

SEX, SECTARIANS AND SECULARISTS: CONDOMS AND THE INTERESTS OF CHILDREN

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INTRODUCTION

Adolescents.¹ Sex. Condoms. Religion. Some parents are eager to discuss these subjects; many are not. Recently some parents have brought court actions against public schools challenging state acts that they perceive as a threat to their religious beliefs and their right to privacy in raising their teenage children.

This Article explores the status of litigation concerning "condom availability" programs and the context in which that litigation arises. Focusing on federal constitutional issues, it critiques judicial decisions which, while acknowledging the potential harm that AIDS presents to adolescents, nonetheless evaluate the claims of parents opposing condom-accessibility programs and find that privacy-based constitutional interests outweigh state interests in attempting to provide young people with protection from the possibility of deadly infection.

Part I discusses the leading New York and Massachusetts condom cases and their conflicting decisions. Part II examines the meaning of "coercion" in Free Exercise Clause doctrine and considers the operation of coercion in American culture in ways that strongly affect and influence adolescents. Part III examines the complexities presented by the specifically sexual nature of the matter being regulated by the state in condom availability programs. It emphasizes the existence of widespread popular denial of the reality and significance of AIDS as a threat to young people's health and lives. Part IV examines the national discordance existing in the United States among religious and political ideologies contending to determine how, and by whom, control over children should be exercised to serve their "best interests."

I. CONDOM LITIGATION

High schools across the country have begun to implement condom availability programs in an effort to reduce the exposure of adolescents to the deadly AIDS virus through sexual contact. Many of these programs include "opt-out" provisions whereby parents may place the name of their child on a list identifying that child as ineligible to obtain condoms from the school. Some programs, however, do not include "opt-out" provisions. As the number of programs without

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1. Throughout this Article, the terms "adolescents" and "teenagers" will refer to young persons aged twelve to eighteen, the approximate ages of the students in grades seven through twelve for whom the condom availability programs were instituted in *Curtis v. School Comm.*, 652 N.E.2d 580 (Mass. 1995), *cert. denied*, 116 S. Ct. 753 (1996) and *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

“opt out” provisions for children of objecting parents increases, so too will the number of lawsuits filed to challenge the states’ aggressive measures in providing adolescents broad access to condoms. Increasingly, such actions are being brought by parents of high-school-aged children attending public schools, in an effort to reduce “messages” communicated by schools to students that conflict with their parents’ religious principles favoring sexual abstinence.

At the time of this writing, only two state courts have opined on the constitutionality of condom availability in public schools.² Those recent opinions, from New York and Massachusetts, are not in agreement, and their rationales and holdings make clear that the condom cases are the product of a highly incendiary debate not likely to be soon resolved. The alarming prevalence of AIDS among adolescents,³ the ever-increasing influence of religious groups on public policy,⁴ and the fact that litigants contesting “condom availability” programs assert rights protected by the First and Fourteenth Amendments to the United States Constitution⁵ all assure that an increase in “condom” litigation is imminent.

In February 1991, the New York City Board of Education voted to establish an expanded HIV/AIDS education program in the public high schools of New York City. Each high school was required to adopt a curriculum incorporating lessons on the methods of AIDS prevention.⁶ The aspect of the program under attack in *Alfonso v. Fernandez* involved the provision of condoms to students in the seventh through twelfth grades.⁷ Under the New York City program, condoms became available to students “for the asking,” regardless of parental wishes. Although students were in no way required to participate in the program, the Board decided against an “opt-out” provision because students whose parents disapproved of premarital sexual relations and who nonetheless were sexually active might especially be in need of a place where they could obtain condoms without having to account for any expenditures of funds or without having to identify themselves before they could be given a condom.⁸

The condoms were to be dispensed by trained health professionals only to a student who requested them, and the student was to be given a pamphlet to read in the presence of the person administering the program.⁹ Afterwards, the administrator would provide a condom and ask if the student had any questions.¹⁰ The pamphlet read as follows:

2. *Curtis*, 652 N.E.2d at 580; *Alfonso*, 606 N.Y.S.2d at 259.

3. An estimated 40,000 to 50,000 adolescents are infected annually with HIV. ALAN GUTTMACHER INSTITUTE, *SEX AND AMERICA’S TEENAGERS* 38 (1994).

4. See Joe Klein, *Learning How to Say No: Clinton’s New Teen Pregnancy Program Will Counsel Abstinence*, NEWSWEEK, June 13, 1994, at 29.

5. See *Curtis*, 652 N.E.2d at 580; *Alfonso*, 606 N.Y.S.2d at 259.

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

7. *Id.*

8. *Id.* at 269 (Eiber, J., dissenting).

9. Nick Chiles, *Lines Form for School Condoms; Students Back the Program*, NEWSDAY, Nov. 27, 1991, at 5.

10. *Id.*

RISKS AND BENEFITS OF THE USE AND MISUSE OF CONDOMS:

The only 100 percent effective way to prevent the sexual spread of HIV and other sexually transmitted diseases is not to have sexual intercourse (abstinence). If you do have sexual intercourse of any kind, the only way to help protect yourself is to use a condom.

The main reason a condom may not provide protection is because it is not used correctly. If you use condoms, you can help protect yourself by reading and learning how to use them properly. The person making condoms available in your school can answer questions or can refer you to other people who can give you additional information on condom usage.

There are two reasons a condom may not protect you.

1. It may break.
2. It may slip and leak.

Knowing how to use a condom properly can reduce these risks. If you have additional questions, you can ask the person who is making condoms available in your school.¹¹

Parents of various New York City public school students filed suit against the New York City Board of Education¹² challenging the condom program as involving statutory and state and federal constitutional violations.¹³ At issue in *Alfonso v. Fernandez*¹⁴ was whether the voluntary condom program was a "health service" requiring parental consent under New York law,¹⁵ and whether the

11. *Id.*

12. Joseph A. Fernandez, Chancellor of the New York City Board of Education was also named as a defendant in this case.

13. *Alfonso v. Fernandez*, 584 N.Y.S.2d 406 (N.Y. Sup. Ct. 1992), *rev'd*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993). The parents alleged that the condom program violated New York law requiring parental consent for the distribution of "health services" to minors; they also asserted violations of their free exercise rights and due process rights to raise their children as they saw fit under the First and Fourteenth Amendments of the Constitution, and under similar state constitutional provisions. *See* N.Y. CONST. art. I, § 3; N.Y. CONST. art. I, § 6; N.Y. PUB. HEALTH LAW § 2504 (McKinney 1993).

14. 584 N.Y.S.2d 406 (N.Y. Sup. Ct. 1992).

15. N.Y. PUB. HEALTH LAW § 2504 (McKinney 1993 & Supp. 1996) dispenses with a common-law parental consent requirement in only six enumerated instances:

1. Any person who is eighteen years of age or older, or is the parent of a child or has married, may give effective consent for medical, dental, health and hospital services for himself or herself
2. Any person who has been married or who has borne a child may give effective consent for medical, dental, health and hospital services for his or

condom program infringed on the parents' free exercise rights¹⁶ or their rights to raise their children as they saw fit.¹⁷ The lower court found that although the condom program was "health related," it did not qualify as a "health service" under section 2504 of New York Public Health Law.¹⁸ It also held that because of its voluntary aspect, the condom program did not infringe on the parents' right to raise their children or to teach them the doctrines of their religious beliefs.¹⁹

her child.

3. Any person who is pregnant may give effective consent for medical, dental, health and hospital services relating to prenatal care.
4. Medical, dental, health and hospital services may be rendered to persons of any age without the consent of a parent or legal guardian when, in the physician's judgment an emergency exists and the person is in immediate need of medical attention and an attempt to secure consent would result in delay of treatment which would increase the risk to the person's life or health.
5. Where not otherwise already authorized by law to do so, any person in a parental relation to a child as defined in section twenty-one hundred sixty-four of this chapter and, (i) a grandparent, an adult brother or sister, an adult aunt or uncle, any of whom has assumed care of the child and, (ii) an adult who has care of the child and has written authorization to consent from a person in a parental relation to a child as defined in section twenty-one hundred sixty-four of this chapter, may give effective consent for the immunization of a child. However, a person other than one in a parental relation to the child shall not give consent under the subdivision if he or she has reason to believe that a person in parental relation to the child as defined in section twenty-one hundred sixty-four of this chapter objects to the immunization.
6. Anyone who acts in good faith based on the representation by a person that he is eligible to consent pursuant to the terms of this section shall be deemed to have received effective consent.

16. Violations of the following federal and New York State constitutional rights were asserted: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I; and "The free exercise and enjoyment of religious . . . worship, without discrimination or preference, shall forever be allowed in this state to all mankind . . ." N.Y. CONST. art. I, § 3.

17. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV. "No person shall be deprived of life, liberty or property without due process of law." N.Y. CONST. art. I, § 6.

The parental liberty interest in directing the upbringing and education of children was first recognized by the United States Supreme Court in *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court found that while it had not "attempted to define with exactness the liberty" guaranteed by the Fourteenth Amendment, "without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . to establish a home and bring up children, [and] to worship God according to the dictates of his own conscience . . ." *Id.* at 399.

18. *Alfonso*, 584 N.Y.S.2d at 409.

19. *Id.* at 410.

Accordingly, the court rejected the plaintiffs' argument that the condom availability program violated their constitutional rights, and it dismissed the plaintiffs' complaint.²⁰ The parents appealed.

In December 1993, the New York Appellate Division Supreme Court issued the first ruling in the country determining whether a "condom availability" program in public high schools was constitutional.²¹ The New York Appellate Division defined the three issues presented in *Alfonso* as: 1) whether the "condom availability" program violated the parents' right to freely exercise their religion²² under the First Amendment and a similar state constitutional provision; 2) whether the Fourteenth Amendment and state constitutional rights of the parents to raise their children as they deemed fit had been violated;²³ and 3) whether the availability of condoms in the public schools constituted a provision of a "health service" to unemancipated minor children that statutorily required parental consent.²⁴ On appeal, the School Board prevailed on the free exercise argument, but the remaining two issues were decided in favor of the parents, and the condom program was struck down.²⁵

The parents in *Alfonso* prevailed on the state statutory-based claim that the provision of condoms in the schools to minors under the age of eighteen was a "health service" requiring parental consent.²⁶ The court noted that it found little guidance in determining what type of services or treatment were encompassed by the "health services" law, because neither the statute nor case law define that term.²⁷ The statute provides: "Any person who is eighteen years of age or older, or is the parent of a child or has married, may give effective consent for *medical, dental, health, and hospital services* for himself or herself"²⁸

The nature of condoms as protective devices, in no way intrusive to the body, could have supported a court finding that provision of condoms was not a "health service" such as the typically invasive medical and health services provided by dentists or hospitals. Indeed, providing a student with a condom and instruction for its usage seems less medically intrusive than treating a student with aspirin. While the latter would seem clearly a delivery of "health services," the former could be regarded as delivery of "health education."²⁹ If the court had fully

20. *Id.* at 413-14.

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

22. *See supra* note 16. Because the state constitutional claims asserted by the plaintiffs were ignored by the court in its analysis, this Article will focus on the alleged federal constitutional violations.

23. *See supra* note 17.

24. *Alfonso*, 606 N.Y.S.2d at 262.

25. *Id.* at 268. The defendants' appeal to New York's highest court was denied on May 3, 1994. *Alfonso v. Fernandez*, 637 N.E.2d 279 (N.Y. 1994).

26. *Alfonso*, 606 N.Y.S.2d at 263. *See supra* note 15 for the text of N.Y. PUB. HEALTH LAW § 2504.

27. *Alfonso*, 606 N.Y.S.2d at 263.

28. N.Y. PUB. HEALTH LAW § 2504 (1) (McKinney 1993 & Supp. 1996) (emphasis added).

29. *Alfonso*, 606 N.Y.S.2d at 263. The court distinguished "health education" from "health

explored the legislative intent giving rise to the "health services" statute, it would have found that in New York, no parental consent is needed for some minors to obtain abortions³⁰ or for all minors to be treated for sexually-transmitted diseases.³¹

Further, minors who are eligible for benefits under certain federally-funded social service programs may obtain contraceptives without parental consent.³² In fact, the court's identification of condoms as a "health service" produced a set of discordant possibilities: minors could obtain treatment without parental consent for the consequences of unprotected sex, but could not, on their own, obtain condoms that might prevent those consequences. Additionally, financially-disadvantaged minors could obtain condoms without parental consent, but minors not receiving welfare or other federal government benefits would be denied similar access to condoms. Notwithstanding the arguments in favor of a finding that condoms were not intended to be included within the reach of the statutory language requiring parental consent, the court branded the New York City program a "means of disease prevention," and thus a "health service" requiring parental consent.³³

services" in the following manner: "The distribution of condoms is not . . . an aspect of education in disease prevention, but rather is a means of disease prevention. Supplying condoms to students upon request has absolutely nothing to do with education, but rather is a health service occurring after the educational phase has ceased." *Id.*

30. *Id.* at 271 (Eiber, J., dissenting). The New York statutes allow some minors to obtain abortions without parental consent as follows:

Any person who is eighteen years of age or older, or is the parent of a child or has married, may give effective consent for medical, dental, health and hospital services for himself or herself, and the consent of no other person shall be necessary

Any person who is pregnant may give effective consent for medical, dental, health and hospital services relating to prenatal care.

Medical, dental, health and hospital services may be rendered to persons of any age without the consent of a parent or legal guardian when, in the physician's judgment an emergency exists and the person is in immediate need of medical attention and an attempt to secure consent would result in delay of treatment which would increase the risk to the person's life or health.

N.Y. PUB. HEALTH LAW §§ 2504 (1), (3), (4) (McKinney 1993 & Supp. 1996).

31. N.Y. PUB. HEALTH LAW § 2305 (1993) states: "A licensed physician . . . may . . . treat . . . a person under the age of twenty-one years without the consent or knowledge of the parents or guardian of said person, where such person is infected with a sexually transmissible disease, or has been exposed to infection with a sexually transmitted disease."

32. The Medicaid and Aid to Families with Dependent Children provisions of the Social Security Act require provision of family planning services and supplies to program recipients including sexually active minors. *See* 42 U.S.C. §§ 602(a)(15), 1396d(a)(4)(c) (1994). State laws governing these programs require contraceptives be made available to eligible minors. *See* N.Y. SOC. SERV. LAW § 350(1)(e) (McKinney 1993). Additionally, Title X of the Public Health Service Act dictates that the services provided to minors remain confidential. *See* 42 U.S.C. § 300(a); 42 CFR §§ 59.15, 59.5(a)(4) (1994); *Alfonso*, 606 N.Y.S.2d at 264.

33. *Alfonso*, 606 N.Y.S.2d at 263.

The parents' state and federal constitutional claims were based on assertions that in instituting and carrying out the condom program, the public schools were "bombarding" their children with information about sex and AIDS, and influencing the students to succumb to peer pressure and to engage in premarital sexual activity that was sinful and contrary to their religious beliefs.³⁴ As a basis for finding a violation of their free exercise rights, the court required the parents to show that the condom program denied them or their children the ability to practice their religion, or otherwise coerced them in the nature of those practices.³⁵ In its analysis, the court, guided by existing judicial precedent, noted that coercion has been found where one who refuses to participate in a required state activity is sanctioned,³⁶ is held criminally liable,³⁷ or is denied a benefit.³⁸

The New York court found that participation in the New York City condom availability program was wholly voluntary.³⁹ Students were in no way required to obtain condoms from the school, and no penalties were imposed for failure to do so.⁴⁰ Additionally, a student was given a condom only if he or she requested one, and only upon his or her own individual request would a student receive informational literature on the proper use of condoms.⁴¹ The *Alfonso* court readily determined that the availability of condoms did not in any way prohibit the parents and their children from practicing their religion, and that it did not directly or indirectly compel them to engage in conduct contrary to their religious beliefs.⁴² On the basis of these findings, the court denied the parents' free exercise claim.⁴³

The plaintiffs prevailed on their claim that the school condom program violated their state and federal constitutional parental liberty rights⁴⁴ by encouraging their children to use contraceptives, which trespassed on their right to influence and guide their children's sexual behavior without state interference.⁴⁵ In its analysis of whether the condom program violated parental privacy rights, the *Alfonso* court conducted a threshold inquiry examining whether an intrusion into the parent-child relationship had occurred. Without attempting to define the level of interference necessary to constitute a governmental intrusion, the court concluded that the condom program was intrusive because it compelled parents to send their children "into an environment where they had unrestricted access to

34. *Id.* at 267.

35. *Id.*

36. *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

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

38. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

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

40. *Id.* at 266.

41. *Id.* at 261.

42. *Id.* at 268.

43. *Id.* at 267.

44. *See supra* notes 16-17.

45. *Alfonso*, 606 N.Y.S.2d at 267.

free contraceptives"⁴⁶ However, the court found a compulsory or coercive state act without any reference to the United States Supreme Court's prior treatment of state compulsion or coercion.⁴⁷

The Supreme Court has established that in determining whether state intrusion has occurred, the state act will be found coercive only when persons are compelled to submit to a mandatory state edict that impedes their right to freedom of religion and provides no alternative options.⁴⁸ Specifically, examples of coercion have been found where parents are forced, under threat of criminal sanctions, to send their children to public schools rather than religious schools;⁴⁹ to refrain from teaching foreign languages in private schools;⁵⁰ or where parents were prohibited from teaching their children in alternative educational environments as required by their religion.⁵¹ In light of the voluntary nature of the *Alfonso* condom program, it is difficult to imagine that the facts in that case could be construed as satisfying the United States Supreme Court's definition of coercion. Nonetheless, the New York City public schools' condom program was found to be coercive, and thus sufficiently intrusive to establish the first aspect of the family privacy standard.⁵²

Having determined that the state had intruded on the parents' liberty rights in rearing their children, the court considered a second aspect of the parental liberty, or privacy claim: whether the state could show a compelling interest for the condom program and whether the program, lacking an "opt out" provision, was necessary to meet that interest.⁵³ The court approached the compelling interest analysis by observing that the absence of the condom program would not cause students difficulty in acquiring condoms. It pointed out that condoms could be legally purchased by minors at stores "next to vitamins and cold remedies," for about "the same price as a slice of pizza," and could also be obtained at federally-funded family planning clinics.⁵⁴ Because condoms could be purchased or obtained from sources other than the public schools, the state's provision of free contraceptives in the school setting was deemed not sufficiently compelling to override the perceived intrusion into the familial unit.⁵⁵ The court further stated:

46. *Id.* at 266.

47. The United States Supreme Court has not specifically stated that coercion or compulsion is the standard for establishing the type of interference necessary to show a state violation of family privacy; however, this standard has been utilized by the Court in that it has not proceeded further in its analysis if a state act is not deemed coercive. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

48. *Yoder*, 406 U.S. at 219; *Pierce*, 268 U.S. at 530; *Meyer*, 262 U.S. at 399.

49. *Pierce*, 268 U.S. at 510.

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

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

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

53. *Id.* at 266.

54. *Id.* at 267.

55. *Id.*

Students are not just exposed to talk or literature on the subject of sexual behavior; the school offers the means for students to engage in sexual activity at a lower risk of pregnancy and contracting sexually transmitted diseases We conclude that the policy . . . interfer[es] with parental decision-making in a particularly sensitive area.⁵⁶

The *Alfonso* court ended its consideration of this issue with the observation that the program would have passed constitutional muster if it had allowed parents who were interested in providing "appropriate guidance and discipline" to their children to "opt out" of the program.⁵⁷ This dicta seems to express a judicial perception that if parents wish to raise their children "appropriately," they should deny them the option of obtaining condoms in their schools. The language of the court in *Alfonso* is illuminating in that it exposes a judicial aversion to unfettered discourse regarding sexually-related issues, particularly where adolescents are involved. Thus, the opinion of the court echoes the plaintiffs' beliefs that for schools to go beyond "talk and literature" in helping sexually active adolescents protect themselves from deadly disease is, on balance, not as important as upholding the "private" sanctum of the family.

Unlike the New York appellate court decision, the Massachusetts lower court and Supreme Judicial Court rulings in the case *Curtis v. School Committee*⁵⁸ support state efforts to combat the exposure of adolescents to HIV, in spite of parental assertions that the state condom availability program violates personal and religious rights. The *Curtis*⁵⁹ case commenced on May 22, 1992. Five students and their parents⁶⁰ challenged two public schools⁶¹ under the jurisdiction of the School Committee of Falmouth, Massachusetts, which had instituted a condom availability program with no "opt out" provision for students in grades seven through twelve.⁶² At Lawrence Junior High School, students could receive condoms free of charge from the school nurse. Prior to obtaining a condom, a student would be counseled and would receive pamphlets providing information about condom use and sexually transmitted diseases.⁶³ At Falmouth High School, students could either request free condoms from the school nurse or purchase them for \$.75 from the condom vending machines in the boys' and girls' restrooms.⁶⁴

56. *Id.* at 266.

57. *Id.* at 267.

58. 652 N.E.2d 580 (Mass. 1995), *cert. denied*, 116 S. Ct. 753 (1996).

59. *Curtis v. School Comm.*, No. 92-518 (Mass. Sup. Ct. Oct. 8, 1993); *Curtis v. School Comm.*, 652 N.E.2d 580 (Mass. 1995).

60. Brief of Amicus Curiae at 15-16, *Curtis v. School Comm.*, 652 N.E.2d 580 (Mass. 1995).

61. The defendants in *Curtis* were the Falmouth School Committee, the superintendent of the Falmouth public schools, the principal of Falmouth High School, and the principal of the Lawrence Junior High School in Falmouth. *Curtis*, 652 N.E.2d at 580 & n.2.

62. *Id.* at 582.

63. *Id.* at 582-83.

64. *Id.* at 583.

Trained faculty members provided counseling to students who requested it, and informational pamphlets were available in the nurse's office.⁶⁵

The plaintiffs alleged that the condom availability program infringed on family privacy and free exercise rights in violation of the First and Fourteenth Amendments of the United States Constitution.⁶⁶ More specifically, they argued that by providing students with sex-related information and access to condoms, the program violated their constitutional right to freely exercise their religion by interfering with their efforts to instill in their children moral beliefs that sex outside of marriage is sinful.⁶⁷

The defendants in *Curtis* moved for summary judgment claiming that the plaintiffs had not shown a reasonable likelihood of proving that the condom availability program violated any of their constitutional or statutory rights.⁶⁸ The trial court found that because the condom availability program neither burdened nor coercively interfered with the plaintiffs' privacy rights or with the right to free exercise of religion, the program did not violate the plaintiffs' federal constitutional rights.⁶⁹ The lower court thus granted the defendants' motion for summary judgment, and the plaintiffs appealed.⁷⁰ The plaintiffs asserted in their appeal that the lower court had erred in its finding that the condom availability program, which lacked an "opt out" provision, did not violate their right to familial privacy and to the free exercise of their religion pursuant to constitutional guarantees.⁷¹ The court began its analysis of the plaintiffs' claims by acknowledging parents' rights to be free from unnecessary governmental intrusion in rearing their children.⁷² It noted that inculcation of moral standards, religious beliefs, and elements of good citizenship are aspects of child rearing protected by the Constitution from unnecessary intrusion.⁷³ It also highlighted the Supreme Court's appreciation and zealous protection of parents' fundamental liberty

65. *Id.*

66. *Id.* at 582. The plaintiffs also asserted claims under MASS. GEN. L. ch. 274, § 3 (1994) (prohibiting the counseling of a felony), MASS. GEN. L. ch. 119, § 51A (requiring school administrators to report incidents of sexual abuse to the Department of Social Services), and MASS. GEN. L. ch. 71, § 30 (requiring public school teachers to impress chastity on the minds of children). The plaintiffs further asserted that all of the above-stated violations resulted in a deprivation of their civil rights under 42 U.S.C. § 1983 (1994) and MASS. GEN. L. ch. 12, § 111. All of plaintiff's claims were denied. *Curtis*, 652 N.E.2d at 582 & n.3.

67. *Curtis*, 652 N.E.2d at 588.

68. *Id.* at 582.

69. *Id.*

70. The plaintiffs filed, and the court granted, an application for direct appellate review by the Supreme Judicial Court of Massachusetts. *Id.*

71. On appeal, the plaintiffs did not argue the claims based on alleged violations of Massachusetts statutory and constitutional law. *Id.*

72. *Id.* at 585.

73. *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923)).

interest in raising their children:

The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and the upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.⁷⁴

The plaintiffs first argued that the condom program violated their substantive due process rights under the Fourteenth Amendment to direct and control the education of their children within the zone of familial privacy.⁷⁵ This claim rested on the assertion that the program placed their children within the compulsory setting of public schools, which provided their children unrestricted access to condoms without parental input.⁷⁶

The *Curtis* court set forth the threshold inquiry in the familial privacy claim: whether parents were burdened by the state in their right to educate their children.⁷⁷ In this inquiry, the court acknowledged that the burden required for such an unconstitutional interference must constitute coercion or "compulsion" by the state.⁷⁸ In its analysis, the court considered the facts surrounding the availability of condoms in the Falmouth schools. The program required no classroom participation of students.⁷⁹ Instead, condoms were made available in the nurse's office to junior high school students who requested them, and were also made available to high school students in vending machines in the boys' and girls' bathrooms.⁸⁰ The students were not required to obtain the condoms, to read the instructional literature, or to participate in counseling regarding their use.⁸¹ They were free to decline to participate in the program, and no penalty would ensue because of failure to obtain condoms from the school.⁸² Further, the parents were free to impart moral and religious teachings to their children and were equally unencumbered in instructing their children not to participate in the condom program.⁸³

Unlike the *Alfonso* court, the court in *Curtis* looked to legal precedent in

74. *Id.* at 585 (quoting *Yoder*, 406 U.S. at 232); see also *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

75. *Curtis*, 652 N.E.2d at 584.

76. *Id.*

77. *Id.* at 585.

78. *Id.* (citing *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980), *cert. denied*, 449 U.S. 829 (1980)). See also *Yoder*, 406 U.S. at 205 (compulsory school attendance law violated Amish parents' right to direct religious upbringing of children); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (law requiring public school attendance and prohibiting attendance at private parochial schools violated parental liberties); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (law prohibiting teaching of foreign languages to school children violated parental liberties).

79. *Curtis*, 652 N.E.2d at 586.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

determining the type of factual scenario necessary to establish the requisite coercive state action. It found that coercion exists where the governmental act in question is mandatory, and provides no alternative option for the party being burdened by the state requirement.⁸⁴ Considering past judicial findings of coercive government acts, the court noted that the United States Supreme Court had found that laws proscribing the education of children other than at public school⁸⁵ and laws prohibiting the teaching of foreign languages to school children⁸⁶ were coercive. The court in *Curtis* found, by reference to precedent, that the plaintiffs had not met a threshold requirement of establishing state coercion interfering with their personal liberty and familial privacy interests.⁸⁷ As a result, the court did not inquire into the compelling nature of the state's interests in implementing the condom program.⁸⁸

In order to prevail on their free exercise claim, the parents had to show that the condom program imposed a substantial burden on the exercise of their religion.⁸⁹ To establish the necessary burden, the parents were required to demonstrate, as in the privacy claim, that the burden was coercive or compulsory in nature.⁹⁰

The court displayed a sensitivity to the plaintiffs' claims by noting that the voluntary condom distribution program might offend the religious sensibilities of the plaintiffs. However, it also recognized that parents have no right to tailor public school programs to meet their individual preferences.⁹¹ Like the *Alfonso* court, the Massachusetts Supreme Judicial Court pointed to the voluntary nature of the condom program in that there was no requirement that any student participate in the program.⁹² As a result, it held that mere exposure of adolescents at public schools to "offensive" programs, without more, did not violate the Free Exercise Clause.⁹³ Treating the issue fairly summarily, the court denied the free exercise claim and upheld the condom availability program.⁹⁴

The outcomes of the New York and Massachusetts condom cases illustrate the discordance existing in the present American and global climates that is fueled by conflicting economic interests, faith-based "truths," life-threatening sexually-transmitted diseases, and judicial attempts to maintain order and to foster the spiritual and physical vitality of children in need of protection. The federal constitutional claims raised in both the New York and Massachusetts cases arise in that complex climate. Because this climate and culture are in many ways

84. *Id.* at 585-87.

85. *Id.* at 585 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

86. *Id.* at 585-86 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923)).

87. *Id.* at 586-87.

88. *Id.* at 583.

89. *Id.* at 587.

90. *Id.*

91. *Id.* at 589 (citing *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)).

92. *Id.*

93. *Id.*

94. *Id.*

different from that which existed a generation ago,⁹⁵ constitutional issues must be decided with an eye to both present context and history.

The opinions of both the New York and Massachusetts courts are disappointing in their myopic treatments of the constitutional issues before them. The *Alfonso* court could certainly have been respectful of precedent while upholding a voluntary and non-coercive governmental program with the potential for safeguarding the lives of adolescents; but it did not produce such a decision. The language of the *Alfonso* court suggests that in addition to the stated bases for its rationale, perhaps the court, like many parents, could not bring itself to peel back the layers of shame and guilt⁹⁶ inherent in sexual taboos surrounding AIDS in order to face the threat of that disease and act in a responsible manner. The court's allocation of the issue to the "private" realm of the family, its refusal to confront the compelling nature of the AIDS epidemic, and the need for a strong public response by state government, all support parental reproduction of shame and guilt.

Although the *Curtis* court upheld the condom availability program, it resembled the *Alfonso* court in its limited examination of the notion of coercion. Both courts employed analyses relying on conventional application of legal doctrine and ignored important cultural pressures contributing to the coercion of adolescents. Perhaps this is because utilization of the latter method of analysis would have forced the courts to put aside their squeamishness regarding the "particularly sensitive area"⁹⁷ of sex and adolescents. This they could not, or would not, do. As a result, their opinions do not provide much needed guidance for resolving future conflicts over when, and how, the state may interfere with parental rights in order to foster the well-being of children. An examination of the realities of present-day coercion might have led the state courts toward more promising analyses.

II. SECTARIANISM, SECULARISM AND SEX EDUCATION

Commentators on Free Exercise and Establishment Clause doctrine sometimes characterize Church and State issues as arising from conflicts of "secularists"⁹⁸ and

95. See the cartoon *Szep's View*, depicting the framers of the Constitution considering whether to include the right to condoms in high schools. Paul Szep, *Szep's View*, BOSTON GLOBE, July 21, 1995, at 16. For an insightful discussion on postmodernist culture, see Marie Ashe, "Bad Mothers," "Good Lawyers," and "Legal Ethics," 81 GEO. L.J. 2533 (1993).

96. See Kate N. Day, *The Moral Confusion of Affirmative Action Jurisprudence or When Will We Learn to Bear the Shame of Guilt?*, 16 VT. L. REV. 777 (1992).

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

98. The terms "secularism," "humanism," and "secular humanism" are often used interchangeably in the discursive realm. For an insightful discussion on the meanings of each of these terms, see Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 616-27. See also JOHN W. WHITEHEAD, *THE SEPARATE ILLUSION: A LAWYER EXAMINES THE FIRST AMENDMENT* (1977); JOHN W. WHITEHEAD, *THE SECOND AMERICAN REVOLUTION* 53-123 (1982).

"sectarians."⁹⁹ These conflicts have become increasingly visible in recent years.¹⁰⁰ The parents' claims in the condom struggle present a window through which to view the larger, more vociferous battle underway and gaining intensity in the country, involving multiple conflicts among secularists and sectarians about the control of children's minds and bodies.

During the 1980s, some Christian groups advanced claims that public schools are promoting the ideology of humanism, which violates the separation of Church and State protected by the Establishment Clause of the First Amendment of the Constitution.¹⁰¹ Essentially, these claims argued that "secular humanism" involves a level of religion and that public schools' endorsements of secular humanism amounted to a favoring of one religion over another.¹⁰² "Humanism" has been defined by its advocates as "[a]n ethical process through which we can all move, above and beyond the divisive particulars, heroic personalities, dogmatic creeds, and ritual customs of past religions or their mere negation."¹⁰³ It has also been defined as "a philosophical, scientific, and ethical viewpoint that involves a commitment to free inquiry, to the use of science to explain nature, and to the use of reason and critical intelligence to solve human problems."¹⁰⁴

One Christian leader has recently issued an all-encompassing denunciation asserting that "[m]ost of the evils in the world today can be traced to humanism."¹⁰⁵ Others have specifically enumerated premarital sex, drugs, rock music, declining S.A.T. scores, easy divorce, and materialism as harms caused by this ideology.¹⁰⁶ Humanists have additionally been accused of attempting to control the public schools, of instituting a curriculum that is anti-God, anti-moral, anti-family, anti-free enterprise, and anti-American.¹⁰⁷ Conversely, humanists, secularists or other "non-fundamentalists" have charged religion with engaging in

99. See Sanford Levinson, *Some Reflections on Multiculturalism, "Equal Concern and Respect," and the Establishment Clause of the First Amendment*, 27 U. RICH. L. REV. 989 (1993).

100. *Id.*

101. The First Amendment provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. See also HOMER DUNCAN, *SECULAR HUMANISM: THE MOST DANGEROUS RELIGION IN AMERICA* 52-63, 77-95 (1979) (with introduction by Senator Jesse Helms); TIM LAHAYE, *THE BATTLE FOR THE FAMILY* 87-103 (1982); TIM LAHAYE, *THE BATTLE FOR THE MIND* 141-79 (1980); TIM LAHAYE, *THE BATTLE FOR THE PUBLIC SCHOOLS* (1983).

102. See *infra* note 107 and accompanying text.

103. *Humanist Manifesto II*, *THE HUMANIST*, Sept.-Oct. 1973, at 4, 5.

104. P. Kurtz, *Who are the Secular Humanists?*, 2 *FREE INQUIRY* 1 (1981).

105. LAHAYE, *THE BATTLE FOR THE MIND*, *supra* note 101, at 9.

106. See JOHN W. WHITEHEAD, *THE SECOND AMERICAN REVOLUTION* (1982).

107. See LAHAYE, *THE BATTLE FOR THE MIND*, *supra* note 101, at 57-83. Also consider the comments of Jennie Wilson, a Christian supporter of the parents who sued the Hawkins County School Board over the alleged "anti-Christian" content of textbooks in *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), found in STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* 22-23 (1993).

dogmatism, intolerance, repression and anti-intellectualism.¹⁰⁸

The differences between sectarians and humanists evidenced in the condom cases are very deep. Even if sectarian parents and the school boards they perceive as "secular-humanist" were to agree on how best to keep teenagers safe from AIDS, the presentation of the information necessary to achieve the desired result remains a source of heated controversy. Many parents assert that Biblical teachings, and thus "morality," are absolute; therefore, any discussion of condoms which might cause adolescents to engage in critical assessment of alternative behavioral choices would constitute an affront to and would be irreconcilable with the religious truths handed down to their children.

These parental perspectives were evident in both *Alfonso*¹⁰⁹ and *Curtis*. In *Curtis*, one plaintiff/mother enunciated the harm that the availability of condoms and the related information provided by the public school caused to her family as follows:

Due to the instruction my son and niece have received at school concerning condoms and sexual activity, they now perceive our views on religion and sex as old-fashioned and openly question our religious beliefs. . . . I am concerned that they may not take the Bible, its commandments and the Word of God as seriously as we have taught them to, and [will] doubt or question the validity of our beliefs.¹¹⁰

Fifteen-year-old Daniel, also a plaintiff in the *Curtis* lawsuit, echoed his mother's concerns: "This new policy has . . . caused problems in my relationship with my parents. They think I may be starting to be more sexually active and do not trust me now as much as they did before the condoms were available."¹¹¹ These sentiments make clear that the potential for inquisitive or critical thinking challenges the "absolute truths" of religious dogma, and is therefore objectionable to the plaintiffs in the condom cases.

Another indication of the plaintiffs' embrace of "absoluteness" is evident in their search for guidelines guaranteeing desired results. Thus, the plaintiffs in *Curtis* asserted that condoms are unreliable, that condoms are an ineffective means of protection against HIV and potentially fatal sexually transmitted diseases, and that for those reasons they should not be made available to adolescents.¹¹² In support of this argument, the plaintiffs referred to a medical report released in 1993, containing information that the Food and Drug Administration tested and found fifty broken condoms per one thousand condoms, a rate exceeding the

108. See CORLISS LAMONT, *THE PHILOSOPHY OF HUMANISM* (6th ed. 1982).

109. See *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 267 (N.Y. App. Div. 1993) (parents' claims of coercion).

110. Affidavit of Nancy MacLone, Brief of Appellants, vol. 1, joint app. at 72-73, *Curtis v. School Comm.*, 652 N.E.2d 580 (Mass. 1995).

111. Affidavit of Daniel MacLone, Brief of Appellants, vol. 1, joint app. at 69, *Curtis v. School Comm.*, 652 N.E.2d 580 (Mass. 1995).

112. Brief of Appellants at 8, *Curtis v. School Comm.*, 652 N.E.2d 580 (Mass. 1995).

FDA's minimum safety standard of four breaks per one thousand condoms.¹¹³

It is obviously not desirable for condoms, in any percentage, to exhibit defects. However, assuming *arguendo* the plaintiffs' assertions regarding the defective nature of the number of condoms tested, it remains the case that in *Alfonso* the Surgeon General of the United States was cited for the statement that condoms are the best protection, other than abstinence, against the sexual transmission of HIV.¹¹⁴ The plaintiffs in the condom cases, however, demand "absolutisms;" they require bright-line distinctions between good and bad, right and wrong, effective and ineffective. Advocating and tolerating only abstinence as the best protection, they cannot tolerate and in fact do condemn condoms, the "second best" form of protection, refusing to see it as better than some other alternatives, such as unprotected sex.

The intensity of the division between secularists and sectarians in the condom cases is not surprising. More striking, however, is the discord existing among individual religious sects over the public school condom programs. This disagreement was clearly evidenced in the *Curtis* litigation. Briefs filed in that case expose the lack of ideological harmony among religious groups. The plaintiffs in *Curtis* were represented in part by legal counsel for The American Center for Law and Justice, a group founded by the Christian evangelist Pat Robertson,¹¹⁵ and the Rutherford Institute, a "religious freedom advocacy" group.¹¹⁶ The American Jewish Congress and the Unitarian Universalist Association, however, filed amicus briefs in support of the Falmouth School Board.¹¹⁷ In opposition to the parents' claims, those religious organizations vehemently objected to the claims that the condom programs burdened religious freedom, set forth legal arguments promoting the constitutional protection of religious freedom through acceptance of the public school condom program, and urged the court to adopt their vision of the proper means for fostering "a thriving of religious minorities in a pluralistic environment."¹¹⁸

The divisions apparent in *Curtis* reflect a contemporary American society within which numerous groups espouse different and seemingly irreconcilable ideologies affected by religion, politics, and economics, regarding the collective concern of children being "at risk" and the need to protect them. These divisions have been met by mechanical application of traditional Free Exercise Clause doctrine such as has been performed by the *Alfonso* and *Curtis* courts. The limits and failures of the courts' approaches can be illustrated by examining their treatment of the notion of coercion. Their approach to the coercion inquiry is simplistic, nostalgic, and unhelpful because of its unwillingness to recognize the

113. *Id.* at 9 n.13.

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

115. Cathy L. Grossman, *Airline's Stance on Religious Expression Causes Lots of Turbulence*, DET. NEWS, Apr. 6, 1995, at D6.

116. Debra J. Saunders, *Who Can Decide, Who Can't*, S.F. CHRON., July 31, 1995, at A19.

117. Brief of Amici Curiae, American Jewish Congress and Unitarian Universalist Association, *Curtis v. School Comm.*, 652 N.E.2d 580 (Mass. 1995).

118. *Id.*

changing realities of contemporary culture.

Both advocates and opponents of various forms of sex education in the public schools are concerned with an array of harms that threaten the well-being of adolescents. However, they are in disagreement about how to prevent these harms. One opponent of sex education has argued: "The sex educators have either a mental block . . . or, for some reason, cannot see that their sex programs are largely responsible for the (1) pregnancies, (2) abortions, (3) prostitution, (4) perversion, (5) suicides and (6) psychological as well as physical venereal diseases that are epidemic in today's youths."¹¹⁹ The "sex educators," including advocates of condom availability programs who perceive a state interest in preventing such harms, argue that the lack of such programs are contributing to the feared harms.

The plaintiffs in the condom litigation have argued that the state, through condom availability programs, coerce their children by "bombarding" them with objectionable messages condoning sexual activity. The *Alfonso* plaintiffs alleged that their children were "bombarded" with information regarding the condom program, which could cause them to succumb to peer pressure to engage in sex.¹²⁰ The "bombardment" was asserted to arise when the schools established health resource rooms where trained professionals dispensed condoms to students who requested them, and when, upon receiving a condom, students were given personal health guidance counseling involving their proper use and the consequences of their misuse.¹²¹ In this process of providing condoms, a student's voluntary activity and initiative are essential. To obtain a condom, a student must, on his or her own volition, travel into an area of a school building set aside specifically for the distribution of condoms, voluntarily request a condom, and only then receive counseling on its proper use.¹²² It is thus very difficult to understand how this seemingly autonomously-acting student can be deemed to have been "bombarded" by any aspect of the condom program.

A much clearer instance of children's exposure to bombardment by sexual images and information may be found in young people's ordinary daily activities: watching television and movies, listening to ubiquitous rap and rock music lyrics, and utilizing the Internet.¹²³ A child needs only to inadvertently access one of

119. DEBRA W. HAFFNER, M.P.H. & DIANE DE MAURO, PH.D., WINNING THE BATTLE: DEVELOPING SUPPORT FOR SEXUALITY AND HIV/AIDS EDUCATION (Sex Information and Education Council of the U.S. ed. 1990) (quoting MELVIN ANCHELL, *KILLERS OF CHILDREN* (1988)).

120. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 267 (N.Y. App. Div. 1993).

121. *Id.* at 261.

122. *Id.*

123. Despite the political rhetoric, it is unlikely that adolescents' exposure to popular culture will be restricted by government or the private sector. America's reluctance to censor expression, or to miss out on a marketing advantage, sustains the ever-broadening "marketplace" for teenagers. Richard Lacyo, *Violent Reaction*, *TIME*, June 12, 1995, at 25-30. Further, the images and experiences available to teenagers are becoming more realistic. Soon teenagers with access to the Internet may have 3-D experiences using Virtual Reality Modeling Language, a new technology enabling them to "virtually" go to the mall and to download rock videos. Michael Meyer, *Surfing the Internet in 3-D*, *NEWSWEEK*, May 15, 1995, at 68.

various on-line services through the Internet on his or her home computer to find sadomasochism, bestiality, and pornography, which are regarded as immoral and highly objectionable to most parents.¹²⁴ Movies and television also provide a deluge of material providing children with numerous examples of sexual relations conducted outside of the mainstream heterosexual marital forum. Today's typical viewer sees about ten thousand scenes of suggested sexual intercourse, sexual comment, or innuendo during one year of average viewing, and seven out of eight acts of intercourse on prime time are extramarital.¹²⁵ Similarly, the American movie industry is consistently and legitimately accused of peddling glamorized images of "irresponsible sex" to children and adolescents.¹²⁶

In addition to the proliferation of media messages concerning sexual activity, drastic changes in the structure of the family that also expose children to non-traditional sexual relationships have taken place during the past twenty years. The percentage of children living in single-parent households doubled from 1970 to 1989, at which time sixteen million children lived in single-parent households, and only one-quarter to one-half of all children born today will live with both of their parents throughout their childhood.¹²⁷ As a result, many children do not experience the benefit of parental supervision during much of the time when they are not in school. As Justice Eiber noted while dissenting from the three-to-two majority opinion in *Alfonso*, many children lack interested parents or have no parents available to provide guidance and discipline and to urge their adolescent children to abstain from sex until marriage.¹²⁸

Notwithstanding parents' claims of coercion by the state, the reality is that modern technological and social constructs provide ready access to sex-themed messages of infinite variety, and those forces will not "leave alone" young people, many of whom have no consistent parental influence to guide them in making important personal decisions. These forces are in fact coercive of children in the most meaningful sense—they are informative, instructive, persuasive and

124. Marty Rimm, *Marketing Pornography on the Information Superhighway*, 83 GEO. L.J. 1849 n.5 (1995). For a general discussion of the availability of highly graphic sexual materials available to children on computers, see Stephen Levy, *No Place For Kids?*, NEWSWEEK, July 3, 1995, at 47.

125. Jim Impoco & Monika Guttman, *Hollywood: Right Face Under Seige, Filmmakers and T.V. Bosses Become More Family Friendly*, U.S. NEWS & WORLD REPORT, May 15, 1995, at 66 (citing studies by Robert Lichter, co-director of the Center for Media and Public Affairs).

126. For a recent example of the perceived power of movies to influence the minds of children, see Senate Majority Leader Bob Dole's angry comments regarding Hollywood's poisoning of the "minds of our young people . . . with destructive messages of casual violence and even more casual sex." *Id.* In his State of the Union address, President Clinton condemned the entertainment industry for "incessant, repetitive, mindless violence and irresponsible conduct." *Id.*

127. See NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 17-23 (1991); Jerry Adler et al., *Kids Growing Up Scared*, NEWSWEEK, Jan. 10, 1994, at 43.

128. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 275 (N.Y. App. Div. 1993).

seductive. They bombard with much greater power and effectiveness¹²⁹ than can the simple presentation of sex education materials by a nurse in an office of the public high school. It is therefore only by utterly ignoring the reality of cultural coercion and bombardment that one could view public school condom programs as bombarding and coercive. In fact, the schools, through the condom programs, offer resistance to the powerful coercions exercised by large social forces.

In examining the claims relating to state coercion, the courts in New York and Massachusetts have failed to account for the cultural context in which those cases arose. Instead, they have limited themselves to reiterating legal doctrine that developed in very different contexts. *Wisconsin v. Yoder*¹³⁰ is one of the leading Free Exercise Clause cases considered by the New York¹³¹ and Massachusetts courts¹³² in their review of their respective states' condom programs. Like the Amish parents in *Yoder*, the plaintiffs in the condom cases argued that they should not be subject to state requirements which compel or coerce the exposure of their children to anti-religious messages and activities.¹³³ In *Yoder*, parents and their children who were members of the Old Order Amish and the Conservative Amish Mennonite Church objected to their children being required to attend school beyond the eighth grade and asserted violations by the state over their "free exercise of religion" rights.¹³⁴ Life in a separated agrarian community was the keystone of the Amish faith and the Amish argued that attendance at a public school would expose their children, during the critical adolescent years, to higher education that might instill into adolescents values which the Amish rejected as alienating man from God.¹³⁵ Testimony established that Amish groups separated themselves from the world, and attempted to shield their children from all worldly influences. If forced to attend public or private school, the children would have had either to abandon their religious beliefs and be assimilated into society at large, or to migrate to a more religiously-tolerant region.¹³⁶

Pursuant to its free exercise inquiry, the Court found that the state requirement of compulsory school attendance to age sixteen for the Amish children posed a threat of undermining the Amish community and religious practice, and that the parental decisions to remove their children from the public school system after completion of the eighth grade were not likely to jeopardize the health or safety of the Amish children.¹³⁷ Further, the state did not prove its own interest of the "highest order" in compelling the Amish children to attend public high school,

129. See *supra* notes 123-27.

130. 406 U.S. 205 (1972).

131. *Alfonso v. Fernandez*, 584 N.Y.S.2d 406, 409 (N.Y. Sup. Ct. 1992), *rev'd*, 606 N.Y.S.2d 259, (N.Y. App. Div. 1993).

132. *Curtis v. School Comm.*, 652 N.E.2d 580, 584 (Mass. 1995).

133. *Id.* at 587; *Alfonso*, 606 N.Y.S.2d at 267.

134. *Yoder*, 406 U.S. at 209. Under Wisconsin law, the children were required to attend school until they reached the age of sixteen. *Id.* at 207.

135. *Id.* at 211-12.

136. *Id.* at 218.

137. *Id.* at 232-35.

given that the alternative education provided within the Amish community appeared to be as good as, or better than, public education.¹³⁸

In *Yoder*, the Court, in its evaluation of constitutional issues, considered the public policy concerns of allowing the Amish children to forego public high school education. The Amish had excellent records as law-abiding and generally self-sufficient members of society.¹³⁹ The Amish community was found to be a highly successful social unit within society, its members productive persons who rejected public welfare benefits.¹⁴⁰ The Court pointed out, favorably, that the Amish group in question had never been known to commit crimes, and that none were unemployed.¹⁴¹

The findings made by the Court concerning the Amish established a compelling argument that their religious community could survive only if it was allowed to educate its children free of governmental interference. Not only would the state action cause an infringement of the parents' constitutional rights, it would also precipitate the extinction of a religious community. This consideration clearly influenced the Court in its decision to foster religious pluralism by favoring the claims of the Amish. Further, although some of the religious practices of the Amish may have seemed different and "other" to a majority, the consequences of those practices were found to be appealing and desirable. The Amish were perceived to have attained goals and exemplified virtues that most Americans respect. It was in that cultural context that the Supreme Court found coercive state action in Wisconsin's requirement of high school education for Amish children.¹⁴²

The applicability of *Yoder* to the condom cases, however, is highly questionable. The world has changed greatly since *Yoder* was decided in 1972. Separation from bombardments by the larger culture is even less likely than it was twenty years ago, and the risks to children differ from those that existed twenty years ago. The Amish families in *Yoder* maintained a "separatist" lifestyle that was unique even in 1972 in its successful avoidance of outside worldly influences. Conversely, the *Curtis* and *Alfonso* parents and children have never asserted that they maintain lives highly isolated from contemporary American society. They do not argue that except for the public school experiences, their children are immune to the cultural bombardment—and indeed coercion—accomplished through media messages.

Religious pluralism could be encouraged in *Yoder* because the court found that, on balance, protection of the parents' constitutional rights presented no significant threat to the children or to society. The same determination, however,

138. *Id.* at 235-36. In considering what effect an exemption from the public school education requirement would have on the Amish children's educational future, one expert witness on education testified that the Amish system of learning through practicing skills directly relevant to their adult role in the Amish community was "ideal," and "perhaps superior to ordinary high school education." *Id.* at 212.

139. *Id.* at 212-13.

140. *Id.* at 222.

141. *Id.* at 223 n.11.

142. *Id.* at 228-29.

cannot be made regarding the factual scenarios presented in the *Alfonso* and *Curtis* cases. Because of the AIDS epidemic, the significant threats to children require a broad array of state actions—including condom programs—to protect against cultural bombardment advocating risk and irresponsibility.

III. ADOLESCENTS, SEX AND AIDS

“My theory . . . is don’t do it before you’re twenty one, and then don’t tell me about it.”¹⁴³

Prior to the first AIDS diagnosis in 1982,¹⁴⁴ parental reluctance to acknowledge sex as a potential force in children’s lives did not carry the grave consequences that it now bears. Before AIDS, the problems associated with adolescent sexual activity were not generally life-threatening. Parents could emotionally armor themselves against troubling statistics regarding the high incidence of teenage sexual behavior by adopting the belief that it was not their children, but “other people’s children” who were having sex. Although some parents were correct in their assessment of their children’s lack of sexual activity, and others were not, neither the mistaken parents nor their children typically faced a real risk of death as a consequence of sexual activity.

Adolescents now are engaging in sexual intercourse and are beginning to become infected with sexually transmitted diseases, including HIV, in very significant numbers.¹⁴⁵ More than eighty percent of Americans have had sexual intercourse by the time they reach the twelfth grade.¹⁴⁶ As a result, two and one-half million adolescents annually contract a sexually transmitted disease.¹⁴⁷

In 1989, AIDS became the sixth leading cause of death for persons aged

143. Ellen Goodman, *When We Talk About Sex and Teens, Can’t We Use Words Besides ‘No’?*, BOSTON GLOBE, June 22, 1995, at 11 (quoting Hilary Rodham Clinton’s reaction to the topic of her daughter Chelsea and sex).

144. As early as 1979, physicians in New York, San Francisco and Los Angeles began seeing gay men with unusually violent forms of *Pneumocystis carinii* pneumonia (PCP) and Kaposi’s sarcoma (KS). These diseases generally do not affect adults with intact immune systems. Initially AIDS was termed GRID, gay-related immunodeficiency, or AID, acquired immune deficiency. The term AIDS, for acquired immune deficiency syndrome, was officially adopted by the Centers for Disease Control in 1982 as the associated diseases were identified. Jan Zita Grover, *AIDS: Keywords*, in *AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM* 17, 18-19 (Douglas Crimp ed. 1988).

145. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 268 (N.Y. App. Div. 1993) (quoting Dr. Margaret Hamburg, Acting Commissioner of the New York City Department of Health).

146. *Facing Facts: Sexual Health for America’s Adolescents: The Report of the National Comm’n on Adolescent Sexual Health*, SEICUS REPORT (Sex Information and Education Council of the U.S.), Aug.-Sept. 1995, at 4.

147. Benjamin R. Barber, *America Skips School: Why We Talk So Much About Education And Do So Little*, HARPER’S MAG., Nov. 1993, at 39.

fifteen to twenty-four.¹⁴⁸ Because this disease has an eight to ten-year latency period, the statistics suggest that the majority of those persons were infected as adolescents.¹⁴⁹

American law has had a long history of commitment to protecting the “best interests” of children. In light of this history, it is very puzzling that judges refuse to endorse governmental efforts to protect minors,¹⁵⁰ in spite of the statistics portraying a sexually active and highly vulnerable adolescent population. This judicial refusal can perhaps be understood as arising out of a denial of the meaning of the AIDS threat to adolescents, an illusion which may mirror a popular misunderstanding that only “other” people get AIDS.¹⁵¹ Commentators have documented the cultural impulse toward segregation of potential AIDS victims as delinquent “others.”¹⁵²

In Western culture, there have been strong themes expressed in established religious dogma portraying disease as a force affecting those who have disobeyed generally accepted rules of conduct. Consider, for example, the Biblical reference to the plague of “boils”¹⁵³ that God sent to the people of Egypt as punishment for the Pharaoh’s refusal to obey His Word:

Then the Lord said to Moses and Aaron, “Take handfuls of soot from a furnace and have Moses toss it into the air in the presence of Pharaoh. It will become fine dust over the whole land of Egypt, and festering boils

148. Center for Disease Control and Prevention, *Selected Behaviors That Increase Risk for HIV Infection Among High School Students—United States, 1990*, 41 MORBIDITY AND MORTALITY WEEKLY REPORT 231(1992).

149. *Id.*

150. Courts, however, will often reject parties’ religious objections to medical procedures, where failure to obtain the medical service would place the person’s life in jeopardy. *See* Crouse-Irving Memorial Hosp., Inc. v. Paddock, 127 Misc.2d 101 (N.Y. Sup. Ct. 1985) (court ordered blood transfusion for pregnant woman during delivery of child despite religious objections); *In re McCauley*, 565 N.E.2d 411 (Mass. 1991) (court ordered blood transfusion to eight-year-old leukemia patient despite Jehovah’s Witness parents’ refusal to consent to procedure); *In re Cabrera*, 552 A.2d 1114 (Pa. Super. Ct. 1989) (parents’ religious objections were outweighed by State’s interest in health of six-year-old child with sickle cell anemia needing blood transfusion).

151. The overwhelming majority of those within the “other” classification have been gay men. Male-to-Male sexual contact is the most frequently reported type of transmission of HIV in persons with AIDS. *Update on AIDS in Men Who Have Sex with Men*, 52 AMERICAN FAMILY PHYSICIAN 667 (1995).

152. Senator Jesse Helms demands “common sense about a disease transmitted by people deliberately engaging in unnatural acts.” *Jesse Helms’ Venom*, BOSTON GLOBE, July 7, 1995, at 14. Helms was arguing for reducing federal AIDS funding upon assertions that more people die from diseases that receive less federal financing than AIDS. Public Health Service figures refute Senator Helms’ claims. *Id.*

153. It has been suggested that “boils” were probably skin anthrax, a black, burning abscess that developed into a pustule, and which seriously affected the knees and legs. *Exodus* 9:8, n.9:9 (NIV Study Bible 1985).

will break out on men . . . throughout the land”¹⁵⁴

As a result of an established religious connection between disease and wrongdoing, plagues and epidemics were sometimes “moralized” as punishments imposed on those who had committed evil acts. The establishment of a causal connection between “good” and “bad” human behavior, and health and disease in the human body, reinforced the importance of adherence to religious teachings. This connection drew clear distinctions between those who lived “right” lives, and the “others” who did not.

A stark instance of modern perpetuation of the belief system connecting disease with immorality arose in 1979-1981, when gay men were dying from illnesses unusual in young people, but which had not yet been diagnosed as AIDS.¹⁵⁵ As the numbers of deaths mounted, medical staffs of New York hospitals informally dubbed what would later become known as AIDS, as WOGS: the Wrath of God Syndrome.¹⁵⁶ The “moral” panic and confusion created by AIDS continues to obstruct concrete efforts to stem the spread of this disease among adolescents. As a disease primarily transmitted through sexual contact,¹⁵⁷ AIDS invites the perception that it is willfully contracted through “evil” acts violative of social mores and religious teachings.¹⁵⁸ The cultural construction of AIDS, then, atavistically repeats deeply-rooted Western connections between disease and moral and spiritual disorder.

It is likely that some courts will consider the public health emergency presented by AIDS in the same way American society views AIDS—as an unprecedented “sexual” disease carrying “moral” implications.¹⁵⁹ The existence of such an underlying mindset may be the best explanation of otherwise incomprehensible judicial balancing in favor of privacy interests and against state efforts making condoms available to sexually active adolescents. In fact, AIDS presents not only a catastrophic medical crisis, but also an intellectual, emotional and spiritual conflict over the human body and its capacities for sexual pleasure.¹⁶⁰

Judicial ambivalence or squeamishness about endorsing the aggressive combating of AIDS should not be surprising, given the popular responses to the epidemic. As a barometer of public attitudes, consider the following warning, sent by the International Banana Association to the Public Broadcasting Service

154. *Exodus* 9:8 (NIV Study Bible 1985).

155. See Paula A. Treichler, *Aids, Homophobia, and Biomedical Discourse: An Epidemic of Signification*, in *AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM* 31 (Douglas Crimp ed. 1988).

156. *Id.* at 52.

157. See *supra* note 151.

158. See *supra* note 153 and accompanying text.

159. See Simon Watney, *The Spectacle of AIDS*, in *AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM* 71 (Douglas Crimp ed. 1988).

160. For an instructive discussion on Americans’ reticence to engage in “sexual” discourse, see Leo Bersani, *Is the Rectum a Grave?* in *AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM* 197 (Douglas Crimp ed. 1988).

following the airing of an educational video promoting "safer sex," wherein the narrator utilized a banana for a demonstration on proper condom use:

I must tell you, Mr. Christiansen . . . that our industry finds such usage of our product to be totally unacceptable. The choice of a banana . . . constitutes arbitrary and reckless disregard for the unsavory association that will be drawn by the public and the damage to our industry that will result therefrom.

. . . .
. . . I have no alternative but to advise you that we intend to hold PBS fully responsible for any and all damages sustained by our industry as a result of the showing of this AIDS program depicting the banana in the associational context planned. Further, we reserve all legal rights to protect the industry's interests from this arbitrary, unnecessary, and insensitive action.¹⁶¹

It is not clear whether the objection by the letter-writer relates to associations between bananas and penises, between bananas and condoms, or between bananas and the topic of AIDS. What is quite clear, however, is the letter-writer's perception that the American public would find those associations "unsavory." Similarly, the plaintiffs in *Curtis* clearly confirmed this reticence to engage in open discourse regarding sex: "There is a reason that, even in this day and age, some adults suffer embarrassment when purchasing condoms from the drug store. It is because adults know what condoms are used for, and a certain societal stigma attaches to the open, public display of sexual intent."¹⁶²

The perception of the letter-writer and the *Curtis* plaintiffs seems accurate. It is unquestionable that many are not comfortable with any acknowledgment, outside the private realm of the marital bedroom, of sexual activity or of methods, such as condom usage, directed at preventing sexually-transmitted disease. A resistance to perceiving AIDS as affecting "us" and "our children" rather than "others," and a common squeamishness about discussion of sexual matters unquestionably affect judicial approaches to condom availability programs. That resistance and squeamishness may impede essential efforts to assure the health and well-being of young people for whom sexual activity presents risks unimagined by the framers of the Constitution.

IV. ROLE OF JUDICIARY—IDENTIFYING CHILDREN'S RIGHTS

While American law has traditionally attended to the interests of children, the task of identifying and fostering those interests becomes singularly difficult in a rapidly changing culture. In a world marked by increasingly intense division and hostilities among social groups and by the increasing threat of AIDS, courts must

161. Douglas Crimp, *How to Have Promiscuity in an Epidemic in AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM* 237, 255-56 (Douglas Crimp ed. 1988) (quoting letter of Robert M. Moore to PBS).

162. Brief of Appellants at 46, *Curtis v. School Comm.*, 652 N.E.2d 580 (Mass. 1995).

act with searching imagination in identifying the interests to be protected before they can begin to determine the proper scope of state involvement.

While most persons are quick to assert commitment to protecting children, claims of advancing children's interests can often become slogans, and children can sometimes become pawns in political struggles. The recent tragedy that occurred in April 1993, at the Branch Davidian compound in Waco, Texas was a situation in which children lost their lives due to a conflict between government and sectarian groups. During the fifty-one days prior to the culmination of the Branch Davidian saga, both sides asserted the well-being of the children remaining within the heavily-armed compound as a primary consideration.¹⁶³ While serious questions may remain concerning the precise sequence of events, it appears that at various times during the standoff between the Federal Government and the members of the religious sect, federal agents in battle tanks threatened the cult members by approaching their residence.¹⁶⁴ In response, the Branch Davidians utilized children as powerful weapons by raising their children behind the windows of the compound, in plain view of the government agents.¹⁶⁵

When Attorney General Janet Reno approved the Government's assault on the members of the religious sect remaining within the compound, she asserted that her fears for the safety of the children within the Branch Davidian compound were a major factor in that decision.¹⁶⁶ After a nearly two-month impasse,¹⁶⁷ it was apparently her belief in the existence of a threat to the well-being of the Branch Davidian children that caused Ms. Reno to order federal agents to invade the compound.¹⁶⁸ Whatever uncertainties remain concerning the motivation of the actors in the Waco situation, it is unquestionable that the discourse of children's interests was involved and manipulated, consciously or unconsciously, by all concerned. It is also unquestionable that, in spite of widely broadcast rhetoric by contending forces claiming to protect children, numerous children lost their lives.

In the aftermath of Waco, divisions about the protection of children have deepened. During the two years since the invasion of the Branch Davidian compound, "'Waco' has become a rallying cry of right-wing paramilitary groups . . . who say that the raid epitomizes . . . a Federal Government that has trampled

163. Nancy Gibbs, *Oh my God, They're Killing Themselves!*, TIME, May 3, 1993, at 26.

164. *Id.*

165. *Id.*

166. Stephen Labaton, *Reno Sees Error in Move on Cult*, N.Y. TIMES, Apr. 20, 1993, at A1.

167. In February 1993, Federal agents tried to enter the compound to arrest the group's leader, David Koresh, on suspicion of violating firearms laws. After four agents and five Branch Davidians were killed, Federal agents and those inside the compound engaged in an armed standoff that lasted fifty-one days. *Id.*

168. *Id.* Prior to ordering the Government to inject tear gas into the compound, Ms. Reno spoke with doctors to obtain assurances that the tear gas would not injure the children. *Id.* Ultimately, Ms. Reno was informed by a Branch Davidian member who had recently left the compound that cult leader David Koresh was "slapping babies around" and beating children. Sam Verhovek, *Scores Die as Cult Compound is Set Afire After F.B.I. Sends in Tanks with Tear Gas*, N.Y. TIMES, Apr. 20, 1993, at A20.

on the rights of individuals and turned on its own people."¹⁶⁹ Each year since the Waco fire, hundreds of persons travel to Texas on April 19th to attend vigils commemorating the death of the Branch Davidians.¹⁷⁰ Most of the persons in attendance belong to "citizen militias"¹⁷¹ who, like the Branch Davidians, do not trust the government and are preparing themselves for the day that government troops invade their homes and "steal" their children.¹⁷² A lack of consensus about what children need and how they should be protected has also been evident at the highest levels of governmental policy-making in this country. President Bill Clinton, together with Hillary Rodham Clinton, exemplify the national confusion over who shall control the messages communicated to American children.

In 1993, President Clinton appointed Dr. Joycelyn Elders Surgeon General of the United States.¹⁷³ Fifteen months later, during a United Nations AIDS Day symposium, Dr. Elders was asked to comment on the implementation of expanded discussion and promotion of masturbation in the nation's schools, in order to discourage school-age children from engaging in riskier forms of sexual activity.¹⁷⁴ She replied:

With regard to masturbation, I think that is something that is a part of human sexuality, and a part of something that perhaps should be taught¹⁷⁵ . . . [b]ut we've not even taught our children the very basics. And I feel that we have tried ignorance for a very long time and it's time we try education.¹⁷⁶

This candid response led President Clinton to ask immediately for her resignation.¹⁷⁷

Moments after she uttered her response to the query regarding children and masturbation, Dr. Joycelyn Elders was asked why she had answered such a politically volatile question. She replied: "I'm not a politician, I'm a physician . . . I'm about improving the health of all Americans. I'm not about getting elected to a public office."¹⁷⁸ Dr. Elders' sharp response brings to light the reality that those who assert the right to control the health and well-being of children are often influenced and encumbered by religious, political, and financial interests that

169. Katharine Q. Seelye, *House Schedules Hearings on Assault Against Branch Davidians*, N.Y. TIMES, June 2, 1995, at A22.

170. Ginia Bellafante, *Waco: The Flame Still Burns*, TIME, May 1, 1995, at 47.

171. Christopher J. Farley, *Patriot Games*, TIME, Dec. 19, 1994, at 48.

172. *Id.* See also Evan Thomas & Russell Watson, *Cleverness and Luck*, NEWSWEEK, May 1, 1995, at 30.

173. James Popkin, *A Case of Too Much Candor*, U.S. NEWS & WORLD REPORT, Dec. 19, 1994, at 31.

174. *Id.*

175. *Id.*

176. Michael Gartner, *You Pick: Candid Doctor or High-Flying General*, USA TODAY, Dec. 27, 1994, at A11.

177. *Id.*

178. Popkin, *supra* note 173, at 31.

obstruct the development of a workable social consensus.

Consider the inconsistent pattern of Hillary Rodham Clinton's proposals concerning the problems of meeting the multifaceted needs of children in this country. In 1973, Ms. Rodham Clinton urged an increased awareness of conflicting parental and state attempts at addressing the needs of children. Noting the lack of existing guidelines for resolving that issue, she stated:

There is an absence of fair, workable, and realistic standards for limiting parental discretion and guiding state intervention. . . . Securing children's rights through the legislatures and the courts will include generating new lines of legal theory, grounded in past-precedent but building onto it more reasonable laws and legal interpretations for the future [T]he resolution of theoretical problems . . . will . . . strip away the legalistic camouflage surrounding the continuing problems of unchecked discretion, inadequate resources, and widespread public indifference.¹⁷⁹

Hillary Rodham Clinton recognized that this nation has failed at developing a functional method of securing protection for children, and urged an employment of fresh, uncamouflaged discourse to remedy this situation. Ms. Clinton, however, seems to have shifted her perception of how to address the difficult questions presented by the activities in which children and adolescents presently engage.

In June 1995, Hillary Rodham Clinton was asked by a news reporter to comment on the subject of adolescents engaging in premarital sexual activity. Ms. Clinton stated that her daughter Chelsea should wait until age twenty-one to become sexually active, and further suggested that when she does engage in sex, Chelsea should not discuss the matter with her mother.¹⁸⁰ Ms. Clinton's comments in 1973 and in 1995 express a recognition of the problems presented in meeting children's needs and the methods to remedy those problems. But Ms. Clinton, sometimes identified as radical in her defense of children's rights, evidences an alarming refusal to generate new lines of communication, particularly where sensitive sexual matters involving adolescents are involved. In a world much more dangerous than the one in which Ms. Clinton wrote in 1973, it is disappointing to see her failure to engage with the new challenges of defining children's interests and rights.

Religious beliefs, for many, provide "truth" and guidance in resolving moral quandaries in a temporal world, and are thus a major force in supporting day-to-day existence. However, if the data regarding the high incidence of adolescent sexual activity is to be believed, religion does not effectively insulate even religious children from the coercion presented by constant exposure to multimedia elements of American culture which relentlessly bombard the underpinnings of their value systems.

At the present time, when intense hostilities focus on the meaning of children's best interests, it becomes essential for courts to contribute to the formulation of new understandings. *Alfonso* and *Curtis* have not made such

179. Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 506 n.4 (1973).

180. See *supra* note 143.

contributions. Instead, the *Alfonso* and *Curtis* decisions promote the further polarization of the state and some Christian parents' positions in the national discourse regarding the availability of free condoms in educational institutions, and thus the control over one aspect of the lives of American adolescents. Although these opinions vividly expose an enormous discordance in approaches to balancing and reconciling interests asserted by or on behalf of parents, children, and the state in an arena in which adolescence, sex, AIDS and religion co-exist and contend, they manifest a sameness in their failure to engage at a deep level with the changed social context.

In *Alfonso*, the court made a casual reference to this nation's "fundamental values."¹⁸¹ However, the court did not explain what those values encompassed. The court therefore assumed a common, national understanding of those values. In a time of uncertainty and conflict about values, that assumption is inadequate. As long as courts follow the lead of *Alfonso* and *Curtis*, they will not contribute to a deepened understanding of children's needs and to the articulation of useful constitutional doctrine regarding Church and State relations.

CONCLUSION

The identification and fostering of children's interests is not a simple task in a deeply divided society. The challenge of protecting children has been presented in the "condom availability" cases in the context of deepening divisions between Church and State, and an increasing threat to adolescents by the AIDS epidemic. Courts which have thus far addressed the "condom availability" issue have been disappointing in their failure to develop constitutional doctrine by frank exploration of the cultural context in which the issues arise, the threat of AIDS, and the uncertainty of "fundamental values." Such candid assessment is an essential element in the process of reaching the kinds of consensus that will permit the actual survival and well-being of children.

181. The court stated: "As with other grave risks we have faced during the past two centuries, the threat of AIDS cannot summarily obliterate this Nation's fundamental values." *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 266 (N.Y. App. Div. 1993) (citing *Ware v. Valley Stream High School Dist.*, 550 N.E.2d 420 (N.Y. 1989)).