election Results (2005)*, <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html>. Commentators differed as to the role of moral values in determining the outcome of the 2004 election, but the analysis most closely analyzing the moral values vote identified it, as this article does, with the intensity of religious commitment. John C. Green and Mark Silk, *Why Moral Values Did Count*, 8 RELIGION IN THE NEWS (2005), <http://www.trincoll.edu/depts/csrpl/RINVol8No1/WhyMoral%20ValuesDidCount.htm>. Moreover, in the regions that Bush carried, a higher percentage of *Bush* voters (two-fifths or more) ranked moral values as their top concern, while Kerry carried the regions in which Bush voters ranked moral values as a lesser concern. Accordingly, the moral values vote served as something of regional marker, and did so to a greater degree than other top voter concerns. *Id.*

Nonetheless, the states form something of a continuum, albeit with clear regional differences, particularly in the concentration of Democratic states. We have discussed the divisions elsewhere, identifying the core “blue” or Democratic regions with the New England, mid-Atlantic and West Coast states (California, Oregon and Washington). The rest of the country was red, with the most intensely red

Barbara Dafoe Whitehead has described the changes nationally as new “pathways to adulthood;”<sup>107</sup> we have termed the changes the “new middle class morality.”<sup>108</sup> Increasing emphasis on education has produced, at least for the middle class, later ages of marriage and first birth.<sup>109</sup> The result for the country as a whole is a larger gap between the beginning of sexual activity and marriage. Whitehead reports that the average age of first intercourse for 17 for women, 16 for men, while the average age of marriage is 25 for women and 26 for men.<sup>110</sup> Delaying sexual activity until the mid-twenties (and later for the college educated) is unrealistic at best. The result for sexual liberals, blue states, and the upwardly mobile middle class is greater emphasis on contraception, and in many cases abortion as the fallback.<sup>111</sup> These changes present a direct affront to religious sensibilities, as both sexual practices have changed and community support for tradition moral understandings have atrophied.<sup>112</sup> The results play out along geographic lines. Brad Wilcox reports that, religion aside:

red state teens tend to hail from less-educated, working-class homes where childbearing at an early age is not a big deal and a long-term orientation to life is in short supply. Red state teens seem to feel as if they don't have much to lose if

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areas including the mountain west states of Idaho, Utah, and Wyoming, the central plains (Nebraska, Kansas, the Dakotas, Texas and Oklahoma), the South and border states. Battleground states, in contrast, included the mid-West (e.g., Ohio, Iowa and Pennsylvania), and the Southwest states of New Mexico and Nevada. CNN, *supra*, and Green and Silk, *supra*.

<sup>107</sup> Barbara DaFoe Whitehead, Trends Shaping Youthful Sexuality, <http://www.nplc.org/commonground/papers/whiteheadpaper.htm>.

<sup>108</sup> See June Carbone, “Is Fertility the Unspoken Issue in the Debate Between Liberal and Conservative Family Values?” 3 *Law & Social Inquiry* 809–839 (2007).

<sup>109</sup> For a more thorough consideration of the relationship between class advantage and age of family formation, see Sara McLanahan, Diverging Destinies: How Children are Faring After the Second Demographic Transformation, 41 *J. MARRIAGE & FAM.* 607 (2004)(finding that for the upper quarter of women, determined by education, the average age of first birth has risen from 26 in 1970 to 32 today, and the children born to better educated women are overwhelming raised in two parent families, while the rate of single parent families has increased dramatically for the rest of the population).

<sup>110</sup> *Id.*

<sup>111</sup> For a comprehensive discussion of these changes, see Carbone and Cahn, *Red Families v. Blue Families*, *ssrn*.

<sup>112</sup>

they give in to their passions--especially if sex occurs with someone they view as a potential marital partner. More generally, as Thomas Sowell has observed, the "redneck" culture of the working-class South does not foster restraint in general and, more particularly, in matters sexual.<sup>113</sup>

The great irony is that while red states may be more religious and more committed to traditional values, they are also more likely to produce teen births, early marriage and subsequent divorce. The incongruity then between belief and practice raises the level of cultural anxiety, reinforcing the perceived importance of moral teachings about the unacceptability of non-marital sex.

Moreover, while Luker emphasizes that all communities have sexual liberals and conservatives, the causal factors that Wilcox identifies -- wealth, class, religion, and their corresponding impact on age of family formation and sexual practices -- vary by region.<sup>114</sup> They accordingly contribute to the formation of different underlying understandings in different states. The relationship among the factors is complex; wealthier states produce better educated citizens who are less religious and marry at later ages.<sup>115</sup> They may be wealthier because they are better educated or better educated because they are wealthier, but the factors tend to be reinforcing and self-perpetuating irrespective of the direction in which causality runs. This section examines them in turn in an effort, not to untangle causation, but to create a cultural snapshot of the factors that influence liberal versus conservative attitudes toward abstinence education.

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<sup>113</sup> W. Bradford Wilcox, *Hormonographics*  
Red states, blue states, and sex before marriage, *The Weekly Standard*, May 28, 2007.

<sup>114</sup> See *infra* notes .

<sup>115</sup> See *infra* notes .

Contrary to historical patterns, greater wealth today correlates with greater support for Democrats.<sup>116</sup> The five states with the highest median household income in 2004 were New Jersey, Connecticut, Maryland, Alaska and Massachusetts – all but Alaska were blue states concentrated in the New England and mid-Atlantic regions.<sup>117</sup> The five top states by median family income were about the same: New Jersey, Connecticut, Maryland, Massachusetts and New Hampshire, with Alaska falling to sixth, making the sweep of northeastern states complete.<sup>118</sup>

The poorest states by median household income were West Virginia, Mississippi, Arkansas, Louisiana and Montana (with Kentucky in a dead heat with Montana for the fifth spot), and Mississippi, Arkansas, West Virginia, New Mexico, and Louisiana by median family income.<sup>119</sup> All are red states (though New Mexico only narrowly), and all are concentrated in the South or mountain regions (though New Mexico is more characteristic of the Southwest).<sup>120</sup> The percentages of families below the poverty line shows a similar picture, with the greatest percentages in Mississippi, New Mexico, Louisiana, Arkansas and West Virginia, and the fewest in Minnesota, New Hampshire, Alaska, Vermont and New Jersey (all blue except for Alaska).<sup>121</sup>

The differences in wealth, as Wilcox observes, may influence time horizons: those with more to look forward to may be more likely to postpone immediate pleasures. One

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<sup>116</sup> This does not necessarily mean that individuals with higher incomes are more likely to be Democrats. See Hacker and Pierson, *supra*, at 194-95 (Republican policies tend to favor wealthy elites).

<sup>117</sup> U.S. Census Bureau, The 2007 Statistical Abstract of the United States, [http://www.census.gov/compendia/statab/income\\_expenditures\\_wealth/](http://www.census.gov/compendia/statab/income_expenditures_wealth/). The 2007 Statistical Abstract is the source for the other statistics on wealth and poverty in this paragraph.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

might expect religious observance, with its focus on the hereafter, to push back those time horizons.<sup>122</sup> At a wholesale level, however, it does not.<sup>123</sup> The states with the highest level of religious participation do not, by reason alone, result in either less poverty or delayed childbearing.<sup>124</sup> The five states with the highest level of church attendance are among the poorest and reddest: South Carolina, Louisiana, Mississippi, Utah and Arkansas.<sup>125</sup> Utah is wealthier than the others, and the only state outside the South. The five states with the lowest level of church attendance are Vermont, New Hampshire, Nevada, Maine and Massachusetts -- with all but Nevada in New England, and all but Nevada voting blue (albeit with very close margins in New Hampshire and Nevada).<sup>126</sup>

Age of family formation completes the regional map. The age of legal marriage in most states is 18.<sup>127</sup> In the United States, the median age of marriage for women is 25.1,

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<sup>122</sup> For a different view of the relationship between class and religion, see Candace Alcorta and Richard Sosis, *Rituals, Emotion, and Sacred Symbols: The Evolution of Religion as an Adaptive Complex*, 16 *Human Nature* 323, 339-40, 345 (2005), arguing that greater tests of commitment are imposed on lower status males to maintain religious membership, but that such males also gain more in status from group membership and experience less cognitive dissonance from participation in a society in which they cannot share in higher status..

<sup>123</sup> Of course, the converse may be true. Robert Wurthow indicates that education is the single biggest factor distinguishing religious conservatives from religious liberals, with one in three college graduates believing that the Bible is literally true compared to twice as many of those with high school degrees. Robert Wurthow, *The Restructuring of American Religion: Society and Faith Since World War II* 168-69 (1988). It is, of course, possible that those who are poorer also tend to be less educated and more religious, with shorter time horizons because of their poverty and/or lack of education.

<sup>124</sup> See *infra* nn. 131-32.

<sup>125</sup> The statistics in this paragraph re church attendance are drawn from Appendix A. For the rankings of comparative wealth between states, see U.S. Census Bureau, *Personal Income Per Capita in Current Dollars, 2005*, avail. at <http://www.census.gov/compendia/statab/ranks/rank29.htm>. As to whether a state voted red or blue in 2004, see Cahn and Carbone, *supra* note \_\_.

<sup>126</sup> *Id.*

<sup>127</sup> All but two states require couples to be 18 to marry without parental consent. "Marriage Laws in the United States – By Age, Cool Nurse, [http://www.coolnurse.com/marriage\\_laws.htm](http://www.coolnurse.com/marriage_laws.htm) (May 2003), last visited September 9, 2007.

while for men it is 26.7.<sup>128</sup> This has changed dramatically since 1960, when the median age at first marriage was 20.3 for women, and 22.8 for men.<sup>129</sup> Today, the five states with the lowest median age of marriage are Utah, Oklahoma, Idaho, Arkansas, and Kentucky (all but Arkansas voting for Bush over Kerry by more than 20 percentage points).<sup>130</sup> Correspondingly, the states with the highest median age of marriage are Massachusetts, New York, Rhode Island, Connecticut, and New Jersey (including four of the top six blue states).<sup>131</sup> Age of first birth complements the marriage figures, with the same regional split. In 2000, Massachusetts had the highest mean age for a mother's first birth, at 27.8, followed by Connecticut (27.2), New Jersey (27.1), New Hampshire (26.7), and New York (26.4) (with all but New York also among the top five in family income). The lowest ages at first birth were in Mississippi (22.5), followed by Arkansas (22.7), Louisiana and New Mexico (23.0), Oklahoma (23.1), and Wyoming (23.2) (four of the top five among the poorest states in family income).<sup>132</sup> Over the past 30 years, all states have experienced an increase in the mean age of mothers at which the first child is born, but the changes have been greatest in the northeast and smallest in Utah.<sup>133</sup>

Childbearing patterns, of course, reflect a combination of the level of sexual activity, the acceptability of teen births and marriage, and access to contraception and abortion.

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<sup>128</sup> Tallese Johnson and Jane Dye, Indicators of Marriage and Fertility in the United States from the American Community Survey: 2000 to 2003, Table 1 (2005), <http://www.census.gov/population/www/socdemo/fertility/mar-fert-slides.html>.

<sup>129</sup> Infoplease, Median Age at First marriage, <http://www.infoplease.com/ipa/A0005061.html>. On the other hand, in 1890, the median age of first marriage for men was 26.1, and 22.0 for women.

<sup>130</sup> Id.

<sup>131</sup> Id.

<sup>132</sup> T.J. Mathews and Brady E. Hamilton, Mean Age of Mother, 1970-2000 10 (Table 3) (2002), [http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_01.pdf).

<sup>133</sup> Id. Looking at just the nineties, however, the areas with the biggest jump in age of first birth were D.C., Mass., Michigan, New Hampshire and New Jersey, North Carolina and Virginia. The states with the least change were Wyoming and Alaska, which showed declines in age, New Mexico, which stayed the same, and South Dakota and North Dakota.

Focusing on teen births, the five states with the lowest rates were New Hampshire, Vermont, Massachusetts, Connecticut, and Maine – all blue New England states.<sup>134</sup> In contrast, the states with the highest teen birth rates were red Texas, New Mexico, Mississippi, Arizona, and Arkansas, with Latino immigration skewing teen birth rates in the Southwest.<sup>135</sup> A gauge on the acceptability of teen birth (or perhaps the unacceptability of birth control and/or abortion) may be the percentage of teen births within marriage. The states with the highest percentages of teen birth taking place within marriage are Idaho, where only 64% of teen births are non-marital, Utah, with 66%, Texas, with 73%, and Colorado, Kentucky, and Wyoming, each with 74%.<sup>136</sup> These states, which are concentrated in the mountain West, appear to encourage family formation – in terms of both marriage and childbirth – at earlier ages.

Analysis of the increasing delay in marriage and childbearing, which has happened faster and more dramatically in the blue states, underscores the correlation with wealth and class. Wilcox, for example, argues that:

blue state teens from middle- and upper-class homes may be "sexually tolerant" but also "perceive a bright future for themselves, one with college, advanced degrees, a career, and a family." They view early and especially unprotected sex as a potential threat to their plans for the future . . . . And so blue state teens--especially mainline Protestant and Jewish teens from well-heeled homes--tend to delay intercourse, even as they dabble in oral sex and pornography at higher rates than their red state peers.

Wilcox emphasizes further that because of “their strategic orientation,” blue state teens who engage in intercourse (as most do before they turn 20), “are much more likely to rely

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<sup>134</sup> Child Trends, Teen Birth Rates Ranked Lowest to Highest, 2003, <http://www.childtrends.org/Files/FAAG2006StatebyState.pdf>.

<sup>135</sup> Id.

<sup>136</sup> ChildTrends, Facts at a Glance, Table 1 (2006), <http://www.childtrends.org/Files/FAAG2006.pdf>



on contraception than their red state peers, often with the winking or open support of parents and local educators. . .”<sup>137</sup> He concludes:

The strategic approach to sex found among well-off blue state teens certainly has its merits: Among other things, they are much less likely to have a baby outside wedlock, to marry before they are ready for the responsibilities of family life, and to get divorced, than are working-class teens from red states. Their strategic approach to sex and especially reproduction gives them a leg up in their drive for professional and familial success.<sup>138</sup>

What Wilcox does not fully discuss is the application of these principles to those unlikely to realize middle class restraint. Some studies suggest that, controlling for other factors, religious teens may delay the beginning of sexual activity, but not necessarily until marriage.<sup>139</sup> At the same time, teens in the same community, who do not share the depth of religious beliefs, may engage in sexual activities earlier than the religious teens, but without as ready access to birth control or abortion as the teens in blue communities more tolerant of sexual activity.<sup>140</sup> The result may exacerbate the problems associated with early pregnancy whether or not religious teachings succeed in reducing the overall level of sexual activity. Moreover, the resulting pregnancies may in turn reinforce the disadvantages to the children born to parents not yet ready to assume the responsibilities of parenting.<sup>141</sup> Lower levels of education or wealth may then in turn influences the

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<sup>137</sup> Wilcox, *Hormonographics*, supra..

<sup>138</sup> *Id.*

Red states, blue states, and sex before marriage, *The Weekly Standard*, May 28, 2007.

<sup>139</sup> See, e.g., Karin L. Brewster, Elizabeth C. Cooksey, David K. Guilkey, and Ronald R. Rindfuss, *The Changing Impact of Religion on the Sexual and Contraceptive Behavior of Adolescent Women in the United States*, 60 *Journal of Marriage and the Family* 493 (1998)(the sexual activity of white Protestant fundamentalist teens fell during the eighties, but contraceptive use by religious teens was less than for non-religious teens).

<sup>140</sup> For a summary of states laws permitting refusal to provide contraceptive services, see GUTTMACHER INST., *STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES* (2005), [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf). For a discussion of the impact of abstinence education on use of contraception, see notes \_\_ infra.

<sup>141</sup> See McLanahan, supra, documenting disparities.

religious and political predispositions of the next generation. Within this context, teen births, not teen sex, may be the most critical issue in determining the cultural milieu that shapes the next generation.

#### IV. The Intersection of Law and Culture

Abstinence education, while it supports the moral understandings of religious conservatives, might be defended in secular terms. The Heritage Foundation, for example, argues that “[t]he harmful effects of early sexual activity are well documented. They include sexually transmitted diseases, teen pregnancy, and out-of-wedlock childbearing.”<sup>142</sup> Liberals and conservatives might applaud programs designed to delay the beginning of sexual experimentation, and prevent unwanted pregnancies and sexually transmitted diseases. The overwhelming evidence, however, is that abstinence only programs are less effective than comprehensive sex education programs in doing so. In a careful review of data from the National Survey of Family Growth published in the *American Journal of Public Health*, the authors examined the bases for the declining teenage pregnancy rate from 1995-2002.<sup>143</sup> The researchers found: the rate of sexual intercourse for 15-17 year-olds declined by about 10%, while it remained fairly stable for 18-19 year olds; the pregnancy risk for 15-17 year olds fell by 55%, while it declined by 27% for 18-19 year olds; the rate of condom use by 15-17 year olds increased by 20%, from 38% to 58%, while it increased from 34% to 50% for 18-19 year olds; and the researchers demonstrated that 14% of the change in pregnancy risk for 15-19 year olds

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<sup>142</sup> Melissa G. Pardue, More Evidence of the Effectiveness of Abstinence Education Programs, May 5, 2003, <http://www.heritage.org/Research/Welfare/wm738.cfm>

<sup>143</sup> John S. Santelli, et al., Explaining Recent Declines in Adolescent Pregnancy in the United States The Contribution of Abstinence and Increased Contraceptive Use, 97 *Am. J. Pub. Health* 150, 1152-154 (2007), avail. at [http://opr.princeton.edu/seminars/papers%5CRecent\\_declines\\_in\\_adol\\_pregnancy\\_NSFG.pdf](http://opr.princeton.edu/seminars/papers%5CRecent_declines_in_adol_pregnancy_NSFG.pdf).

was a decline in the number of sexually active young women, while 86% of the decrease resulted from changes in contraceptive use.<sup>144</sup> In an April 2007 comprehensive review of Title V programs that was authorized by Congress, the authors found that youth who participated in abstinence education programs were no more nor less likely to have abstained from sex than those in a control group who had not received the abstinence education programs.<sup>145</sup> The study randomly assigned more than 2,000 youths to an abstinence education program group or to a control group; four to six years after the study began, the researchers also found virtually no differences between the age of first sexual intercourse and the rate of unprotected sex for those who had received abstinence education compared to those in the control group.<sup>146</sup> The authors reported: “Findings from this study provide no evidence that abstinence programs implemented in upper elementary and middle schools are effective at reducing the rate of teen sexual activity several years later,” although, as the authors noted, the study provided no evidence concerning programs implemented at earlier or later ages.<sup>147</sup>

In 2005, the American Psychological Association also reviewed the existing scientific literature and concluded that abstinence only education programs have limited effectiveness in encouraging abstinence, and unintended consequences. Based on fifteen years of research, the APA report concluded that comprehensive sex education programs that included abstinence education with information about birth control were at least as effective in discouraging early sexual activity and more effective in reducing pregnancies

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<sup>144</sup> John S. Santelli, et al., Explaining Recent Declines in Adolescent Pregnancy in the United States The Contribution of Abstinence and Increased Contraceptive Use, 97 Am. J. Pub. Health 150, 1152-154 (2007), avail. at

[http://opr.princeton.edu/seminars/papers%5CRecent\\_declines\\_in\\_adol\\_pregnancy\\_NSFG.pdf](http://opr.princeton.edu/seminars/papers%5CRecent_declines_in_adol_pregnancy_NSFG.pdf)

<sup>145</sup> Christopher Trenholm et al, Impacts of Four Title Vi, Section 510 Abstinence Education Programs, Final Report xvii (2007), <http://www.mathematica-mpr.com/publications/PDFs/impactabstinence.pdf>.

<sup>146</sup> Id. at xvii-xviii.

<sup>147</sup> Id. at 61

and sexually transmitted diseases.<sup>148</sup> Similarly, a Center for Disease Control study released in 2002 indicated that five of the government funded comprehensive sex education programs appeared to produce successful results compared to none of the abstinence only programs.<sup>149</sup> Congressman Henry Waxman, in a report examining the federally funded programs concluded that over eighty percent of federal grants go to providing abstinence only curricula that "contain false, misleading, or distorted information about reproductive health."<sup>150</sup> Moreover, other studies have shown the incidence of abstinence, even if it reduces or delays sexual intercourse, to increase the risk of sexually transmitted diseases as teens engage in unprotected oral or anal sex.<sup>151</sup>

In this context, the primary reason for adopting abstinence only programs becomes religious or ideological,<sup>152</sup> not child protection. First, as we have noted above, absolutist approaches place an emphasis on consistency. If non-marital sex is wrong, then the ineffectiveness of the programs in delaying sexuality does not itself justify a shift to programs that appear to sanction non-marital sexuality by providing greater access to

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<sup>148</sup> Resolution In Favor of Empirically Supported Sex Education and HIV Prevention Programs for Adolescents, American Psychological Association, February 18-20 (2005) [http://www.apa.org/releases/sexed\\_resolution.pdf](http://www.apa.org/releases/sexed_resolution.pdf).

<sup>149</sup> CDC, *Programs That Work* (archived version online at <http://web.archive.org/web/20010606142729/www.cdc.gov/nccdphp/dash/rtc/index.htm>).

<sup>150</sup> MINORITY STAFF SPECIAL INVESTIGATIONS DIV., U.S. HOUSE OF REP., CONTENT OF FEDERALLY FUNDED ABSTINENCE ONLY EDUCATION PROGRAMS i (2004), available at <http://www.democrats.reform.house.gov/Documents/20041201102153-50247.pdf>.

<sup>151</sup> See Hazel Beh & Milton Diamond, Children and Education: The Failure of Abstinence-Only Education: Minors have a Right to Honest Talk about Sex, 15 Colum. J. Gender & L. 12, 38-42 (2006)(summarizing reviews of the programs' effectiveness); Hannah Bruckner & Peter Bearman, *After the promise: the STD consequences of adolescent virginity pledges*, 36 J. ADOLESCENT HEALTH 271, 273-77 (2005); Douglas Kirby et al., The Impact of Postponing Sexual Involvement Curriculum among Youths in California, 29 Fam. Plan. Persp. 100, 100-08, <http://www.guttmacher.org/pubs/journals/2910097.html> (concluding that California program did not prevent sexual activity but did increase pregnancy rates of participants). Heritage Foundation scholars, however, have criticized the findings of some of these studies. See Robert Rector & Kirk A. Johnson, Adolescent Virginity Pledges and Risky Sexual Behaviors (June 14, 2005), <http://www.heritage.org/Research/Welfare/whitepaper06142005-2.cfm>.

<sup>152</sup> For a critique of the programs in these terms, see James McGrath, Abstinence only Adolescent Education: Ineffective, Unpopular, and Unconstitutional 38 U.S.F. L. Rev. 665, 687-89 (2004).

contraception.<sup>153</sup> Second, abstinence only programs may be a way of promoting more traditional values generally. Those most likely to choose to implement such programs are often faith-based or allied with faith-based groups, in part, because groups that do not share such religious commitments are unlikely to seek to promote abstinence only programs.<sup>154</sup> Third, the programs may also reinforce patterns that lock in more traditional ways of life. A lack of access to effective contraception promotes early marriage, either as a deliberate choice or as a response to an improvident pregnancy. Early marriages in turn tend to reinforce traditional gender roles, and greater emphasis on traditional family understandings. In the modern era, these early marriages are also more likely to end in divorce.<sup>155</sup> Abstinence only programs thus reflect the values and life choices of one side, and only one-side of a cultural divide.

It is accordingly unsurprising that implementation varies by region. In Title V of the Social Security Act, one of the dedicated abstinence education earmarks, states decide whether to participate, and, during the past several years, five states have refused potential federal funding for abstinence education pursuant to this program.<sup>156</sup> The five

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<sup>153</sup> Of course, married couples may also use contraception, but programs effective at encouraging contraception provide information not just about their operation, but about ways of obtaining them.

<sup>154</sup> Heritage Community Services in South Carolina, for example, includes the following testimonial on its website: “*The principle-based curriculum taught by Heritage teachers compliments [sic] the Biblical teaching that our students receive. We appreciate Heritage’s focus on character because we know that it takes strength of character to abstain from risky behavior.*” <http://www.heritageservices.org/SuccessStories/Greenville/ChristianSchoolWeb.pdf>. Heritage Community Services offers abstinence education as well as “Faith community Education,” and it provides a marriage initiative designed to reduce the divorce rate and the number of cohabitants.

<sup>155</sup> Paul R. Amato and Stacy J. Rogers, A Longitudinal Study of Marital Problems and Subsequent Divorce, 59 JOURNAL OF MARRIAGE AND THE FAMILY 612, 621 (1997); A. Booth and J. Edwards, Age at Marriage and Marital Instability, 47 J. OF MARRIAGE AND THE FAMILY 67-95 (1985); BARBARA DAFOE WHITEHEAD AND DAVID POPENOE, STATE OF OUR UNIONS: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA Box 2 (2004), <http://marriage.rutgers.edu/Publications/SOOU/TEXTSOOU2004.htm#Divorce>.

<sup>156</sup> [http://www.acf.hhs.gov/programs/fbci/progs/fbci\\_saep.html](http://www.acf.hhs.gov/programs/fbci/progs/fbci_saep.html).

states – California, Maine, New Jersey, Pennsylvania, and Wisconsin<sup>157</sup> – are all blue.<sup>158</sup>

The differences in approach reflect and are likely to reinforce cultural variation by region.

Legal challenges to the programs have focused overwhelmingly on the second prong in this analysis – the use of federal funds to promote faith-based groups. The cultural divide we have described, however, involves the first and third to a much greater degree. Nonetheless, the programs’ strong religious associations provide a richer legal target. In one of the more important cases to examine the permissibility of government funding for religious-based service organizations, the Court rejected a challenge to the inclusion of faith-based organizations as potential fundees pursuant to the Adolescent Family Life Act.<sup>159</sup> The AFLA explicitly recognizes the potential use of religious organizations as potential support systems for families dealing with adolescent pregnancy, and authorizes federal funding for eligible religious organizations. The majority held that the purpose of the statute was secular, and it anticipated that religious organizations could comply with the statutory mandate without religious indoctrination. In a strong dissent, Justice Blackmun (joined by Justices Brennan, Marshall, and Stevens) noted that “the religious significance in the counseling provided by some grantees . . . is a dimension that Congress specifically

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<sup>157</sup> Kaiser Family Foundation, Daily Women’s Health Policy, Mar. 6, 2007, available at [http://www.kaisernet.org/Daily\\_reports/rep\\_index.cfm?DR\\_ID=43365](http://www.kaisernet.org/Daily_reports/rep_index.cfm?DR_ID=43365).

<sup>158</sup> Pennsylvania and Wisconsin were battleground states.

<sup>159</sup> Bowen v. Kendrick, 487 U.S. 589 (1988). “In a significant departure from prior practice, the Court ruled that such a program, which treated religious and secular organizations neutrally, could not be challenged on its face for its overall tendency to advance religion. The Court suggested that if challengers proved that the implementation of specific grants involved distinctively religious activities, such as worship or proselytizing, or that grants were being distributed to “pervasively sectarian organizations,” courts would enjoin those particular grants.” Lupu and Tuttle, 2002 Annual Report, [http://www.religionandsocialpolicy.org/docs/legal/reports/12-4-2002\\_state\\_of\\_the\\_law.pdf](http://www.religionandsocialpolicy.org/docs/legal/reports/12-4-2002_state_of_the_law.pdf)

sought to capture by enlisting the aid of religious organizations.”<sup>160</sup> As the dissent noted, various religious organizations will provide differing answers to questions of how an adolescent should handle her pregnancy.<sup>161</sup> Further, although the Court had previously upheld providing aid to religious organizations which were administering social welfare programs, in this case, the dissent noted:

There is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them. The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter.<sup>162</sup>

Unlike the majority, the dissent was highly skeptical that religious attitudes toward counseling pregnant adolescents could be disentangled from the secular counseling purposes for which the federal grant had been received.

In two subsequent cases brought by the American Civil Liberties Union against specific service providers alleging that the abstinence education programs promote religion, the parties have entered into consent decrees that carefully establish the boundaries of acceptable language and religious messages. In 2002, the ACLU sued the Louisiana Governor’s Program on Abstinence, claiming that, in a variety of ways, it promoted religion through its own programs, that it funded organizations which transmitted religious messages, and which were primarily sectarian, rather than

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<sup>160</sup> Bowen, 487 U.S. at 625, 639 (Blackmun, J. dissenting). For purposes of this paper, the outcome of the constitutional challenge – that particular grants pursuant to the AFLA would be invalid if they advanced religion, but that the mere appropriation of grants to religious organizations did not invalidate the statute – is less important than the evidence supporting the religious basis for abstinence education. See, e.g. *id.* at 640 n.9.

<sup>161</sup> *Id.* at 642.

<sup>162</sup> *Id.* at 640.

secular.<sup>163</sup> The Louisiana “programs that were going out and saying, you know, “get saved by Jesus, sponsored by the governor's program on abstinence.”<sup>164</sup> Two months after the suit was filed, the court entered a preliminary injunction that prohibited the state from funding any religious activities and “pervasively sectarian institutions,” and required the state to develop a monitoring mechanism to guarantee that abstinence education funds were not used for religious purposes.<sup>165</sup> Shortly thereafter, the state and the ACLU entered into a settlement agreement in which the state promised to clarify that government-sponsored abstinence programs could not include religious messages or promote religion in any way.<sup>166</sup> The state also agreed to investigate any allegation that abstinence programs had religious content.<sup>167</sup> The ACLU returned to court in 2005, claiming violations of the settlement agreement because “the governor's program continues to feature religious materials on its official website, AbstinenceEdu.com. State-appointed experts advise readers, for example, that “abstaining from sex until entering a loving marriage will . . . [make you] really, truly, 'cool' in God's eyes” and that “God is standing beside you the whole way” if you

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<sup>163</sup> Complaint, avail. at Roundtable on Religion & Social Welfare Policy (Profs. Ira C. Lupu and Robert Tuttle), ACLU of Louisiana v. Foster, available at

[http://www.religionandsocialpolicy.org/legal/legal\\_update\\_display.cfm?id=5](http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=5)

<sup>164</sup> [http://www.socialpolicyandreligion.org/docs/transcripts/12-16-2002\\_state\\_of\\_the\\_law\\_transcript.pdf](http://www.socialpolicyandreligion.org/docs/transcripts/12-16-2002_state_of_the_law_transcript.pdf) (comments of Professor Bob Tuttle).

<sup>165</sup> [http://www.religionandsocialpolicy.org/legal/legal\\_update\\_display.cfm?id=7](http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=7)

<sup>166</sup> [http://www.aclu.org/FilesPDFs/foster\\_settlement.pdf](http://www.aclu.org/FilesPDFs/foster_settlement.pdf)

<sup>167</sup> As Professors Lupu and Tuttle explain, “In American Civil Liberties Union of Louisiana v. Foster, a court held unconstitutional a grant to faith-based organizations that provided sexual abstinence education, because the education had been conducted through intensely religious messages.” Ira C. Lupu and /Tuttle, The Faith-Based Initiative and the Constitution, 55 DePaul L. Rev. 1, 86 (2005).



commit to abstinence.”<sup>168</sup> This time, the judge upheld the religious content of the state’s website, finding no excessive entanglement.<sup>169</sup>

A second suit, filed three years later, concerned funds appropriated to the Silver Ring Thing (SRT)<sup>170</sup> as part of a special Congressional earmark. The ACLU of Massachusetts accused the federal government of providing a “direct government grant to a pervasively sectarian institution . . . [with] federal dollars [] demonstrably underwriting religions activities and religious content.”<sup>171</sup> Among other allegations, the ACLU asserted that each Silver Ring was inscribed with a verse from the New Testament, and was accompanied by a SRT Bible; that the SRT 12-step follow-up program included the SRT student acknowledging that “God has a plan for his or her life, and a plan for his or her sexuality;”<sup>172</sup> and that the SRT Newsletter included information such as: “more people are becoming part of this abstinence phenomenon. And ultimately, they are developing a relationship with Jesus Christ. This is such

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<sup>168</sup> <http://www.aclu.org/reproductiverights/gen/12754prs20050120.html>

<sup>169</sup> Cheryl Wetzstein, Court OKs religious abstinence content, Wash. Times, June 26, 2005, avail. at <http://washingtontimes.com/national/20050625-104915-8744r.htm>.

<sup>170</sup> As it explains on its website,

The Silver Ring Thing is the fastest growing teen abstinence program in the United States and is rapidly gaining international recognition for its concert-style show incorporating music, laser lights, fast-paced video, drama & comedy performances. Through this program teens are able to understand that abstinence until marriage is not only God's plan for their lives, but also the best and only way to avoid the harmful physical and emotional effects of premarital sex. By offering a message of forgiveness and new beginnings the program reaches out to those teens that have become sexually active & offers an opportunity to embrace a "second virginity."

<http://www.silverringthing.com/about.html>.

<sup>171</sup> [www.aclu.org/FILESPDFs](http://www.aclu.org/FILESPDFs), *ACLY v. Leavitt*, Complaint, para. 1.

<sup>172</sup> *Id.*, para. 51.

good news.”<sup>173</sup> Three months after the filing of the SRT lawsuit, HHS withheld funding of the remaining \$75,000 of the SRT’s \$1.2 million.<sup>174</sup>

The parties entered into a settlement agreement pursuant to which SRT agreed that, if it sought further funding, it would certify its compliance with applicable federal regulations, which prohibit using federal funds to support “inherently religious activities.”<sup>175</sup> The Department of Health and Human Services sent a list of “Safeguards Required” if SRT sought additional federal money; the safeguards included requiring that abstinence education programs with religious content constitute separate and distinct programs from those funded by federal money, including a requirement that each program have a distinct name.<sup>176</sup> As Professors Chip Lupu and Bob Tuttle point out, the settlement agreement establishes a distinction between the religious activities that the government can support and those that are “inherently religious activities” in “terms that are constitutionally accurate, unambiguous, and detailed.”<sup>177</sup>

These cases, however, which address the direct use of these programs to promote religion, miss the larger issue of the promotion of cultural issues integrated with religious views at a time when the majority of American do not share them. In surveys of the public attitude toward abstinence education, researchers repeatedly find

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<sup>173</sup> Id. Para. 62a.; see S. Shoshanna Ehrlich, From Age of Consent Laws to the “Silver Ring Thing”: The Regulation of Adolescent Sexuality, 16 Health Matrix 151, 179-80 (2006).

<sup>174</sup> <http://www.religionandsocialpolicy.org/news/article.cfm?id=3918>

<sup>175</sup> Settlement Agreement, Sec. 2b., available at [http://www.religionandsocialpolicy.org/docs/legal/cases/SRT-HHS-ACLU\\_Settlement%202-24-06.pdf](http://www.religionandsocialpolicy.org/docs/legal/cases/SRT-HHS-ACLU_Settlement%202-24-06.pdf)

<sup>176</sup> Id.

<sup>177</sup> Ira C. Lupu and Robert W. Tuttle, Legal Update, 3/7/2006, available at [http://www.religionandsocialpolicy.org/legal/legal\\_update\\_display.cfm?id=44](http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=44).

broad support for comprehensive information. The level of support, however, varies, depending on the participants' frequency of attendance at a religious institution; and evangelicals have a different approach than non-evangelicals.<sup>178</sup> In a survey of 1000 people in late 2005, among people who attend religious services more frequently than once per week, 31.3% opposed abstinence only education, while among those who never attend religious services, 57% opposed abstinence only.<sup>179</sup>

In *Lawrence v. Texas*, Justice Scalia accused Justice Kennedy's majority opinion, which struck down Texas's same-sex sodomy statutes, as having "taken sides in the culture war."<sup>180</sup> Abstinence only education does so to a much greater degree. Comprehensive sex education programs provide information about and support for abstinence; abstinence only programs do not provide similar information about contraception, abortion or non-reproductive sexuality. If the programs were effective in the religiously and culturally neutral objectives of delaying the beginning of sexuality, slowing the spread of STD's, and preventing unwanted pregnancies, the efforts would be applauded on both sides of the cultural divide. In the face of convincing evidence that they are both ineffective and counter-productive, they become little more than a vehicle for the partisan promotion of religiously identified, cultural views.<sup>181</sup>

#### V. Toward Consensus? Yes and No

The law can diffuse or inflame the cultural conflicts described in this paper.

Abstinence only education itself is a very public endorsement of one side of the cultural

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<sup>178</sup> NPR, Kaiser, etc., Sex Education in America (2004), available at <http://www.npr.org/programs/morning/features/2004/jan/kaiserpoll/publicfinal.pdf>; Amy Bleakley, et al., Public Opinion on Sex Education in US Schools, 160 Arch Pediatric Adolesc. Med. 1151 (2006).

<sup>179</sup> Bleakley, supra note \_\_\_, at 1154-55.

<sup>180</sup> *Lawrence v. Texas*, 539 U.S. 558, 586-602 (2003) (Scalia, J., dissenting)

<sup>181</sup> McGrath, supra note \_\_\_.

divide. In contrast, judicial decisions that distinguish between promotion of sectarian views and more secular forms of abstinence shift the discussion to more specialized and less intrinsically divisive issues. The very decision to advocate public funding for religious groups to promote religiously identified views was a calculated political decision;<sup>182</sup> the question then becomes how the judiciary and the public respond.

The law has several distinct means for responding to these different approaches to teen sexuality. First, rather than one side trying to convert the other to the “right” view, it might be appropriate to examine any potential points of convergence,<sup>183</sup> and then, as suggested by the cultural cognition literature, to develop programs for building dialogue. After all, attitudes toward sexuality *are* on a continuum. At one extreme are those who would permit casual sexual activity between anyone who consents.<sup>184</sup> At the other end are those who believe that sex should be limited to reproductive purposes within marriage, they would disapprove of sodomy and contraception even within marriage.<sup>185</sup> In the center is a large group that believes non-marital births are a greater problem than non-marital sex, and that use of contraception, not the negative example of the births, is the most important factor in decreasing their incidence.<sup>186</sup> Notwithstanding the potential for consensus, activists do, however, divide into dichotomous groups, and group loyalty

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<sup>182</sup> For a comprehensive discussion of the politics, see Julie Jones, MONEY, SEX, AND THE RELIGIOUS RIGHT: A CONSTITUTIONAL ANALYSIS OF FEDERALLY FUNDED ABSTINENCE ONLY-UNTIL-MARRIAGE SEXUALITY EDUCATION, 35 Creighton L. Rev. 1075 (2002).

<sup>183</sup> See Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U. L. Rev. 1559, 1608-12 (1991)(how pro-choice and anti-choice advocates can work together).

<sup>184</sup> Luker emphasizes, however, that even sexual liberals overwhelmingly prefer sex within marriage; it is the enforcement of such preferences that gives them greater pause. *Supra* at .

<sup>185</sup> For a history of the laws against non-reproductive sex within marriage, see *Lawrence v. Texas*, *supra*, 539 U.S. at 572. *Griswold v. Connecticut*, 381 U.S. 479 (1965), after all, involved a law prohibiting distribution of contraception to married as well as unmarried couples.

<sup>186</sup> See, e.g., Heather Boonstra, Trends and Lessons Learned, the Guttmacher Report on Public Policy, Vol. 1, Issue 5 (Feb. 2002), <http://www.guttmacher.org/pubs/tgr/05/1/gr050107.html> (concluding that the decline in teen pregnancies during the nineties was far more due to increased contraceptive use by sexually experienced teens than due to the increase in abstinence, which also contributed to the decline).

may be more important than the merits of an individual issue in determining political behavior such as voting.<sup>187</sup> Accordingly, the potential for discourse *within* communities, where appeals to reason are not confounded by appeals to loyal, may offer greater potential for compromise, than discourse between communities.<sup>188</sup>

Some religious leaders, for example, have recognized the importance of using the language of faith to support the need for comprehensive sex education, so appealing to rhetoric that might satisfy both sides by promoting discourse within each position – for example, comprehensive sex education advocated by faith communities. The Religious Institute on Sexual Morality, Justice, and Healing, which is an interfaith organization devoted to issues of advocating for sexual health and related issues in “faith communities,”<sup>189</sup> issued an “Open Letter to Religious Leaders on Adolescent Sexuality.”<sup>190</sup> The Letter uses faith-based language, such as recognizing that “sexuality is a divinely bestowed blessing,” and empirical evidence on teen pregnancy and sexually transmitted diseases to argue that faith communities must acknowledge that adolescents may belong to sexual minorities, may be abstinent, and may have been involved in sexual

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<sup>187</sup> See discussion of increased partisan identification and political divisions over values issues at notes *supra*.

<sup>188</sup> At one time, the legal profession would have constituted a distinct community with specialized language and professional identity and loyalty that transcended religious or partisan identification. With 5-4 votes on contentious issues reflecting partisan identification, and fractured plurality opinions that provide little guidance to the lower courts, the U.S. Supreme Court has largely lost such an identification. For a discussion of what makes the role of the courts political, compare Peter Gabel, *What It Really Means To Say "Law Is Politics": Political History And Legal Argument In Bush V. Gore*, 67 *Brooklyn L. Rev.* 1141 (2002) with Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 *Calif. L. Rev.* 1721 (2001). See also *Red Families*, *supra* (arguing that court has withdrawn from culturally divisive issues over abortion by excessive deference to state legislatures).

<sup>189</sup> <http://www.religiousthought.org/about.html>

<sup>190</sup> [http://www.religiousthought.org/AdolSex\\_OpenLetter.pdf](http://www.religiousthought.org/AdolSex_OpenLetter.pdf). “The *Open Letter to Religious Leaders on Adolescent Sexuality* was developed at a colloquium of theologians sponsored by the Religious Institute on Sexual Morality, Justice, and Healing. The participants at the colloquium included theologians and ordained clergy from a diverse range of religious perspectives, including Jewish, Baptist, Brethren, Episcopal, Presbyterian, Roman Catholic, United Church of Christ and Unitarian Universalist.” <http://www.religiousthought.org/news.html>

relationships, and that society must promote comprehensive sexuality education.<sup>191</sup> This approach, using language that appeals to both sides, seems appropriate. Ensuring that leaders within the different communities persuasively advocate, however, seems somewhat more difficult to ensure.

In addition to examining places of “overlapping consensus”<sup>192</sup> between the two different systems, a second approach draws on the federalist nature of family law, and then suggests one of two possibilities: either states could continue to experiment with different approaches before imposing a national standard that would privilege one side, or the federal government could, in an attempt to prevent further divergence, simply impose a national norm. We explore these issues more comprehensively in a companion article.<sup>193</sup> In the context of abstinence education, however, suffice it to say that the current status of federal law shows the danger of a national law that reflects only one side of the controversy and that rejects empirical evidence on the most appropriate policies.<sup>194</sup> Indeed, with a Democratically controlled House of Representatives, the continuation of Title V funding became highly questionable in mid-2007, and key members of Congress indicated their support for comprehensive sex education programs that included abstinence as well as other forms of education.<sup>195</sup>

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<sup>191</sup> Id.

<sup>192</sup> See John Rawls, *Political Liberalism* 147 (1993); June Carbone, *Autonomy to Choose what Constitutes a Family: Oxymoron or Basic Right* 19 (2006), avail. at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=935418#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=935418#PaperDownload).

<sup>193</sup> See Cahn and Carbone, *Red Families*, supra note \_\_\_\_.

<sup>194</sup> Id. We argue in *Red Families* that partisan division over abortion has produced a change in the judicial role in parental involvement cases from judicial balancing of the substantive issues at stake in the seventies (*Bellotti v. Baird*, 443 U.S. 622 (1979)) to conflicting opinions that provide little guidance by the end of the eighties (see *Hodgson v. Minnesota*, 497 U.S. at 417 (1990)) to wholesale deference to state legislatures today. See *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320 (2006).

<sup>195</sup> Kevin Freking, *Funding for Abstinence Likely to Drop*, *Wash. Post*, May 16, 2007.

Moreover, we are concerned that compromise dilutes the underlying messages concerning teen sexuality. Conservatives and religious organizations are unwilling to recognize the value of other forms of sex education, while liberals, who share comparable goals of responsible sexuality, are more pragmatic and tolerant. Compromise, which might involve teaching sex education, but only the abstinence education component, is, in this formulation, concession. As one editorial bluntly explained, “The lavish spending [on abstinence education] reflects the Bush administration's blind faith in abstinence only and its insistence that the sole message kids receive is that premarital sex is wrong. In such programs, even whispering the word "contraceptive" dilutes the "no sex" mantra.”<sup>196</sup> Given that more information and program evaluation are virtually irrelevant in changing positions, that compromise can mean foregoing fundamental values, then the political process becomes the most promising avenue for change. And the means for doing that involve learning from both Lakoff and the Cultural Cognition Project: reframe the issues by using the language of the other side.<sup>197</sup> Indeed, when the leading Democratic contenders in the 2008 Presidential campaign spoke movingly at a forum on faith about the significance of religion to their lives, prompting a charge that the Democrats sounded like “evangelicals,” compared to the Republicans, who sounded like “secularists.”<sup>198</sup>

Finally, political scientists and lawyers have each been involved in a longstanding debate: does change come from imposing the law or from grass-roots pressure? The recent history of Supreme Court family law cases, from *Loving*<sup>199</sup> to *Roe*<sup>200</sup> to *Roper*<sup>201</sup>

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<sup>196</sup> Editorial, ‘Just say No’ The Wrong Way to Go, *Atlanta-Journal Constitution*, May 27, 2007, p. 6B.

<sup>197</sup> See *supra* nn. 41-47.

<sup>198</sup> Ruth Marcus, *The Democrats’ Leap of Faith*, *Wash. Post*, June 6, 2007, at A23.

<sup>199</sup> 388 U.S. 1 (1967)(declaring anti-miscegenation laws unconstitutional).

<sup>200</sup> *Roe v. Wade*, 410 U.S. 113 (1973)(finding anti-abortion provisions conflicted with women’s reproductive rights).

<sup>201</sup> *Roper v. Simmons*, 125 S. Ct. 1183 (2005)(declaring juvenile death penalty unconstitutional).

to *Gonzales v. Carhart*,<sup>202</sup> shows both; individual states changed their laws, responding to changing moral and popular sentiment, and ultimately prompted the Supreme Court to revise national standards.

### **Conclusion**

Religion, as the evolutionary biologists and election observers both observe, is a critical factor in developing moral values. When religion overlaps with partisan identity, and when politicians deliberately frame partisan issues in terms of cultural divisions, dichotomous (or at least seemingly dichotomous) positions dominate debate.<sup>203</sup> As the approaches threaten to diverge even more, as those who attend religious services at least once a week and those who rarely attend – if ever – reach opposite conclusions on fundamental issues, finding common themes becomes increasingly important. Ironically, perhaps, these calls for compromise typically come from only one side, providing some grounds for pessimism. In the short term, using the consensus positions developed by some within the faith-based community as a means for talking to both sides may provide a way forward.

Ultimately, however, on issues of family values, the more direct introduction of religion into public life runs the risk of further polarizing discourse, and hardening opposing positions in ways that short-circuit the evolution of the underlying normative values. While profound disagreement would exist in any event, religion may exacerbate those differences by linking policy positions to issues of identity, and doing so in a way that hampers effective discourse or compromise. Religion complicates these difficulties in the following ways:

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<sup>202</sup> 127 S. Ct. 1610 (2007)(upholding ban on partial birth abortions).

<sup>203</sup> For an account of the deliberate manipulation of such strategies to advance extreme views, see Hacker, *supra*, at 1-11.



1. The form of argument: Many communities of faith accept more authoritarian styles of argument likely to be rejected by secular communities. It is commonplace, for example, to find comments like the following on the Web: “The Bible clearly and consistently tells us that homosexual activity is a sin.<sup>204</sup> God does not create a person with homosexual desires. A person becomes a homosexual because of sin,<sup>205</sup> and ultimately because of his or her own choice.”<sup>206</sup> These comments state a conclusion in terms of an appeal to authority that brooks no discussion or dissent. When they are advanced as a basis for public policy outcomes, they also alienate those who do not share the same perspective.

2. The role of religion in creating identity: Citizenship in a democracy is mediated by overlapping membership in various groups, each of which contributes partially to the individual’s construction of self. When one form of identity becomes comprehensive to the exclusion of others, it can build in isolation and extremism. Consider [Ayaan Hirsi Ali](#)’s description of the role of the veil within Muslim communities in Europe:

The veil is an expression of the moral philosophy they [veil wearing Islamic women] hold and wish to impose upon others. They seek to provoke, to intimidate. In many European cities it is increasingly common to see girls, sometimes as young as 5, with headscarves tied tightly around their necks, or even little veils. They are taught to keep away from boys, from unbelievers and from Muslims who are weak in the faith--in other words, other unveiled Muslim little girls. That is precisely the purpose of the veil.<sup>207</sup>

The Catholic Church’s suggestion that pastors should deny communion to those who

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<sup>204</sup> Genesis 19:1-13; Leviticus 18:22; Romans 1:26-27; 1 Corinthians 6:9.

<sup>205</sup> Romans 1:24-27.

<sup>206</sup> GotQuestions.org, “What Does the Bible say about Gay Marriage/Same Sex Marriage?”

<http://www.gotquestions.org/gay-marriage.html>. See also The Kingdom Foundation,

“HOMOSEXUALITY is a forgivable SIN,”

<http://www.kingdomfoundation.org/livingnow/godswordhomosexuality.html> (God addresses and condemns homosexuality in His holy scripture. The Bible is very clear as is the Torah. Homosexuality is a sin that is condemned by God.)

<sup>207</sup> [Ayaan Hirsi Ali](#), Setting Themselves Apart, American Enterprise Institute for Public Policy Research, Nov. 22, 2006, avail. at [http://www.aei.org/publications/filter.all.pubID.25183/pub\\_detail.asp](http://www.aei.org/publications/filter.all.pubID.25183/pub_detail.asp).

support abortion rights, while less premised on physical separation, also serves to draw an impermeable line between observant Catholics and others.<sup>208</sup> In contrast, the principle of tolerance may require separation of appropriate behavior and arguments within public society from the form and content of beliefs that may be privately held.

3. Religious beliefs often encourage behavior that reinforces identification with the faith. Fundamentalist religions, for example, often encourage early marriage and large families. These large families are then welcomed into communities of faith that provide support for childrearing. Given the dependence that children produce, managing outside of the marriage or the faith-based community becomes that much more difficult. Darren Sherkat writes that:

Studies consistently show that among sectarian Protestant fertility is higher, and ages of marriage are lower. The burden of early marriage and fertility are also likely factors in low rates of educational attainment for conservative Christian men, since having a family often requires forsaking future rewards which could accrue from educational attainment for the immediate benefits of employment. Large family size, coupled with limited wealth, will also hinder sectarian Christian parents' ability to help finance the educational pursuits of their children. This may help explain lower rates of college attendance and completion among conservative Christians.<sup>209</sup>

Such results produce reinforcing cycles as the habits of mind of the more educated and less educated may be reinforced by different experiences and values.

4. To the extent that religious membership then correlates more strongly with family form and political party identification,<sup>210</sup> a single more ideological, more partisan or more sectarian identity can work to undermine the partial roles that have historically

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<sup>208</sup> See, e.g., JimmyAkin.org, quoting the synod of bishops, objecting that "Some receive communion while denying the teachings of the Church or publicly supporting immoral choices in life, such as abortion, without thinking that they are committing an act of grave personal dishonesty and causing scandal . . ." July 8, 2005, [http://jimmyakin.typepad.com/defensor\\_fidei/2005/07/new\\_doc\\_on\\_abor.html](http://jimmyakin.typepad.com/defensor_fidei/2005/07/new_doc_on_abor.html).

<sup>209</sup> The Religious Engagements of American Undergraduates, Darren E. Sherkat, Religion and Higher Education: the Good, the Bad and the Ugly, Feb 06, 2007, <http://religion.ssrc.org/reforum/Sherkat/index1.html>.

<sup>210</sup> See data presented earlier on the differences in church attendance by Democrats and Republicans.

allowed democratic institutions to bridge differences. Members of Congress, for example, once viewed their loyalty to Congress as an institution as separate from their roles as Democrats or Republicans. If the well-being of the nation, however, is identified with the inflexible content of certain beliefs, then the institutions themselves can be sacrificed to advance the right causes.

Greater partisanship can also be self-reinforcing. A liberal columnist in the Los Angeles Times observed, for example, “Your average conservative may not know anything about climate science, but conservatives do know they hate Al Gore. So, hold up Gore as a hate figure and conservatives will let that dictate their thinking on the issue.” The net result is that as the evidence of global warming has increased, the percentage of Republicans who respond to public opinion polls by saying that the case has been made has decreased.<sup>211</sup>

5. Neutralizing the role of the courts: Federal political appointments have clearly become politicized and in many states the public elects judges or votes to continue them in office.<sup>212</sup> To the extent that the courts lack independence, and to the extent that cautious, legally grounded decision become defined in partisan terms, the court lose their ability to provide effective leadership. At that point, legislative judgments become paramount.<sup>213</sup>

Polarization not only increases conflict over issues such as the control of adolescent sexuality, but it also slows the evolution of new norms within and across

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<sup>211</sup> Jonathan Chait, Why the right goes nuclear over global warming: Most of the heat is generated by a small number of hard-core ideologues.

March 25, 2007, <http://www.latimes.com/news/opinion/commentary/la-op-chait25mar25,0,3748551.column?coll=la-news-comment-opinions>

<sup>212</sup> Hacker, *supra*, at 105-06. See also American Judicature Society, Judicial Selection in the United States, <http://www.ajs.org/js/materials.htm>.

<sup>213</sup> For a more in depth development of this argument, see Red Families, *supra*.

communities. The adoption of same-sex marriage in Canada, for example, has spurred a debate with gay and lesbian communities about the meaning of marriage, and the sight of same-sex couples affirming their unions has helped to remake the image of marriage as less patriarchal and more egalitarian.<sup>214</sup> In similar fashion, the ineffectiveness of abstinence only policies should spark debate about the consequences of unplanned pregnancies and the need for contraception. If the positions on these issues, however, become matters of loyalty, then the more moderate compromises that might allow institutions to grow and change, and that might provide children with enough information so that they can make their own choices, become impossible. Compromising on language – using the language of faith – to advocate the same policies may provide leverage where trumpeting the results of new studies will not. Compromising on the law – allowing abstinence only education because it is at least a form of sex education – serves no one. Highly publicized and contentious battles over adolescent sex education in legislatures and courts involving constitutional issues of free exercise provide an example of how religious rhetoric trumps legal standards. As the country develops red and blue family models, religion is a significant factor in creating and maintaining those models through its efforts to control teen sexuality to foster particular family forms. Religion reinforces conflicting approaches to fundamental cultural values, affecting the laws surrounding the family lives of Americans.

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<sup>214</sup> See, e.g., Nicholas Bala, *The Debates About Same-Sex Marriage in Canada and the United States: Controversy Over the Evolution of a Fundamental Social Institution*, 20 *BYU J. Pub. L.* 195 (2006); Law Commission of Canada, *Beyond Conjugalities* 30 (2002) (recommending a fundamental rethinking of the legal regulation of adult personal relationships).

## Appendix A

### Teen Sexuality Regulation and Church Attendance

State <sup>215</sup>	Required Parental Involvement in Minors' Abortions <sup>216</sup>			Teen Pregnancy Rate Rank <sup>217</sup>	Teen Abortion Rate Rank <sup>218</sup>	Church Attendance 24-58% <sup>219</sup>
	Consent	Notification	None			
<b>Alabama r</b>	X			15	30	58%
<b>Alaska r</b>	▼			30	35	N/A
<b>Arizona r</b>	X			2	19	35%
<b>Arkansas r</b>	X			10	41	55%
<b>California</b>	▼			7	5	32%
<b>Colorado r</b>		X		22	21	35%
<b>Connecticut</b>			X	33	9	37%
<b>Delaware</b>		X* <sup>220</sup>		11	8	43%
<b>DC</b>			X	na	na	33%
<b>Florida r</b>		X		6	7	N/A
<b>Georgia r</b>		X		8	22	52%
<b>Hawaii</b>			X	12	6	N/A
<b>Idaho r</b>	§			37	45	43%
<b>Illinois</b>		▼		20	10	42%
<b>Indiana r</b>	X			31	38	46%
<b>Iowa</b>		X		43	42	46%
<b>Kansas r</b>		X		34	39	47%
<b>Kentucky r</b>	X			25	47	48%
<b>Louisiana r</b>	X			19	44	58%
<b>Maine</b>			X	46	31	31%
<b>Maryland</b>		X*		13	3	41%
<b>Massachusetts</b>	X			40	11	31%
<b>Michigan</b>	X			27	15	N/A
<b>Minnesota</b>		Both parents		47	36	44%
<b>Mississippi r</b>	Both parents			3	28	57%
<b>Missouri r</b>	X			29	34	46%
<b>Montana r</b>		▼		38	32	34%
<b>Nebraska r</b>		X		41	40	53%

<sup>215</sup> Red indicates that George W. Bush won the state in the 2004 presidential election; Blue indicates that John Kerry won the state in the 2004 presidential election.

<sup>216</sup> Except where indicated, parental involvement laws in minors' abortions require the involvement of one parent and apply to minors under 18.

<sup>217</sup> Ranking by rates of pregnancy per 1,000 women aged 15-19 according to state of residence, 2000.

<sup>218</sup> Ranking by rates of abortion per 1,000 women aged 15-19 according to state of residence, 2000.

<sup>219</sup> Church or Synagogue Attendance by State, San Diego Union-Tribune, May 2, 2006. The national average is 42% or people who say they attend a church or synagogue either once a week or almost once per week. There are no blue states in the top 15, and only one red state in the bottom 15.

<sup>220</sup> Law applies to women under 16

<b>Nevada r</b>		▼		<b>1</b>	<b>4</b>	<b>27%</b>
<b>New Hampshire</b>		▼		<b>48</b>	<b>25</b>	<b>24%</b>
<b>New Jersey</b>		▼		<b>16</b>	<b>1</b>	<b>34%</b>
<b>New Mexico r</b>	▼			<b>4</b>	<b>18</b>	<b>41%</b>
<b>New York</b>			X	<b>14</b>	<b>2</b>	<b>33%</b>
<b>North Carolina r</b>	X			<b>9</b>	<b>17</b>	<b>53%</b>
<b>North Dakota r</b>	Both parents			<b>50</b>	<b>48</b>	<b>43%</b>
<b>Ohio r</b>	X			<b>28</b>	<b>27</b>	<b>43%</b>
<b>Oklahoma r</b>		X		<b>21</b>	<b>37</b>	<b>50%</b>
<b>Oregon</b>			X	<b>23</b>	<b>13</b>	<b>32%</b>
<b>Pennsylvania</b>	X			<b>39</b>	<b>23</b>	<b>43%</b>
<b>Rhode Island</b>	X			<b>36</b>	<b>16</b>	<b>N/A</b>
<b>South Carolina r</b>	X <sup>221</sup>			<b>17</b>	<b>24</b>	<b>58%</b>
<b>South Dakota r</b>		X		<b>44</b>	<b>49</b>	<b>45%</b>
<b>Tennessee r</b>	X			<b>18</b>	<b>29</b>	<b>52%</b>
<b>Texas r</b>	X			<b>5</b>	<b>26</b>	<b>49%</b>
<b>Utah r</b>		X		<b>45</b>	<b>50</b>	<b>55%</b>
<b>Vermont</b>			X	<b>49</b>	<b>33</b>	<b>24%</b>
<b>Virginia r</b>	X			<b>32</b>	<b>20</b>	<b>44%</b>
<b>Washington</b>			X	<b>26</b>	<b>12</b>	<b>32%</b>
<b>West Virginia r</b>		X*		<b>35</b>	<b>46</b>	<b>46%</b>
<b>Wisconsin</b>	X*			<b>42</b>	<b>43</b>	<b>43%</b>
<b>Wyoming r</b>	X			<b>24</b>	<b>14</b>	<b>36%</b>
<b>Total</b>	<b>25</b>	<b>18</b>	<b>7 + DC</b>			

▼ Enforcement permanently enjoined by court order; policy not in effect.

§ Temporarily blocked by court order; policy not in effect.

\* Allows specified health professionals to waive parental involvement if judge is unavailable.

~ Physicians may, but is not required to, inform the minor's parent

<sup>221</sup> Law applies to women under 17