

---

---

# PROPOSITION 8 AND EDUCATION: TEACHING OUR CHILDREN TO BE GAY?

JOYCE H. HAHN\*

## INTRODUCTION

Proposition 8 was an initiative on California's 2008 Election Ballot that eliminated the right of same-sex couples to marry in California.<sup>1</sup> Over seven million Californians voted yes on Proposition 8 in 2008, giving the initiative 52.3% majority of the popular vote and making same-sex marriage illegal in California.<sup>2</sup> The following advertisements were part of the campaign in support of Proposition 8:

Advertisement #1<sup>3</sup>: [A young girl runs home from school and hands her mom a picture story book titled *King and King*.]  
Young girl: Mom! Guess what I learned in school today?  
Mom: What sweetie?  
Young girl: I learned how a prince married a prince; and *I* can marry a princess!  
Mom: [Expression of shock and horror]  
Ad Announcers: Think it can't happen? It's already happened. When Massachusetts legalized gay marriage,

---

\* University of Southern California Gould School of Law, Juris Doctor Candidate, Class of 2010. I would like to thank Professor Camille Rich of the University of Southern California Gould School of Law for her invaluable insight and guidance. Special thanks to my dear friend Linda Chia for all her editorial assistance. In addition, I would like to dedicate this Note to my beloved mother, Keum Ok Kim. I love you and miss you more than words can express.

<sup>1</sup> Cal. Sec'y of State, Proposition 8—Eliminates Right of Same-Sex Couples to Marry, [hereinafter General Election Results], [http://www.sos.ca.gov/elections/sov/2008\\_general/maps/returns/props/prop-8.htm](http://www.sos.ca.gov/elections/sov/2008_general/maps/returns/props/prop-8.htm) (last visited April 12, 2010).

<sup>2</sup> *Id.*

<sup>3</sup> *It's Already Happened* (ProtectMarriage.com television advertisement Oct. 7, 2008) [hereinafter *It's Already Happened*], <http://www.protectmarriage.com/video/view/5> (ProtectMarriage.com paid for its advertisements with funding from sources such as Knights of Columbus, National Organization for Marriage California Committee and Focus on the Family.).

schools began teaching second graders that boys can marry boys. . . . Under California law, public schools instruct kids about marriage. Teaching children about gay marriage will happen here unless we pass Proposition 8. Yes on 8!

- Advertisement #2<sup>4</sup>: [Two fathers sit on the sofa as their young daughter is playing with her doll.]
- Daughter: Daddy where do babies come from?
- Dad #1: Mommies have babies dear. That's where they come from.
- Daughter: Can boys ever have babies?
- Dad #1: [Laughing] No, dear, only mommies.
- Daughter: Megan says you have to have a mommy and a daddy to have a baby.
- Dad #2: Maybe we should spend a little less time over at Megan's house.
- Dad #1: What Megan means is that it takes a man and a woman to make a baby, that's all.
- Daughter: She said that mommies and daddies have to get married first.
- Dad #1: No sweetheart, you don't have to be married to have a baby.
- Daughter: [Confused pause] Then . . . *what's marriage for?*
- Ad Announcer: Let's not confuse our kids. Protect marriage by protecting the real meaning of marriage—only between a man and a woman. Vote yes on Proposition 8.

During California's 2008 general election, opponents of same-sex marriage spent over thirty-nine million dollars on a campaign in support of Proposition 8.<sup>5</sup> This campaign spent much of its money on advertisements, such as the ones featured above, which exploited parental fears by focusing on the supposedly harmful effects of legalized same-sex marriage on child-

<sup>4</sup> *Where Do Babies Come From?* (ProtectMarriage.com television advertisement, Oct. 25, 2008) [hereinafter *Where Do Babies Come From?*], <http://www.youtube.com/user/VoteYesonProp8#p/f/11/75J3TN9Zzck>.

<sup>5</sup> Lisa Leff, *Donors Pumped \$83M into Calif. Gay Marriage Campaign*, SFGATE, Feb. 2, 2009, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/02/02/state/n130550S13.DTL&type=politics>.

ren—namely the harms resulting from student participation in mandatory same-sex marriage lectures in schools.<sup>6</sup>

But what is so worrisome about same-sex marriage discussion in classrooms? What will happen to our children when they are shown that other forms of legal families exist aside from the traditional mother and father families? According to the Proposition 8 advertisements, exposure to the legal existence of same-sex marriage would detrimentally alter children's views on marriage values by morphing their sense of morality and creating confusion and instability in their lives.<sup>7</sup> These advertisements also tap into parents' greater underlying concern—that their children will be taught to become homosexuals themselves.<sup>8</sup> The possible realization of these effects undoubtedly struck fear into the hearts of many California parents prompting them to take a protective stance against same-sex marriage. Some would say this fear was the very reason that Proposition 8 passed.<sup>9</sup>

This Note analyzes the claims made by Proposition 8 advocates regarding the effects of legalized same-sex marriage on children's education, and discusses whether these claims are well founded. Part I lays out the history of the same-sex marriage debate, and explains how Proposition 8 was included on the November 2008 ballot. Part II discusses the likelihood of same-sex marriage being introduced in primary and secondary schools under the California Education Code by examining the three main ways in which same-sex marriage potentially would have been introduced in statewide school curriculums: health education, sexual education and diversity education. Part III pinpoints two major values of marriage set forth by proponents of Proposition 8 which would affect children, and considers whether exposure to the concept of same-sex marriage in school curricula would undermine these values. Part IV analyzes the possibility of influencing children's sexuality by mere exposure to the legal same-sex marriage in these curricula. It looks at numerous studies concerning possible origins of homosexuality that argue homosexuality is determined by a combination

---

<sup>6</sup> ProtectMarriage.com, *Why Proposition 8*, <http://www.protectmarriage.com/about/why> (last visited April 12, 2010); see *Everything to Do with Schools* (ProtectMarriage.com television advertisement, Oct. 8, 2008) [hereinafter *Everything to Do with Schools*], <http://www.protectmarriage.com/video/view/7>.

<sup>7</sup> *It's Already Happened*, *supra* note 3; *Why Proposition 8*, *supra* note 6; *Where Do Babies Come From?*, *supra* note 4.

<sup>8</sup> *It's Already Happened*, *supra* note 3.

<sup>9</sup> Shelby Grad, *How Proposition 8 Was Won—and Lost*, L.A. TIMES (EDITORIAL BLOG), Nov. 6, 2008, <http://latimesblogs.latimes.com/lanow/2008/11/how-proposition.html>. Over 6.8 million Californians voted yes on Proposition 8, giving it a majority of 52.3% of the popular vote. General Election Results, *supra* note 1.

of biological and environmental factors. Finally, this Note concludes that because of the limited influence that same-sex marriage in schools' curriculums would have on children, the debate for legalizing same-sex marriage should not have involved children's education; any concerns regarding such influences should have been addressed specifically through changes in the school system, rather than through a constitutional ban of same-sex marriage.

## I. BACKGROUND TO CALIFORNIA'S STATUTORY DEFINITION OF MARRIAGE AND PROPOSITION 8

Before considering the possible ramifications of same-sex marriage to California's school system, a historical analysis of the statutory definition of marriage is vital, not only because it provides the basis for the constitutionality of limiting marriage, but because it also depicts how California's views on homosexuality and homosexual relationships have evolved throughout the years.

When the California Constitution was adopted in 1849, it did not specifically define "marriage" as being only between a man and a woman, but it provided a basis for such an inference by utilizing gender specific words such as "husband" and "wife":

All property, both real and personal, of the *wife*, owned or claimed by marriage, and that acquired afterwards by gift, devise, or descent, shall be *her* separate property; and laws shall be passed more clearly defining the rights of the *wife*, in relation as well to *her* separate property as to that held in common with *her husband*.<sup>10</sup>

California's first Civil Code, enacted in 1872, also used gender specific language in outlining marriage logistics: "[m]arriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary."<sup>11</sup> The original Civil Code also required that "[t]he parties [] declare, in the presence of the person solemnizing the marriage, that they take each other as *husband* and *wife*."<sup>12</sup> The statutory provision setting the age requirement for marriage consent further provided that "[a]ny unmarried *male* of the age of eighteen years or upwards, and any unmarried *female* of the age of fifteen years or upwards . . . [were] capable of consenting to and consummating marriage."<sup>13</sup>

<sup>10</sup> CAL. CONST. of 1849, art. XI, § 14 (emphasis added).

<sup>11</sup> CAL. CIV. CODE § 55 (1872) (enacted in 1872).

<sup>12</sup> § 71 (emphasis added).

<sup>13</sup> § 56 (emphasis added). When the Civil Code of California was adopted, it did not state that same-sex marriages were invalid, but rather, it identified other forms of heterosexual marriages that

Over the next century, the California Constitution and relevant statutes did not change in any way to suggest that the definition of marriage included or excluded same-sex marriage.<sup>14</sup> However, in 1971, California adopted a bill that eliminated the words “male” and “female” from the then section 4101(a) of the California Civil Code, and added “[a]ny unmarried person of the age of 18 years or upwards” as eligible candidates for consenting to marriage in an attempt to equalize the age of consent for marriage.<sup>15</sup> Encouraged by this change, several same-sex couples applied for marriage licenses in California, but were strictly denied by county clerks.<sup>16</sup> In 1977, the state legislature amended sections 4100 and 4101 of the Civil Code to define marriage as “between a man and a woman.”<sup>17</sup> In 1992, the California Family Code was adopted and the provisions of section 4101 of the California Civil Code were transferred to section 301 of the Family Code.<sup>18</sup> Although section 301 of the Family Code retained the same “between a man and a woman” language, section 308 of the Family Code allowed for the recognition of marriages valid outside California state lines.<sup>19</sup> Opponents of same-sex marriage believed this created a loophole that forced Californians to accept same-sex marriages legalized in other jurisdictions.<sup>20</sup> To prevent this, Proposition 22 was introduced and passed in 2000.<sup>21</sup> The measure created section 308.5 of the Family Code, which

---

were explicitly void: marriages between parents and children, ancestors and descendants of every degree, brothers and sisters of the half as well as the whole, uncles and nieces or aunts and nephews. § 59. Certain interracial marriages were also invalid such as those between whites and “negroes or mulattoes.” § 60.

<sup>14</sup> *In re Marriage Cases (Marriage Cases III)*, 183 P.3d 384, 407–09 (Cal. 2008), *reh’g denied* (June 4, 2008).

<sup>15</sup> *Id.* at 408 (quoting 1971 Cal. Stat. 3747).

<sup>16</sup> *Id.* at 409.

<sup>17</sup> *Id.* (citing 1977 Cal. Stat. 1295).

<sup>18</sup> *Id.*

<sup>19</sup> CAL. FAM. CODE § 308 (West 2009) (“A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state.”).

<sup>20</sup> See Cal. Sec’y of State, 2000 California Primary Election Voter Information Guide: Argument in Favor of Proposition 22, <http://primary2000.sos.ca.gov/VoterGuide/Propositions/22yesarg.htm> (last visited April 12, 2010); see also, *Marriage Cases III*, 183 P.3d at 409–10. Connecticut, Iowa and Massachusetts currently recognize same-sex marriages. Vermont will begin recognizing same-sex marriages on Sept. 1, 2009, Maine on Sept. 11, 2009 and New Hampshire on Jan. 1, 2010. Some countries that recognize same sex marriages are Belgium, Canada, Netherlands, Norway, South Africa, Spain and Sweden. Ramon Johnson, States and Countries that Allow Gay Marriage, <http://gaylife.about.com/od/samesexmarriage/a/legalgaymarriage.htm> (last visited April 12, 2010).

<sup>21</sup> Cal. Sec’y of State, 2000 California Primary Election Voter Information Guide: Text of Proposition 22 [hereinafter Text of Proposition 22], <http://primary2000.sos.ca.gov/VoterGuide/Propositions/22text.htm> (last visited April 12, 2010). Proposition 22 passed with a 61.4% majority and the words were codified in section 308.5 of the Family

stated that “[o]nly marriage between a man and a woman is valid or recognized in California.”<sup>22</sup>

Meanwhile, same-sex marriage advocates achieved partial success by ensuring that same-sex couples obtained certain domestic rights with the passage of the Domestic Partners Act in 1999 and the California Domestic Partner Rights and Responsibilities Act of 2003.<sup>23</sup> Domestic partners are defined as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”<sup>24</sup> Domestic Partners are afforded “the same rights, protections, and benefits” and are made “subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses,” thereby giving same-sex couples the opportunity to obtain the same rights and obligations as married heterosexual couples.<sup>25</sup> Still, advocates of same-sex marriage pointed to the inherent differences between the two forms of legal relationships, namely the right for domestic partners to legally call their relationship a

---

Code. Vote2000-California Primary Election, State Ballot Measures, Statewide Returns, Percentage of “Yes” Votes for Proposition 22, Jun. 2, 2000, <http://primary2000.sos.ca.gov/returns/prop/00.htm>.

<sup>22</sup> CAL. FAM. CODE § 308.5 (West 2009).

<sup>23</sup> §§ 297, 297.5, 298, 298.5, 299, 299.2, 299.3, 299.6.

<sup>24</sup> § 297–297.5(a).

<sup>25</sup> Although the Domestic Partner Act generally affords registered domestic partners the same substantive benefits and privileges and imposes upon them the same responsibilities and duties that California law affords to and imposes upon married spouses, the act does not purport to (and lawfully could not) modify the applicable provisions of *federal law*, which currently do not provide for domestic partnerships and which define marriage, for purposes of federal law, as the union of a man and a woman. *Marriage Cases III*, 183 P.3d at 417; *see also* § 297.5(a). Eligibility requirements for Domestic Partner status is set out in sections 297(b)–(c) of the Family Code:

(b) A domestic partnership shall be established in California when both persons file a Declaration of Domestic Partnership with the Secretary of State pursuant to this division, and, at the time of filing, all of the following requirements are met:

- (1) Both persons have a common residence.
- (2) Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity.
- (3) The two persons are not related by blood in a way that would prevent them from being married to each other in this state.
- (4) Both persons are at least 18 years of age.
- (5) Either of the following:

(A) Both persons are members of the same sex.

(B) One or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62.

(6) Both persons are capable of consenting to the domestic partnership.

(c) “Have a common residence” means that both domestic partners share the same residence. It is not necessary that the legal right to possess the common residence be in both of their names. Two people have a common residence even if one or both have additional residences. Domestic partners do not cease to have a common residence if one leaves the common residence but intends to return.

§ 297(b)–(c).

“marriage” and all the positive social connotations that come with such a label.<sup>26</sup> Many argued that this exclusion was reminiscent of the old “separate-but-equal” and miscegenation laws of the South and therefore should have been found similarly unconstitutional.<sup>27</sup> Consequently, a challenge to same-sex marriage exclusion began in 2004 in what would eventually be known by higher courts as the *In re Marriage Cases*.<sup>28</sup> Proponents of same-sex marriage argued that the right to marry was a fundamental right, protected by the privacy and equal protection provisions of the California Constitution, and could not be legally denied to any Californian.<sup>29</sup> Opponents of same-sex marriage argued that the fundamental right to marry should be viewed as a right to marry only a person of the opposite sex because same-sex marriage has never been recognized in California, thus it could not form a basis for an equal protection analysis.<sup>30</sup>

The Superior Court held that sections 300 and 308.5 of the California Family Code, which both define marriage as “between a man and a woman,”<sup>31</sup> contained gender classifications, triggering strict scrutiny.<sup>32</sup> After applying the standard to the statutes, the court found that both statutes violated the equal protection clause of the California Constitution.<sup>33</sup> The Court of Appeals reversed this decision in 2006, in part because the statutes applied equally to both male and female same-sex couples thus not gender based, and in part because the novelty of same-sex marriage precluded it from being considered a constitutionally protected fundamental right.<sup>34</sup> The issue was again reconsidered in the California Supreme Court, which rejected the appellate court’s reasoning and concluded that laws limiting marriage to heterosexual couples violated the California’s Equal Protection clause.<sup>35</sup> The court reasoned that “retention of the traditional definition of

---

<sup>26</sup> *Marriage Cases III*, 183 P.3d at 416–17. In footnote 24 of *Marriage Cases III*, the California Supreme Court identified nine legal differences between domestic partnerships and marriages, such as the common residence requirement which is required for domestic partnerships but not for marriages. *Id.* at n.24.

<sup>27</sup> EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY 134–36 (2004).

<sup>28</sup> *In re* Coordination Proceeding, Special Title Rule 1550(c) (*Marriage Cases I*), 2005 WL583129 (Cal. Super. Ct. Mar. 14, 2005), *aff’d in part, rev’d in part, sub nom. In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006) *rev’d*, 183 P.3d 384 (Cal. 2008), *reh’g denied* (June 4, 2008).

<sup>29</sup> *Id.* at \*1–2.

<sup>30</sup> *Id.* at \*10.

<sup>31</sup> CAL. FAM. CODE §§ 300, 308.5 (West 2009).

<sup>32</sup> *Marriage Cases I*, 2005 WL583129 at \*10.

<sup>33</sup> *Id.* at \*12.

<sup>34</sup> *In re Marriage Cases (Marriage Cases II)*, 49 Cal. Rptr. 3d 675, 703–06 (Cal. Ct. App. 2006), *rev’d*, 183 P.3d 384 (Cal. 2008), *reh’g denied* (June 4, 2008).

<sup>35</sup> *In re Marriage Cases (Marriage Cases III)*, 183 P.3d 384, 452–53 (Cal. 2008), *reh’g denied* (June 4, 2008).

marriage does not constitute a state interest sufficiently compelling, under the strict scrutiny equal protection standard, to justify withholding that status from same-sex couples.”<sup>36</sup> It added:

[i]n light of the fundamental nature of the substantive rights embodied in the right to marry—and their central importance to an individual’s opportunity to live a happy, meaningful, and satisfying life as a full member of society—the California Constitution properly must be interpreted to guarantee this basic civil right to *all* individuals and couples, without regard to their sexual orientation.<sup>37</sup>

Such a victory for same-sex marriage advocates proved to be short-lived as Proposition 8, aimed to amend the California Constitution, was introduced and added to California’s General Ballot in 2008.<sup>38</sup> The proposed measure, titled “California Marriage Protection Act,” added the sentence, “Only marriage between a man and a woman is valid or recognized in California,” to the California Constitution.<sup>39</sup> The Proposition quickly became the most expensive ballot measure on a social issue in the nation’s history with supporters and opponent raising more than \$83 million in combined campaign donations.<sup>40</sup> Thirteen million votes were cast for the Proposition 8 issue; over 6.8 million Californians, 52.3% of the voters, voted to ban same-sex marriage.<sup>41</sup> On November 4, 2008, California definitively limited marriage to heterosexual couples only.

Within days of the election, opponents of Proposition 8 filed challenges to Proposition 8 with the California Supreme Court, arguing that the added language not merely *amended* the state Constitution, but actually *revised* its meaning, which made the measure invalid.<sup>42</sup> After lengthy brief-

---

<sup>36</sup> *Id.* at 452

<sup>37</sup> *Id.* at 427.

<sup>38</sup> See generally CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 54, 54–57, 128 (2008) [hereinafter OFFICIAL VOTER INFORMATION GUIDE], available at <http://voterguide.sos.ca.gov/past/2008/general/pdf-guide/vig-nov-2008-principal.pdf> (stating that Proposition 8 changes the California constitution to eliminate the right of same-sex couples to marry in California).

<sup>39</sup> *Id.* at 128.

<sup>40</sup> Leff, *supra* note 5.

<sup>41</sup> General Election Results, *supra* note 1.

<sup>42</sup> Press Release, Judicial Counsel of Cal., California Supreme Court Takes Action on Proposition 8: High Court Denies Requests to Stay Enforcement of Proposition 8 and Agrees to Decide Issues Arising Out of Proposition 8 at 3 (Nov. 19, 2008), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR66-08.PDF>. The California Supreme Court agreed to hear arguments on three issues:

- (1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution?
- (2) Does Proposition 8 violate the separation-of-powers doctrine under the California Constitution?



ings, the court concluded in May 2009 that the effects of Proposition 8 were not “far-reaching” and “sweeping[]” enough to be considered a revision, and therefore remained valid.<sup>43</sup>

Currently, Yes! on Equality, a same-sex marriage advocacy organization, is in the process of placing an initiative titled “California Marriage Equality Act” on the 2010 ballot.<sup>44</sup> If passed, the initiative would remove the language added by Proposition 8 from the California Constitution.<sup>45</sup> The initiative also would address certain educational and religious concerns by limiting its interpretation to exclude any modifications to school curricula and any requirements for church clergy to perform services incongruent with their faith.<sup>46</sup>

Although Proposition 8 was successful in limiting marriage to heterosexual couples, it is clear that there is continued conflict between judicial and legislative handling of the law on one hand and the law as an accurate reflection of people’s sentiments on the other. To ensure that laws truly reflect majority views, accurate advocacy material from both sides of the legislative debate is more vital than ever before.

## II. SAME-SEX MARRIAGE IN CALIFORNIA SCHOOLS

In the same-sex marriage debate, several key arguments were made by proponents of Proposition 8 regarding its inclusion in public schools and its effects on children. The main arguments were that (1) children will be forced to participate in mandatory same-sex marriage education; (2) children will be taught that same-sex marriage is the same as traditional marriage, thereby undermining marriage values; and (3) same-sex marriage in schools will influence children to become homosexuals themselves.<sup>47</sup> This section will examine the accuracy and merits of these claims.

---

(3) If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?

*Id.* (citation omitted).

<sup>43</sup> *Strauss v. Horton*, 207 P.3d 48, 102–03 (Cal. 2009).

<sup>44</sup> Yes! on Equality, Frequently Asked Questions, <http://www.yesonequality.com/index-1.html> (last visited April 12, 2010).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See *It’s Already Happened*, *supra* note 3; see also *Where Do Babies Come From?*, *supra* note 4.

A. THE MYTH OF MANDATORY SAME-SEX MARRIAGE EDUCATION AND  
THE TRUTH ABOUT OPT-OUT PROVISIONS

The California Education Code, a collection of statutory provisions establishing state education laws, provides the guidelines schools use to achieve the many goals of public education. Stemming from these guidelines are three main curricula into which the topic of same-sex marriage might be incorporated statewide: health education,<sup>48</sup> sexual education<sup>49</sup> and diversity education.<sup>50</sup> Each curriculum is implemented with different guiding principles, and each deals with the topic of marriage in different ways.

1. Health Education Program

In the list of required study courses for grades 1–12, as set out in sections 51210–51229 of the California Education Code, students in grades 1–6 must receive health education including instruction in the “principles and practices of individual, family, and community health.”<sup>51</sup> Students in grades 7–12 are required to receive parental skills education such as instruction on child development and growth, nutrition, household finances and budgeting and family and individual health.<sup>52</sup> Because of these wide ranging requirements, the Comprehensive Health Education Act (Health Act) was adopted in 1977 to organize and provide frameworks for schools and educators.<sup>53</sup>

Proponents of Proposition 8 saw the Health Act as direct evidence that public schools would be forced to teach students about same-sex marriage if it remained legal.<sup>54</sup> Section 51890 of the California Education Code

---

<sup>48</sup> CAL. EDUC. CODE §§ 51930–51939 (West 2009).

<sup>49</sup> §§ 51880–51921.

<sup>50</sup> §§ 200–201, 212.6.

<sup>51</sup> § 51210(f).

<sup>52</sup> § 51220.5(b).

<sup>53</sup> §§ 51880–51921.

<sup>54</sup> See Press Release, SaveCalifornia.com, Prop. 8: Why Jack O’Connell Can’t Read (Oct. 29, 2008) available at <http://savecalifornia.com/ca-release-10-29-08-prop.-8-why-jack-oconnell-cant-read.html>; see also Gina Perry, *We Need a Yes on Prop 8*, DAILY SOUND, <http://www.thedailysound.com/Ginaperry/103008-Gina-Perry> (last visited April 12, 2010) (arguing that legal recognition of gay marriage would require teachers to instruct their students that gay and traditional marriage are equal); Jennifer Mesko, *How Does Gay ‘Marriage’ Affect Education?*, CITIZENLINK.COM, Oct. 9, 2008, <http://www.citizenlink.org/content/A000008391.cfm> (arguing that legal recognition of gay marriage would require teachers to teach their students about gay marriage).

Alternatively, in the California General Election Voting Guide, proponents of Proposition 8 did not use mandatory language, but argued that “[s]tate law *may* require teachers to instruct children as young as kindergarteners about marriage. (Education Code § 51890.),” and that “[i]f the gay marriage ruling is not overturned, TEACHERS *COULD* BE REQUIRED to teach young children there is *no dif-*

states in part that “[p]upils will receive instruction to aid them in making decisions in matters of personal, family, and community health, [such as] . . . family health and child development, including the legal and financial aspects and responsibilities of *marriage* and parenthood.”<sup>55</sup> From this language, proponents of Proposition 8 concluded “if the gay marriage ruling is not overturned, teachers would be required to teach young children there is no difference between gay marriage and traditional marriage.”<sup>56</sup>

Looking at this sub-section of the Code alone, it appears as though this conclusion has some merit. The Code states that students “will” receive instruction in family health including the legal aspects of marriage.<sup>57</sup> However, a closer look at the Health Act shows that this language is located in the “Definitions” section, which merely defines the type of programs that fall within the Health Act, not a section proscribing the list of subjects that *must* be taught to students.<sup>58</sup> In fact, section 51890(a)(2) states that the subjects listed in the definition section be taught only to the “maximum extent possible,” showing that there is no legal mandate to include marriage discussion, let alone same-sex marriage discussion in health education.<sup>59</sup>

---

ference between gay marriage and traditional marriage.” (first emphasis added). OFFICIAL VOTER INFORMATION GUIDE, *supra* note 38, at 56.

<sup>55</sup> § 51890(a)(1) (emphasis added). Full text of section 51890(a):

For the purposes of this chapter, “comprehensive health education programs” are defined as all educational programs offered in kindergarten and grades 1 to 12, inclusive, in the public school system, including in-class and out-of-class activities designed to ensure that:

(1) Pupils will receive instruction to aid them in making decisions in matters of personal, family, and community health, to include the following subjects:

- (A) The use of health care services and products.
- (B) Mental and emotional health and development.
- (C) Drug use and misuse, including the misuse of tobacco and alcohol.
- (D) *Family health and child development, including the legal and financial aspects and responsibilities of marriage and parenthood.*
- (E) Oral health, vision, and hearing.
- (F) Nutrition, which may include related topics such as obesity and diabetes.
- (G) Exercise, rest, and posture.
- (H) Diseases and disorders, including sickle cell anemia and related genetic diseases and disorders.
- (I) Environmental health and safety.
- (J) Community health.

(2) To the maximum extent possible, the instruction in health is structured to provide comprehensive education in health that includes all the subjects in paragraph (1).

(3) The community actively participates in the teaching of health including classroom participation by practicing professional health and safety personnel in the community.

(4) Pupils gain appreciation for the importance and value of lifelong health and the need for each individual to take responsibility for his or her own health.

(5) School districts may voluntarily provide pupils with instruction on preventative health care, including obesity and diabetes prevention through nutrition education.

§ 51890(a)(1) (emphasis added).

<sup>56</sup> *Why Proposition 8*, *supra* note 6; OFFICIAL VOTER INFORMATION GUIDE, *supra* note 38.

<sup>57</sup> § 51890(a)(1).

<sup>58</sup> *See* § 51890(a)(1).

<sup>59</sup> § 51890(a)(2).

Practically speaking, however, proponents of Proposition 8 may reasonably argue that if the listed subjects must be taught to the “maximum extent possible,” then schools must teach about marriage, if possible. Schools would not be able to freely exclude subject matters that could be incorporated into the health curriculum. Therefore, if the legal aspects of marriage can be included in health education, the legal *existence* of same-sex marriage may also be included.

This possibility that schools could discuss the legal existence of same-sex marriage does not, however, validate the Proposition 8 proponents’ claim that schools will have to teach children that gay marriage is acceptable or even that gay marriage is the same as traditional marriage. Their claim strategically infers something more, one that forecasts a state where schools are forced to indoctrinate students on the moral validity of same-sex marriage. This claim unreasonably concludes that the mere inclusion of instruction on the *legal and financial aspects of marriage* is the same as giving schools the license to teach that gay marriage is “okay” or that there is “no difference” between gay and heterosexual marriage. In addition, by mislabeling a possibility as an inevitability, the Proposition 8 proponents’ claims ignore the procedural measures in place that give parents active control over their children’s educational material.

The Health Act guarantees parents an active role not only in the development of health education, but to the execution of it as well. Section 51914 of the Education Code states, “[n]o plan shall be approved by the State Board of Education unless it determines that the plan was developed with the active cooperation of parents, community, and teachers, in all states of planning, approval, and implementation of the plan.”<sup>60</sup> The importance of parental involvement is again reiterated in Section 51890(a)(3) which encourages “[t]he community [to] actively participate[] in the teaching of health . . . [.]” with community participation being defined to include *parents* and other healthcare professionals.<sup>61</sup> The natural filter created by parents and health science professionals in all stages of health education would make it unlikely that the moral aspects of same-sex marriage would make it into health curricula, unless the community believed that it should be included.

Most importantly, even if the community agrees to include same-sex marriage in its health education curricula, section 51240 of the Education Code allows parents to fully exempt their children from “any part of a

---

<sup>60</sup> § 51914.

<sup>61</sup> § 51890(a)(3) (emphasis added).

school's instruction in health" that "conflicts with the religious training and beliefs of a parent or guardian of a pupil," including "personal moral convictions" of the parent or guardian.<sup>62</sup> This broad opt-out provision essentially guarantees that a student would not at any point be forced to participate in same-sex marriage discussion in school against parental wishes.

## 2. Comprehensive Sexual Health Education Program

Another Californian educational program that might include same-sex marriage discussion in its curriculum is sexual health education. The California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act (Sexual Health Act), outlined in section 51930–51939 of the Education Code, incorporates the concept of marriage by (1) encouraging students to develop "healthy attitudes" concerning marriage<sup>63</sup> and (2) encourage teaching "respect for marriage and committed relationships."<sup>64</sup>

First, the stated legislative intent provides a background in which the Sexual Health Act should be interpreted. Section 51937 of the Act states that,

---

<sup>62</sup> § 51240.

<sup>63</sup> § 51930.

(a) This chapter shall be known and may be cited as the California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act.

(b) The purposes of this chapter are as follows:

(1) To provide a pupil with the knowledge and skills necessary to protect his or her sexual and reproductive health from unintended pregnancy and sexually transmitted diseases.

(2) To encourage a pupil to develop healthy attitudes concerning adolescent growth and development, body image, gender roles, sexual orientation, dating, marriage, and family.

§ 51930.

<sup>64</sup> §§ 51930, 51933. Section 51933 reads, in relevant part:

(a) School districts may provide comprehensive sexual health education, consisting of age-appropriate instruction, in any kindergarten to grade 12, inclusive, using instructors trained in the appropriate courses.

(b) A school district that elects to offer comprehensive sexual health education pursuant to subdivision (a), whether taught by school district personnel or outside consultants, shall satisfy all of the following criteria:

(1) Instruction and materials shall be age appropriate.

(2) All factual information presented shall be medically accurate and objective.

(3) Instruction shall be made available on an equal basis to a pupil who is an English learner, consistent with the existing curriculum and alternative options for an English learner pupil as otherwise provided in this code.

(4) Instruction and materials shall be appropriate for use with pupils of all races, genders, sexual orientations, ethnic and cultural backgrounds, and pupils with disabilities.

(5) Instruction and materials shall be accessible to pupils with disabilities, including, but not limited to, the provision of a modified curriculum, materials and instruction in alternative formats, and auxiliary aids.

(6) Instruction and materials shall encourage a pupil to communicate with his or her parents or guardians about human sexuality.

(7) Instruction and materials shall teach respect for marriage and committed relationships.

§ 51933(a)–(b)(7).

[i]t is the intent of the Legislature to encourage pupils to communicate with their parents or guardians about human sexuality and HIV/AIDS and to respect the rights of parents or guardians to supervise their children's education on these subjects. . . . [And] [t]he Legislature recognizes that . . . parents and guardians have the ultimate responsibility for imparting values regarding human sexuality to their children.<sup>65</sup>

Considering this language, it would be inappropriate to construe the Sexual Health Act as suggesting that schools have an interest in indoctrinating students that overrides family views on human sexuality. Instead, the education proscribed by the Sexual Health Act should be viewed only as a secondary source of sexual health information that supplements the values learned at home.

Second, unlike health education, the implementation of this curriculum is optional at the discretion of individual school districts.<sup>66</sup> Because a school district may elect not to provide sexual education at all, same-sex marriage discussion is never compulsory under this Act. If a school district chooses to offer comprehensive sexual health education, the curriculum must be taught in a way that is “objective,” “medically accurate” and devoid of religious doctrine.<sup>67</sup>

Given these limitations, a school district that chooses to implement curricula that encourages “healthy attitudes” about marriage must do so objectively and in a manner that is sensitive to cultural backgrounds.<sup>68</sup> Any decision to include same-sex marriage in marriage discussion cannot be subjective or structured in a way to indoctrinate students into taking a moral stance on gay marriage. The same is true for curriculum teaching “respect” for marriage and committed relationships. Notice, “respect” is used instead of “acceptance” or “approval,”<sup>69</sup> suggesting that sexual education should be understood as a source of supplemental education to parental instruction and not as a medium for promoting same-sex marriage. Furthermore, because domestic partnerships and homosexual relationships are already incorporated in the category of committed relationships, additional instruction fostering respect for same-sex marriages would probably have little to no effect on student attitudes toward homosexuality.

---

<sup>65</sup> § 51937.

<sup>66</sup> §§ 51933(a)–(b), 51937–51939. Although sex-education is not required, section 51934 of the Education Code requires students in grades 7–12 to receive HIV/AIDS prevention instruction once during middle school and once during high school. § 51934.

<sup>67</sup> §§ 51933(b)(2), (d)(1).

<sup>68</sup> §§ 51933(b)(4), (d)(2).

<sup>69</sup> § 51933.

Aside from the inherent limitations on marriage discussion set by the language of the Sexual Health Act, the Legislature provides additional safeguards that parents can use to ensure that their child is not exposed to unwanted same-sex marriage discussion in schools. On one level, parents are given the right to participate in the development and execution of their children's education through principal and teacher meetings, class material reviews, in-class volunteering and advisory committee participation.<sup>70</sup> On another level, the Sexual Health Act guarantees parents the absolute right and opportunity to opt their children out of sexual education.<sup>71</sup> The opt-out provision, set forth in section 51938, requires each school district to notify parents of information relating to the sexual health educational curriculum planned for the coming year. The notification must include, among other things, information advising parents of their right to inspect all written and audiovisual education materials used in sexual education, the date of the planned instruction and the identity of any outside consultant or guest speakers.<sup>72</sup> If parents decide to opt their children out of sexual education, an alternate educational activity must be provided.<sup>73</sup> With such a detailed opt-out provision, children would not be required to participate in same-sex marriage discussion in sexual education.

On the other hand, proponents of Proposition 8 may still have cause for concern regarding the inclusion of same-sex marriage in school curricula. A 2003 survey conducted by PB Consulting, in cooperation with American Civil Liberties Union of Northern California and Planned Parenthood Affiliates of California ("PB Consulting Survey"), found that 96% of the California school districts surveyed provided sexual education, despite having no requirement to do so, making it hard for parents to find any district which does not provide sexual education.<sup>74</sup> Of more concern is the data suggesting that 42% of the surveyed schools violate parent notification and consent requirements and over 40% admit that they are either unfamiliar

---

<sup>70</sup> §§ 51100–51102.

<sup>71</sup> § 51938(a).

<sup>72</sup> § 51938(a).

<sup>73</sup> § 51939. The Code section does not provide any guidance on what type of alternate educational activity must be provided to students whose parents have opted their children out of the sexual education or HIV/AIDS education. In the example of the first-grade students attending their teacher's same-sex marriage, the two children who opted out of the field trip by their parents spent the day at school with another first-grade class.

<sup>74</sup> PHYLLIDA BURLINGAME, SEX EDUCATION IN PUBLIC SCHOOLS: ARE STUDENTS LEARNING WHAT THEY NEED TO KNOW? 5 (2003), available at [http://www.aclunc.org/docs/reproductive\\_rights/sex\\_ed\\_in\\_ca\\_public\\_schools\\_2003\\_full\\_report.pdf](http://www.aclunc.org/docs/reproductive_rights/sex_ed_in_ca_public_schools_2003_full_report.pdf).

This ACLU distributed survey was funded in part by organizations such as the Asian Pacific Islanders for Reproductive Health and California National Organization for Women. *Id.* at ii.

with the state laws governing sex and HIV/AIDS prevention education or that they find the laws confusing.<sup>75</sup>

Furthermore, even though opt-out provisions suggest a “no harm, no foul” attitude toward possible same-sex marriage discussions in schools, both parents and children may be forced to deal with the side effects of opting out. For instance, according to the PB Consulting Survey, parents are unlikely to remove their children from sexual education; in 70% of schools surveyed no more than 1% of students were removed from sexual education or HIV/AIDS education by their parents and only 5% of schools had more than 5% of children removed.<sup>76</sup> These numbers seem to indicate that parents overwhelmingly want their children to have some form of sexual education at school. Yet, if same-sex marriage discussions were to be mingled with regular sexual education in a way that would make it hard for parents to extract their children from same-sex marriage discussion only, parents might be forced to choose between sexual education that incorporates same-sex marriage discussions or no sexual education at all. For parents, this may be a difficult decision since schools have the resources to hire experts to plan and instruct students with the most up-to-date information on disease control, abstinence and statistics.<sup>77</sup> At a minimum, sexual education provides beneficial material to supplement parent-child discussions regarding sex and health.

Students who opt-out of sexual education may also be socially stigmatized by peers who interpret their absence as a sign of homophobia or bigotry. Because same-sex marriage is a highly controversial issue, negative social consequences from opting-out may be a likely outcome. This is especially troublesome considering that proponents of Proposition 8 have been labeled bigots and homophobes for their opposition to same-sex marriage.<sup>78</sup> This concern is exemplified in Proposition 8 proponents’ desire to

---

<sup>75</sup> See *id.* at 23 (stating 15% of surveyed schools find the law confusing, 26% of surveyed schools said they are not familiar with the HIV/AIDS prevention education and sex education laws and 4% of the surveyed schools find some aspects of the laws clear and others confusing).

<sup>76</sup> *Id.* at 21.

<sup>77</sup> §§ 51935, 51936.

<sup>78</sup> See, e.g., Fitness for the Occasion, <http://fitnessfortheoccasion.wordpress.com/2008/11/05/prop-8-bigotry-wins-in-california/> (Nov. 5, 2008) (labeling the approval of Proposition 8 by voters as a victory for “bigotry”); see also, Wendy Wilson, *Lawmaker: Don’t blame blacks for Proposition 8*, CNN.COM, <http://www.cnn.com/2009/LIVING/06/12/what.matters.bass.gay.marriage/index.html> (last visited April 12, 2010) (stating “[s]ome in the LGBT (lesbian, gay, bisexual, and transgender) community blame the passing of Proposition 8 last November on conservative, homophobic African-Americans voters”).



have campaign donor lists made anonymous for fear of harassment from the public.<sup>79</sup>

It is also possible that parents who are against same-sex marriage may fail to use the opt-out provisions because opting out requires additional administrative steps. The PB Consulting survey showed that when compared to inaction, the additional requirement of signing and returning forms may result in parents forgetting or failing to return them, thus inaccurately reflecting their wishes to have their children opt-out.<sup>80</sup> The ineffectiveness of the opt-out provision can be seen in a well-publicized first-grade field trip. In this instance, a group of San Francisco first-graders famously took a field trip to attend and participate in their lesbian teacher's wedding on October 10, 2008.<sup>81</sup> Although parents were notified and given the choice to opt-out of the field trip, only two families chose to do so.<sup>82</sup> This is certainly a small sample size, but considering that 52% of Proposition 8 balloters voted to ban same-sex marriage,<sup>83</sup> with many voters citing to same-sex marriage discussions in schools as the primary reason for their decision,<sup>84</sup> it seems unlikely that all but two parents wanted their first-grade children not only to attend, but also participate in an actual same-sex marriage ceremony.<sup>85</sup>

Despite the difficulties associated with opt-out provisions, the question still remains as to whether these obstacles pose enough of a problem to warrant a complete ban on same-sex marriage. With a little extra parental diligence and proper teacher training, many of the concerns presented by Proposition 8 proponents could have easily been addressed at the school level, without the constitutional exclusion of same-sex marriage.

---

<sup>79</sup> Brad Stone, *Disclosure, Magnified on the Web*, N.Y. TIMES, Feb. 8, 2009, at BU3.

<sup>80</sup> BURLINGAME, *supra* note 74, at 21. The survey refers to a study conducted by the RAND Institute finding that opt-out policies are more accurately reflective of parents' wishes than opt-in policies. The study found that opt-in policies can lead to a reduction in the number of students participating in sex education classes, because these policies require that parents take extra steps to sign and return consent forms, which they may neglect to do despite their support for the class. This is true when parents generally want their children to participate in sex-education. If the addition of same-sex marriage discussion alters parental preferences, the extra step of returning opt-out forms would have the same effect as did the extra steps parents had to take for opt-in provisions previously.

<sup>81</sup> Jill Tucker, *Field Trip to Wedding 'A Teachable Moment'*, S.F. CHRON., Oct. 11, 2008, at A1. The trip was not school sponsored by organized by parents of the students.

<sup>82</sup> *Id.*

<sup>83</sup> General Election Results, *supra* note 1.

<sup>84</sup> See Why Proposition 8, *supra* note 6.

<sup>85</sup> See Tucker, *supra* note 81 (describing the scene after the wedding stating "the [teacher and her new wife] walked out City Hall's main doors [] the students were lined up down the steps with bags of pink rose petals and bottles of bubbles hanging from their necks").

### 3. Diversity Education

Diversity Education is another area of California's school curriculum through which same-sex marriage may be introduced to students. Sections 200 and 201 of the California Education Code ("Code") state that public schools have an "affirmative obligation" to provide safe and supportive learning environments to all students regardless of disability, gender, nationality, race or *sexual orientation*.<sup>86</sup>

There is an urgent need to prevent and respond to acts of hate violence and bias-related incidents that are occurring at an increasing rate in California's public schools. . . . It is the intent of the Legislature that each public school undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity.<sup>87</sup>

In this anti-discriminatory context, same-sex relationships may become part of the curriculum to discourage biases based on sexual orientation among students.<sup>88</sup> Despite the "affirmative" stance the Code takes, California does not mandate that schools teach diversity and tolerance.<sup>89</sup> The Code only mandates that the State Board of Education prepare guidelines for local curriculum that promote "understanding, awareness, and appreciation of the contributions of people with diverse backgrounds and of harmonious relations in a diverse society" if the Superintendent of Public Instruction requests for the adoption of specific policies directed toward creating a discriminatory free environment, and only if these policies do not lead to increase costs.<sup>90</sup> For schools that implement diversity education, it is up to the individual school districts to determine the appropriate content.<sup>91</sup>

What makes diversity education different from health or sexual education is that there is no parental notification or opt-out provisions that would allow parents to pull their children out of class if the parents disagreed with its content. To highlight this point, Proposition 8 proponents made repeated reference to *Parker v. Hurley*,<sup>92</sup> a First Circuit case arising out of

---

<sup>86</sup> CAL. EDUC. CODE §§ 200–01 (West 2009) (emphasis added).

<sup>87</sup> § 201(d), (f).

<sup>88</sup> "Sexual orientation" means "heterosexuality, homosexuality, [and] bisexuality;" § 212.6.

<sup>89</sup> § 201 (stating that the Legislature merely intends for schools to counter discriminatory incidents, but such action is not *mandatory*).

<sup>90</sup> §§ 233 (b)(1), 233.8.

<sup>91</sup> See § 51002. The California Education Code mainly provides broad frameworks for educational programs and leaves development of these programs to the local level.

<sup>92</sup> 514 F.3d 87 (1st Cir. 2008).

Massachusetts, which found that parents of children exposed to educational material showing diverse families—including same-sex parent families—neither had a Constitutional right to parental notification nor the opportunity to opt their children out of the curriculum.<sup>93</sup>

In *Parker*, two families brought a claim against the state for violation of their First Amendment right to religious freedom and their Fourteenth Amendment Due Process right to direct the upbringing of their children.<sup>94</sup> The Parkers' kindergarten son brought home a "Diversity Book Bag" which contained a picture book titled *Who's in a Family?* The book depicted different types of families, including one with two dads and two moms.<sup>95</sup> The child was neither required to read the book, nor did his teacher read the book to him.<sup>96</sup> The other plaintiff family in *Parker*, the Wirthlins, objected to their second-grade son's teacher in-class reading of *King and King*, a story about two princes falling in love.<sup>97</sup> In both situations, the parents sought to force the schools to notify them if and when their children were to be exposed to such materials and provide them with the right to opt their children out of the curriculum.<sup>98</sup>

Like California, Massachusetts statutes require schools to give parental notice and the opportunity to exempt their children from sexual education or portions of health education or science courses that deal primarily with human sexual education or human sexuality issues.<sup>99</sup> Also like California, Massachusetts mandates that academic standards must "be designed to inculcate respect for the cultural, ethnic and racial diversity of the commonwealth" and "to avoid perpetuating gender, cultural, ethnic or racial stereotypes."<sup>100</sup> Massachusetts' school guidelines indicate that elementary students "should be able to '[d]escribe different types of families'" and to "[d]escribe the concepts of prejudice and discrimination."<sup>101</sup> Individual schools have the freedom to choose the materials used to meet these academic standards.<sup>102</sup> The Supreme Court of Massachusetts found that the specific books presented to Parker and Wirthlin were within the terms of

---

<sup>93</sup> *Id.* at 106–07.

<sup>94</sup> *Id.* at 94.

<sup>95</sup> *Id.* at 92.

<sup>96</sup> *Id.* at 92–93.

<sup>97</sup> *Id.* at 93.

<sup>98</sup> *Id.* at 94.

<sup>99</sup> *Id.* at 90–91; CAL. EDUC. CODE §§ 51938, 51939 (West 2009).

<sup>100</sup> *Id.* at 91 (quoting MASS. GEN. LAWS ch. 69, § 1D (2008)); see also CAL. EDUC. CODE §§ 200–01 (West 2009) (discussed earlier on pages 21–22).

<sup>101</sup> *Parker*, 514 F.3d at 91.

<sup>102</sup> *Id.*

the state statutes.<sup>103</sup> Therefore, because there was neither a specific policy requiring parental notification nor the choice to opt-out of a curriculum for educational materials adopted within the boundaries proscribed by statute, parents did not have a Constitutional right to require schools to notify them or provide opt-out options.<sup>104</sup>

However, not having a Constitutional right to notification or opt-out provision, does not mean that that every Massachusetts student would be forced to listen to lectures about same-sex marriages or that state school system could not change existing procedures to include these options. It only meant that student education containing material designed to encourage tolerance neither reasonably effected religious freedom nor the right to direct the upbringing of their children, especially when the school “impose[d] no requirement that the student agree with or affirm [the ideas presented in the books], or even participate in discussions about them.”<sup>105</sup> Instead, the court suggested, every parent had the right to address curricula contents or opt-out policies through political reform of education.<sup>106</sup> The court went further to state that “[a] parent whose ‘child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family’s moral or religious context, or to supplement the information with more appropriate materials.’”<sup>107</sup>

Furthermore, Massachusetts’ diversity education framework does not require that every Massachusetts student read books like *King and King* and *Who’s in a Family*. Massachusetts has no statewide regulation dictating the use of particular educational material, a fact that had remained the same both prior to and after legalized same-sex marriage in Massachusetts.<sup>108</sup> An educational specialist from the Massachusetts Department of Elementary and Secondary Education stated,

Legalized same-sex marriage has not changed the school curriculum in any way. The curriculum always had units on families and family structures, but they existed before legalization [of same-sex marriage], and they are still part of the curriculum. . . . I haven’t seen any real changes in schools other than possibly validating the existence of certain type of families.<sup>109</sup>

---

<sup>103</sup> *Id.* at 92.

<sup>104</sup> *Id.* at 106.

<sup>105</sup> *Id.* at 106.

<sup>106</sup> *Id.* at 107 (citing *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990)).

<sup>107</sup> *Id.* at 105 (quoting *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3rd Cir. 2005)).

<sup>108</sup> *Id.* at 91–92.

<sup>109</sup> Telephone Interview with Sarah Slautterback, Educ. Specialist, Mass. Dep’t of Elementary and Secondary Educ. (Aug. 10, 2009) (Ms. Slautterback has worked in Safe School Program for Gay and

Similarly, neither the passage nor rejection of Proposition 8 would have had any direct influence on California's diversity education. California already recognizes the existence of same-sex relationships in civil unions and schools are already encouraged to promote tolerance and respect for different types of committed relationships.<sup>110</sup> If diversity education is provided, then tolerance for same-sex unions was likely incorporated into the curriculum before Proposition 8 was ever introduced.

If proponents of Proposition 8 were primarily concerned about the possibility of same-sex marriage being introduced to children in school, such concerns could have been adequately addressed through the regular legislative process to change school policies and/or to add notification or opt-out provisions as suggested by the Supreme Court. A constitutional ban on same-sex marriage was unnecessary.

In sum, the California Education Code does not *require* students to receive instruction in same-sex marriage in public schools. In fact, diversity curriculum, which is not required by the state, might be the most likely avenue for children to learn about the existence of same-sex marriage.<sup>111</sup> However, this would only be possible if the individual school district, with the consent of the community, changed its curriculum to do so.<sup>112</sup> If school districts decide to adopt same-sex marriage curriculum, parents would be able to opt children out under existing policies if it related to health or sexual education.<sup>113</sup> If diversity education were implemented in a specific school, same-sex relationships is most likely already a part of the school curriculum in civil union and same-sex relationship discussions undermining the prediction of indoctrination and the need to strip same-sex couples of marriage rights.<sup>114</sup> Thus, parents and members of the community should exercise their ability to work with the school or state to add notice and opt-out provisions for same-sex marriage education directly, instead of banning same-sex marriage altogether.

---

Lesbian Students. She currently works in the Secondary School Services Department in Massachusetts).

<sup>110</sup> CAL. FAM. CODE § 297-297.5(a) (West 2009); CAL. EDUC. CODE §§ 200-01, 51930, 51933 (West 2009).

<sup>111</sup> CAL. EDUC. CODE § 51890(a)(2) (West 2009).

<sup>112</sup> §§ 51914 and 51890(a)(3).

<sup>113</sup> § 51240.

<sup>114</sup> §§ 200-01.

### III. DOES TEACHING STUDENTS ABOUT THE EXISTENCE OF SAME-SEX MARRIAGES UNDERMINE MARRIAGE VALUES?

In the traditional marriage vs. same-sex marriage debate, “traditional” marriage is understood to be a union only “between a man and a woman.”<sup>115</sup> Proponents of traditional marriage argue that legalizing same-sex marriage would undermine marriage values<sup>116</sup> and effectively confuse children.<sup>117</sup> But what are the *values* of traditional marriage that are at stake when children are taught about same-sex marriage in schools? Although there are numerous values that traditional marriage advocates point out, this Note will address two main values of the institution of marriage that primarily effect children: (1) the creation of stable societal environments within which children can flourish, and (2) the ability for children to understand “legitimate” procreation.<sup>118</sup>

#### A. STABLE ENVIRONMENT FOR CHILDREN

From an early age, children have historically been told that a family is created when a man and a woman get married and have children.<sup>119</sup> A closed group of individuals made up of biological parents and siblings is an easily definable concept of “family” that can be readily taught to children as the “building block” of society. This in turn allows children to understand their roles in society as future parents. But does changing the shape of this building block create an unstable, confusing environment for children? Same-sex marriage advocates may point out that family blocks are not perfectly square in today’s society in the first place. Each family block is unique and malleable to encompass stepparents, single parents, half siblings and other family varieties. But it is this exact modernization that traditional marriage advocates seem concerned about, often pointing to the harmful effects of divorce, remarriage and single parent families on today’s children and correlating this discord with same-sex marriages.<sup>120</sup>

However, in making this connection, traditional marriage advocates fail to clearly show how same-sex marriage is similar to the divorce, remar-

---

<sup>115</sup> *Why Proposition 8*, *supra* note 6; The Traditional Values Coalition, Traditional Values Defined, <http://www.traditionalvalues.org/defined.php> (last visited April 12, 2010).

<sup>116</sup> *Why Proposition 8*, *supra* note 6.

<sup>117</sup> *It’s Already Happened*, *supra* note 3; *see also Where Do Babies Come From?*, *supra* note 4.

<sup>118</sup> Charles J. Russo, *Same-Sex Marriage and Public School Curricula: Preserving Parental Rights to Direct the Education of Their Children*, 32 U. DAYTON L. REV. 361, 367 (2007).

<sup>119</sup> *Id.* at 375–76; *See Why Proposition 8*, *supra* note 6.

<sup>120</sup> Glenn T. Stanton, *Why Marriage Matters for Children*, ISSUE ANALYSIS, <http://www.citizenlink.org/FOSI/marriage/A000000982.cfm> (last visited April 12, 2010); Carrie A. Moore, *Gay Marriage Criticized*, DESERET MORNING NEWS (Salt Lake), Aug. 23, 2008.

riage, and single parent families that are assumed to provide unstable environments for children. For example, on the most basic level, divorce by definition is the *breaking up* of families that may lead to instability for children, while same-sex marriage unites two people to *form* a family, thus having the potential to increase the number of stable environments for children.

Perhaps traditional marriage advocates intend to make the argument that same-sex couples are less likely to be in long-lasting committed relationships and that constant changes in partners would create unstable environments for children.<sup>121</sup> But, how can this be reconciled with the fact that “marriage” has not historically been available to same-sex couples? There cannot be an adequate sample to compare heterosexual married couples’ and homosexual married couples’ length of relationships. The earliest country to legalize same-sex marriage was the Netherlands in 2001, followed by Belgium in 2003, Spain and Canada in 2005, South Africa in 2006 and Norway and Sweden in 2009.<sup>122</sup> In the United States, Massachusetts was the first state to legalize same-sex marriage in 2004, followed by Connecticut and California (temporarily) in 2008 and Iowa in 2009. Vermont and Maine will begin recognizing same-sex marriage in late 2009, while New Hampshire will recognize same-sex marriage in 2010.<sup>123</sup> Because of the relatively short history of same-sex marriage all over the world, an accurate comparison would likely be unattainable. Even studies comparing the length of unmarried heterosexual and homosexual relationships have highly varying results, usually with methodical problems and inferential leaps.<sup>124</sup> In fact, it is possible that same-sex marriages would increase the number of long-term relationships among same-sex couples as the legal and social aspects of marriage calls for a greater promise of commitment.

---

<sup>121</sup> See FAMILY RESEARCH INST., GETTING THE FACTS: SAME SEX MARRIAGE (2009) <http://www.familyresearchinst.org/2009/02/getting-the-facts-same-sex-marriage/> (stating scientific and antidotal evidence for the claim that homosexual marriages are short-lived); see also TIMOTHY J. DAILEY, THE SLIPPERY SLOPE OF SAME-SEX MARRIAGE 3 (2009), available at <http://downloads.frc.org/EF/EF04C51.pdf> (stating that “[w]hile a high percentage of married couples remain married for up to 20 years or longer, with many remaining wedded for life, the vast majority of homosexual relationships are short-lived and transitory”).

<sup>122</sup> States and Countries that Allow Gay Marriage, *supra* note 20.

<sup>123</sup> *Id.*

<sup>124</sup> See Lawrence A. Kurdek, Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?, 66 J. MARRIAGE & FAM. 880, Nov. 2004 (finding that gay and lesbian couples have healthier relationships than heterosexual couples); see also Lynn D. Wardle, A Response to the “Conservative Case” for Same-Sex Marriage: Same-Sex Marriage and “The Tragedy of the Commons,” 22 BYU J. PUB. L. 441, 453–55 (2008) (citing a Dutch study that finds that the average duration of gay “steady partner” relations was only 1.5 years in Amsterdam).

Even if it were to be found that homosexual relationships are of significantly shorter duration than heterosexual relationships, the length of a relationship does not necessarily indicate greater stability. Traditional ideals of marriage have been known to keep individuals in an abusive marriage to avoid the negative stigmatization associated with failed marriages. Although this would prolong the length of a marriage, it could result in highly unstable home environments.

Some traditional marriage advocates have come right out and claimed that same-sex parents just make bad parents.<sup>125</sup> For instance, Paul Cameron, chairman of the Family Research Institute, claimed that children who have at least one homosexual parent are more likely to have had sex with a parent, experience homosexuality as their first sexual encounter, be sexually molested, become homosexual or bisexual and report dissatisfaction with their childhood.<sup>126</sup> On the other hand, in 2004 the American Psychological Association (APA) released a research summary article concluding that,

There is no scientific basis for concluding that lesbian mothers or gay fathers are unfit parents on the basis of their sexual orientation. . . . On the contrary, results of research suggest that lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children. . . . Fears about children of lesbian or gay parents being sexually abused by adults, ostracized by peers, or isolated in single-sex lesbian or gay communities have received no scientific support. Overall, results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents.<sup>127</sup>

In 2005, William Meezan and Jonathan Rauch confirmed the APA findings in an independent review of the body of research on how same-sex parenting affects children.<sup>128</sup> They concluded that same-sex parents are “much like other parents.”<sup>129</sup> Meezan and Rauch found that “there is no evidence that children of lesbian and gay parents are confused about their

---

<sup>125</sup> FAMILY RESEARCH INST., *supra* note 121; Kelley O. Beaucar, *Homosexual Parenting Studies Are Flawed, Report Says*, FOXNEWS.COM, July 18, 2001, <http://www.foxnews.com/story/0,2933,29901,00.html>.

<sup>126</sup> FAMILY RESEARCH INST., *supra* note 121.

<sup>127</sup> Ruth Ullmann Paige, *Proceedings of the American Psychological Association for the Legislative Year 2004: Minutes of the Annual Meeting of the Council of Representatives, February 20–22, 2004, Washington, DC, and July 28 and 30, 2004, Honolulu, Hawaii, and Minutes of the February, April, June, August, October, and December 2004 Meetings of the Board of Directors*, 60 AM. PSYCHOLOGICAL 436 (2005).

<sup>128</sup> William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and American's Children*, 15 FUTURE CHILD. 97, 97 (2005), available at [http://www.futureofchildren.org/futureofchildren/publications/docs/15\\_02\\_FullJournal.pdf](http://www.futureofchildren.org/futureofchildren/publications/docs/15_02_FullJournal.pdf).

<sup>129</sup> *Id.* at 103.



gender identity,”<sup>130</sup> and that these children “show no difference in cognitive abilities, behavior, general emotional development.”<sup>131</sup> “Where differences are found, they sometimes favor same-sex parents.”<sup>132</sup>

In a case analyzing the quality of parenting by same-sex couples in Hawaii, expert witnesses for both traditional marriage advocates and same-sex marriage advocates stated that same-sex couples make good parents.<sup>133</sup> For example, Dr. Pruett, an opponent of same sex marriage, testified that single parents, gay fathers, lesbian mothers, adoptive parents, foster parents and same-sex couples can be, and do become, good parents.<sup>134</sup> Another opponent of same sex marriage, Dr. Merrill, admitted that the sexual orientation of a parent is not an indication of parental fitness.<sup>135</sup> Even the American Academy of Pediatrics published a study “demonstrating that there is no systematic difference between gay and nongay parents in emotional health, parenting skills, and attitudes toward parenting.”<sup>136</sup> Dr. Ellen Perrin, a professor of pediatrics at Tufts University School of Medicine in Boston, summarized the studies regarding children raised in same-sex families: “The vast consensus of all the studies shows that children of same-sex parents do as well as children whose parents are heterosexual in every way . . . [i]n some ways children of same-sex parents actually may have advantages over other family structures.”<sup>137</sup> Given the current trend of studies, the claim that same-sex parents make bad parents seems unfounded.

Proponents of Proposition 8 also claimed that legalizing same-sex marriage would lead to a slippery slope towards legalization of polygamy and even bestiality that would confuse children and increase instability in their lives.<sup>138</sup> If “love” was the underlying reason for legalizing same-sex marriage, what really is stopping the free fall to legalized polygamy and bestiality? Simply that in this society, the Constitution and the law is a ref-

---

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (For instance, lesbian co-mothers seem to be more involved in the lives of children than are heterosexual fathers.).

<sup>133</sup> *Baehr v. Miike*, 1996 WL 694235, at \*5, 10 (Hawai’i Cir. Ct. Dec. 3, 1996).

<sup>134</sup> *Id.* at 5.

<sup>135</sup> *Id.* at 10.

<sup>136</sup> See Ellen C. Perrin & Comm. on Psychological Aspects of Child & Family Health, *American Academy of Pediatrics Technical Report: Co-parent or Second Parent Adoption by Same-Sex Parents*, 109 *PEDIATRICS* 341, 344 (2002), available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;109/2/341.pdf>.

<sup>137</sup> Louise Chang, *Study: Same-Sex Parents Raise Well-Adjusted Kids: Researchers Say Children Who Grow Up in Households with Gay Parents Have Normal Self-Esteem*, WEBMD, Oct. 12, 2005, <http://www.webmd.com/mental-health/news/20051012/study-same-sex-parents-raise-well-adjusted-kids>.

<sup>138</sup> DAILEY, *supra* note 121, at 3.

lection of accepted societal views—a codification of what the majority believes is right or needed—not a mechanism used to indoctrinate the majority. Currently same-sex relationships are legally recognized through same-sex marriages, civil unions or both, in over twenty countries and in over ten states in the United States.<sup>139</sup> The modern trend has been towards legalizing same-sex marriage, while polygamy has been decreasing throughout the world.<sup>140</sup> Also, there are various studies suggesting that homosexuality has a strong biological basis, meaning it is unlikely that homosexuals plainly choose to be gay, while polygamy is a localized cultural phenomenon, where the individuals involved choose to be in a multi-party relationship.<sup>141</sup>

As for the assertion that legalizing same-sex marriage would open up the argument for interspecies marriage, there has not been a single institution in history that has legalized bestiality, even in those countries that have practiced polygamy for centuries. There is no significant support for the legalization of bestiality anywhere. Taking one large step back, one cannot help but be concerned about how same-sex marriage, a union of two human beings, was so readily compared to one that involved humans and animals. So often, both sides of a heated debate have lose sight of the real issue at hand, detrimentally distracting from what is really at stake. Surely, it would have been in the best interest of California and its children to focus on the reasonable effects of same-sex marriage, rather than pointing to remote possibilities for the sake of shock value.

Still, the argument that laws are a reflection of popular accepted beliefs is not without counterarguments. Proposition 8 proponents draw attention to the fact that the law does not always reflect majority view, and argue that the majority view disapproving of same-sex marriage was overridden by the acts of a few: “Californians have never voted for same-sex marriage. If gay activists want to legalize gay marriage, they should put it on the ballot. Instead, they have gone behind the backs of voters and con-

---

<sup>139</sup> National Conference of State Legislatures, Civil Union and Domestic Partnership Statutes, <http://www.ncsl.org/Default.aspx?TabId=4244> (last visited April 12, 2010).

<sup>140</sup> Martha Bailey, et al., *Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada*, 25 NAT'L J. CONST. L. 83, 86 (2008–2009) (advocating recognition of foreign polygamous marriage in Canada and noting the decline in polygamy throughout the world); Véronique Hertrich, Chair, Institut National d'Etudes Démographiques [INED], European Population Conference: Is Polygamy Weakening? Diversity and Trends in Africa During the Past 50 Years, European Population Conference (June 24, 2006), (transcript available at <http://paa2007.princeton.edu/download.aspx?submissionId=71630>) (stating research results indicate the beginning of a decline in polygamy in Africa).

<sup>141</sup> See *infra* notes 159–183.

vinced four activist judges in San Francisco to redefine marriage for the rest of society.”<sup>142</sup>

This statement, however, mischaracterizes the acts of the judicial branch. The California judicial branch, created by the state constitution, interprets laws so that they are in accord with the California Constitution. The Justices in *In re Marriage Cases*, did not create new law, but merely clarified the pre-existing law of the land using the powers given to them by the people. They determined that language in California statutes defining marriage as between a man and a woman violated the Equal Protection of the California Constitution.<sup>143</sup> And when the court was confronted with Proposition 8, which was in direct conflict with its holding in *In re Marriage Cases*, the court held that the ballot initiative was within the rights conferred to the people by the Constitution.<sup>144</sup> Although it is true that Californians have never voted to legalize same-sex marriage, there is cause for concern when the outcome of Proposition 8 seems to have been influenced by numerous misleading propaganda regarding same-sex marriage and education.

Despite Proposition 8 proponents’ argument that same-sex marriage in schools would destabilize children, it seems more likely that discussions of same-sex marriages and relationships would have a more stabilizing effect on the environment of today’s children. Showing children the existence of diverse relationships and teaching students to be tolerant of other family lifestyles, as encouraged by diversity education, promotes a stable societal environment for all children, both heterosexual and homosexual.

On February 12, 2008, a fourteen-year-old boy shot a fellow male classmate in the head twice with a .22 caliber revolver in Oxnard, California; prosecutors claim the victim was shot because of his sexual orientation.<sup>145</sup> The victim died a few days later and the boy shooter is currently facing charges of premeditated murder with a hate crime enhancement, facing up to 50 years to life in prison.<sup>146</sup> This unfortunate event is an example of how schoolchildren are negatively harmed by lack of tolerance among students. When homosexual or bisexual children become targets of intoler-

---

<sup>142</sup> OFFICIAL VOTER INFORMATION GUIDE, *supra* note 38.

<sup>143</sup> *In re Marriage Cases (Marriage Cases III)*, 183 P.3d 384, 452–53 (Cal. 2008), *reh’g denied* (June 4, 2008).

<sup>144</sup> *Strauss v. Horton*, 207 P.3d 48, 102–03 (Cal. 2009).

<sup>145</sup> Catherine Saillant & Amanda Covarrubias, *Killing Called a Hate Crime; 14-Year-Old Is Charged in Shooting of Oxnard Classmate*, L.A. TIMES, Feb. 15, 2008, at A1; Catherine Saillant, *Details in Gay Student’s Slaying Revealed; The Youth Accused of Shooting Classmate Had Experience with and Had Made Threats, Prosecution Says*, L.A. TIMES, Feb. 12, 2009, at B3.

<sup>146</sup> *Killing Called a Hate Crime*, *supra* note 145.

ance, they can turn to drugs and other destructive behaviors; they can be forced to run away from home, and even may turn to suicide when they fail to find acceptance among their peers and families.<sup>147</sup> One legal author commented that, “When public high schools promote heterosexuality at the cost of denying homosexual youth the opportunity to learn about minority sexualities, these schools contribute to the disastrous situation in which many sexual minority high school students find themselves.”<sup>148</sup> With the introduction of diversity education and exposure to alternative family lifestyles, like same-sex marriage, homosexual children would be able to safely express themselves without fear of rejection from their peers. They can safely explore their sexuality without internalizing sexual conflicts, thereby reducing identity confusion and unhealthy sexual behaviors such as anonymous sexual encounters. Even heterosexual children are victimized when they become victims of homophobia, confusion and anger that can lead to devastating consequences as evidenced by the Oxnard shooting.

#### B. LEGITIMATE PROCREATION

The other marriage value which proponents of traditional marriage claim is undermined by same-sex marriage discussions in schools is a child’s ability to identify and understand legitimate procreation.<sup>149</sup> The definition of “legitimate procreation” depends on two types of legitimacy: (1) legal legitimacy, and (2) social legitimacy.

Legitimacy is legally defined as the “condition of being born in wedlock.”<sup>150</sup> In California, “in wedlock” refers to children born to *biological* parents married to each other at the time of conception.<sup>151</sup> Because legal legitimacy is a concept that is defined by law, the preservation of this definition is essentially unaffected by same-sex marriage. Although legalization of same-sex marriage would redefine “wedlock,” the category of children born “in” wedlock would remain the same due to the natural inability of same-sex partners to procreate. Even if one lesbian parent gave birth to a child, the fact that the two biological parents were not married at the time would preclude them from being considered “born in wedlock.”

---

<sup>147</sup> Carlo A. Pedrioli, *Lifting the Pall of Orthodoxy: The Need for Hearing a Multitude of Tongues in and Beyond the Sexual Education Curricula at Public High Schools*, 13 UCLA WOMEN’S L.J. 209, 215 (2005).

<sup>148</sup> *Id.* at 211–12.

<sup>149</sup> Russo, *supra* note 118, at 367; *see also* Baehr, 1996 WL694235, at \*6 (quoting expert witness for opponent of same-sex marriage stating that marriage is a “gateway to becoming a parent,” and “marriage is synonymous with having children”).

<sup>150</sup> BLACK’S LAW DICTIONARY 625 (6th ed. 1991).

<sup>151</sup> CAL. FAM. CODE §17400(h)(5)(i) (West 2009).

The social definition of legitimate procreation, on the other hand, may undergo some changes if the topic of same-sex marriage was introduced in schools. Many proponents of Proposition 8 argue that the purpose of marriage is for procreation as illustrated by the *What's Marriage For?* advertisement.<sup>152</sup> Children are taught that the only legitimate form of procreation is within marriages where traditional “mommies” and “daddies” can have babies. By this logic, the natural sterility of same-sex couples would preclude them from legitimate procreation. Therefore, if schools were to incorporate same-sex unions in redefining marriage, children who are taught that marriage is for procreation would be forced to alter their definition of legitimate procreation.

From this redefinition, the social value of legitimate procreation presented by Proposition 8 advocates would admittedly be undermined. But this does not logically correlate to the implication that marriage values would also be undermined. Any value obtained from teaching children that marriage is for procreation likely outweighs the potential harm that such a view would create. For example, one obvious value is that it encourages children to procreate only in wedlock in the future. But, what does it teach children about sterile heterosexual couples? About couples who use contraception? Couples who adopt? Postmenopausal women who marry? The answers to these questions all lead to the conclusion that couples who marry and do not or cannot procreate act against marriage values are detrimental to society. Such a conclusion is one that Proposition 8 proponents would probably be unwilling to adopt. If this is the case, the claim that altering the social definition of “legitimate procreation” would undermine the importance of marriage is insignificant considering the countervailing negative values children obtain from learning that marriage *is* for procreation. In other words, answering the question, “what is marriage for?” with “so that parents can have babies” does not create a significant marriage value that could be undermined by the redefinition of marriage when viewed in light of the negative message it portrays to children.

#### IV. TEACHING STUDENTS TO BE GAY?

Analysis of the claim that legalizing same-sex marriage will lead teachers to teach students to be gay is difficult without looking into the possible causes of homosexuality—mainly whether a child’s environment can influence a child’s sexual orientation. Although there is no conclusive data resolving this issue, summaries of major studies are presented below.

---

<sup>152</sup> *Where Do Babies Come From?*, *supra* note 4.

Evelyn Hooker conducted one of the first physiological research tests to investigate the relationship between homosexuality and environmental factors in 1956.<sup>153</sup> In this study, homosexual and heterosexual participants were paired based on age, IQ, and education level and then subjected to three psychological tests (the Rorschach Test, Thematic Apperception Test and Make-A-Picture-Story Test) to compare psychopathological development.<sup>154</sup> Hooker's sample consisted of three groups: thirty homosexual men associated with a homophile group dedicated to integrating homosexuals into society and thirty heterosexual men.<sup>155</sup> Test results showed no significant difference in the participants' answers leading to Hooker's conclusion that there are no correlation between sexuality and psychopathology.<sup>156</sup> Studies like Hooker's eventually swayed the American Psychiatric Association to ceased identifying homosexuality as a mental disorder in 1973.<sup>157</sup>

In the 1990's D.F. Swaab conducted a post mortem tests to see if there were differences in brain structures between homosexuals and heterosexuals.<sup>158</sup> The studies analyzed the brains of ten deceased homosexuals and six heterosexual males, all of whom had AIDS.<sup>159</sup> The resulting data showed that the suprachiasmatic nucleus (SCN) of the hypothalamus, a portion of the brain known to indirectly govern a person's sex drive, was twice as large for the homosexual males than those of heterosexual males.<sup>160</sup> Two other independent studies showed differences in various parts of the hypothalamus among homosexual and heterosexual subjects.<sup>161</sup>

---

<sup>153</sup> Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECHNIQUES 18 (1957); see also Mathew Kennedy, *Making Homosexuality Healthy: The Work of Evelyn Hooker*, NAT'L SEXUALITY RESOURCE CENTER, Mar. 20, 2003, [http://nsrc.sfsu.edu/article/making\\_homosexuality\\_healthy\\_work\\_evelyn\\_hooker](http://nsrc.sfsu.edu/article/making_homosexuality_healthy_work_evelyn_hooker) (examining the life and work of Evelyn Hooker).

<sup>154</sup> Hooker, *supra* note 153, at 19–21.

<sup>155</sup> *Id.* at 19.

<sup>156</sup> *Id.* at 30.

<sup>157</sup> Ryan D. Johnson, *Homosexuality: Nature or Nurture*, ALLPSYCH J., Apr. 30, 2003, <http://allpsych.com/journal/homosexuality.html>; See also Am. Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights*, 131 AM. J. PSYCHIATRY 497 (1974) (setting forth the American Psychiatric Association's official policy on homosexuality).

<sup>158</sup> Dick F. Swaab & Michael A. Hofman, *An Enlarged Suprachiasmatic Nucleus in Homosexual Men*, 537 BRAIN RES. 141, 141–48 (1990).

<sup>159</sup> *Id.* at 141. The study's control group also included two heterosexual females with AIDS, but their data was excluded to limit results to males. The study also had a reference group of sixteen males whose sexual orientations were unknown.

<sup>160</sup> *Id.* at 146.

<sup>161</sup> See Ryan D. Johnson, *Homosexuality: Nature or Nurture*, ALLPSYCH J., Apr. 30, 2003, <http://allpsych.com/journal/homosexuality.html> (discussing studies conducted by Laura S. Allen and Simon LeVay).

Together the studies suggest that because the size and shape of the human brain is determined biologically very early in development and is impacted minutely by behavior, human sexuality has its origins in biology.<sup>162</sup>

Twin studies were also conducted to analyze any genetic correlation to homosexuality. Franz J. Kallman's experiments in the 1950s and 1960s showed that identical twins had a 100% match rate for homosexual orientation and only an 11.5–42.3% match rate for fraternal twins.<sup>163</sup> A different study adding “non-related adopted brothers” as a comparative group found that 52% of identical twins were both self-identified homosexuals, while only 22% and 5% of fraternal twins and non-related adopted brothers respectively identified themselves as homosexuals.<sup>164</sup>

Most interestingly, geneticist Dean Hamer hypothesized that homosexuality was linked to genetics after studying patterns of homosexuality in families.<sup>165</sup> In his search for the “gay gene,” Hamer analyzed the DNA of 40 homosexual brothers and their families.<sup>166</sup> For thirty-three of the forty brothers, the study found a link between homosexuality and a portion of an X chromosome.<sup>167</sup> Hamer postulated a statistical confidence level of more than 99% that at least one subtype of male sexual orientation is genetically influenced.<sup>168</sup>

Although the studies mentioned above suggest a strong biological basis for homosexuality, the evidence should be examined with a critical eye. It cannot be said that the above studies on biological origins of homosexuality stem purely from objective stances, nor can it be said that the studies are immune from research faults. Evelyn Hooker's finding of zero correlation between social determinism and homosexuality based on similar psychological development between homosexuals and heterosexuals seem flawed when considering her study sample and the types of test used. Not

---

<sup>162</sup> Laura S. Allen & Roger A. Gorski, *Sexual Orientation and the Size of the Anterior Commissure in the Human Brain*, 89 PROC. NAT'L. ACAD. SCI. U.S.A. 7199 (1992) (finding that the anterior commissure of the hypothalamus was significantly larger in homosexual subjects than that of heterosexuals); Simon LeVay, *A Difference in Hypothalamic Structure Between Homosexual and Heterosexual Men*, 253 SCIENCE 1034, 1034–37 (1991) (finding that the third interstitial notch of the anterior hypothalamus was two to three times smaller in homosexual men than in heterosexual men).

<sup>163</sup> See Franz J. Kallman, *Twin and Sibship Study of the Overt Male Homosexuality*, 4 AM. J. HUM. GENETICS 136, 143 (1952).

<sup>164</sup> J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES OF GEN. PSYCHIATRY 1089 (1991).

<sup>165</sup> Dean Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321 (1993).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 325.

<sup>168</sup> *Id.*

only was the sample size of thirty study subjects and thirty control subjects limited, but the homosexual participants were all associated with a homophobic group in the 1950's.<sup>169</sup> Presumably, this was a group of men who were more socially comfortable about their sexuality, suggesting a healthier psychopathological development than those who were still "in the closet." Another limiting factor to the study is that only homosexual men were studied, leaving out other important sexual groups such as lesbians and bisexuals. Even the use of Rorschach, Thematic Apperception and Make-A-Picture-Story tests should be criticized, because these tests measure mental and social adjustments, not biological determinism of sexuality.<sup>170</sup>

The Swaab study showing different brain structures between homosexuals and heterosexuals also had methodological problems. Although surely limited by the availability of bodies donated for research, the study did not include female homosexuals to see if their hypothalamus showed any difference in size to heterosexual males or females. More importantly, like Hooker's study, Swaab's study does not show that biology is the source of heterosexuality—only that there is a correlation.

This same criticism applies to Dean Hamer's "gay gene" study where certain portions of a chromosome showed similarities among homosexuals. Hamer himself admitted that "[t]he pedigree study failed to produce what we originally hoped to find: simple . . . inheritance. In fact, we never found a single family in which homosexuality was distributed in [an] obvious sort of pattern . . ."<sup>171</sup> Hamer also acknowledged that his team "knew also that genes were only part of the answer" and "assumed the environment also played a role in sexual orientation, as it does in most if not all behaviors."<sup>172</sup> Looking at the studies from a critical perspective, the studies of biological origins for homosexuality should be seen as pointing to nature as a prominent factor in the development of homosexuality, but perhaps not its sole cause. In fact, many believe that a combination of nature and nurture better explains homosexuality.<sup>173</sup> The world's largest population-

---

<sup>169</sup> Hooker, *supra* note 153, at 19.

<sup>170</sup> *See id.* at 19.

<sup>171</sup> DEAN HAMER & PETER COPELAND, *THE SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR* 104 (1994).

<sup>172</sup> *Id.* at 82.

<sup>173</sup> *See id.*; MICHAEL RUTTER, *GENES AND BEHAVIOR: NATURE-NURTURE INTERPLAY EXPLAINED* (2006); Susanne M. Stronkski Huwiler & Gary Remafedi, Adolescent Homosexuality, 33 *REV. JURIDICA U. INTERAMERICANA*. P.R. 151, 159 (1999); Niklas Långström et al., *Genetic and Environmental Effects on Same-sex Sexual Behavior: A Population Study of Twins in Sweden*, *ARCHIVES OF SEXUAL BEHAV.* (ONLINE FIRST ISSUE), June 7, 2008.



based survey of twins was recently conducted in Sweden.<sup>174</sup> The study analyzed over 3,800 same-gender twin pairs and their sexualities<sup>175</sup> and determined that homosexual behavior was largely shaped by genetics and individual-specific environmental factors with little or no influence from shared environmental factors.<sup>176</sup> The study differentiated between individual-specific environmental factors, experiences that are distinct to each twin, and shared environmental factors, which are experienced by both twins such as family environment and societal attitudes.<sup>177</sup> Using this dichotomy, the study found that for men, genetics accounted for about 35% of the difference in homosexual behavior while individual-specific environmental factors accounted for 64%, leaving 1% or less to shared environmental factors.<sup>178</sup> For women, genetics explained roughly 18% of the variation in same-sex behavior, 64% from individual specific environmental factors and 16% from shared environmental factors.<sup>179</sup> Therefore, this study identifies two major influences on sexual orientation: genetics and individual specific environment. The results of the study suggest that shared environmental factors such as home life, school life and societal attitudes seem to have minimal effects on homosexuality.<sup>180</sup>

The theory that genetic factors and individual-specific environmental factors greatly affect homosexuality suggests that children's homosexuality may be determined by looking at the children's predispositions for homosexuality in combination with the children's personal experiences. Therefore, for the purposes of this Note, children's predispositions for homosexuality will be categorized as "no predisposition," a "strong predisposition," or a "weak predisposition." Under this categorization, children with no predisposition could not be influenced, coerced and indoctrinated to become gay. Children born with a strong predisposition for homosexuality would have a low trigger threshold and are more likely to be gay at an earlier age, while children born with a weak predisposition may or may not be gay depending on the strength of the triggering environment.

---

<sup>174</sup> Långström, *supra* note 173; Sian Halkyard, *Homosexual Behavior Due to Genetics and Environmental Factors*, GENETICS, ENGINEERING, & BIOTECHNOLOGY NEWS, Jun. 28, 2008, <http://www.genengnews.com/news/bnitem.aspx?name=38037271>.

<sup>175</sup> *See id.* (explaining and summarizing the findings of Långström's study; *see generally* Långström, *supra* note 180 (containing the full-findings and methodology of the study)).

<sup>176</sup> Långström, *supra* note 173, at 3.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *See id.*

Because a child with “no predisposition” for homosexuality could not be changed by alternative lifestyle education in schools, the two types of children that opponents of same-sex marriage would be concerned about are those children who have weak and strong predispositions for homosexuality. In order for same-sex marriage education to influence their sexuality, the influence must be large enough to trigger the predispositions and counter other opposing influencing factors.

As previously discussed in Section III of this Note, there are three types of curricula under the California Education Code in which same-sex marriage might be introduced: health, sex and diversity education. For both health and sexual diversity education, parents have broad notice and opt-out provisions that would allow parents to remove their children from participating in classes that utilize materials that might potentially have a “triggering” effect on their children’s sexuality. But if children with weak and strong dispositions accidentally participated in these health and sexual education classes due to failure by the school to notify parents or failure by parents to opt their children out, the context in which “marriage” and “same-sex marriage” would be presented (if presented at all) would unlikely have any “triggering” effect on student homosexuality. For example, if a school decides to include the topic of marriage in health education, it must do so in the context of educating students on *health*, such as informing students on the “legal and financial aspect of marriage.”<sup>181</sup> For same-sex marriage discussion to have some effect on homosexuality, it seems reasonable to assume that only materials that comment on its moral merits or depict sexual behaviors would have the potential to influence. Because the topic of marriage in health education is so remote from same-sex behaviors and is not likely to include discussion on merits, it seems extremely unlikely that students, even those with a strong predisposition for homosexuality, could be “taught” to be gay in health class.

Although sexual health education would probably expose children to some homosexual behaviors, it is also unlikely that the actual “trigger” to homosexuality would be from exposing children to the existence of same-sex marriage. The main purpose of sexual health education is to provide students with the “knowledge and skills necessary to protect his or her sexual and reproductive health” and to encourage students “to develop healthy attitudes concerning adolescent growth and development, body image, gender roles, sexual orientation, dating, marriage, and family.”<sup>182</sup> It also

---

<sup>181</sup> CAL. EDUC. CODE §§ 51210(f), 51220.5(b) (West 2009).

<sup>182</sup> § 51933(b)(1)–(2).

requires that all instructional materials teach “respect for marriage and committed relationships.”<sup>183</sup> Under all of these standards, it is likely that sex health education already addresses homosexual activities regardless of the legal status of same-sex marriage. Therefore, exposing students to same-sex marriage would not have affected their sexuality any more than it would already be affected by current sexual education. Of course, since parents have the benefit of parent notification and opt-out provisions for sexual health education, parents may evade any “triggering” effects that sexual education may have by opting their children out.

On the other hand, the influence on student sexuality by same-sex marriage discussions in diversity education is harder to predict. On one hand, California schools are not required to adopt a diversity curriculum, and parents have the right to examine the educational materials for the classes their children are enrolled in.<sup>184</sup> Parents also have the right to participate as a member of a parent advisory committee and to volunteer their time and resources for the improvement of school programs, including the opportunity to assist in the classroom, thus limiting the likelihood that same-sex marriage materials would be incorporated into a diversity curriculum.<sup>185</sup> On the other hand, if diversity education was adopted and same-sex relationship materials were used, parents would not have the benefit of a prior notification or opt-out provision. But, as the name “diversity” suggests and the *Parker* decision supports,<sup>186</sup> any mention of same-sex marriage introduced would be designed to encourage understanding and tolerance of different types of families and to prevent discrimination among students, rather than to “indoctrinate” or “coerce” the students into adopting alternative lifestyles.<sup>187</sup> This, combined with other more coercive sources of information available to children, such as parents, family, friends, religion, internet, movies and television, makes it unlikely that a school’s limited introduction of same-sex marriages in the context of increasing tolerance would amount to a sufficient level of influence that could trigger a child’s homosexuality.<sup>188</sup> It is doubtful that even children with a strong homosexual predisposition would be influenced by diversity

---

<sup>183</sup> § 51933(b)(7).

<sup>184</sup> § 51101(a)(8).

<sup>185</sup> § 51101(a)(14).

<sup>186</sup> *Parker v. Hurley*, 514 F.3d 87, 103–06 (1st Cir. 2008).

<sup>187</sup> See §§ 51930, 51933.

<sup>188</sup> Opponents of same-sex marriage and its discussion in schools may argue that teachers are traditionally in a position of influence, and this power should not be overlooked. However, the non-coercive nature of the educational material and the highly coercive nature of other sources (especially parents and religion) would probably negate any extra influence a teacher might have on a child’s sexuality.

education. Refer back to the Sweden twin survey that found that homosexual behaviors are largely influenced by the combination of genetic and *individual-specific* environmental factors. Looking at the two categories of environmental factors, formal school education logically falls under the shared environmental category because twins likely attend the same schools. If this is the case, school curricula would have only a minimal effect on homosexual behaviors, and diversity education is unlikely to have a great “triggering” effect on student homosexuality.

### CONCLUSION

In the Proposition 8 debates, proponents of limiting marriage to heterosexual couples argued that same-sex marriage would inevitably be taught in public schools, and thus cause harmful effects on children. An analysis of the California Education Code shows that under the current system, same-sex marriage is unlikely to be introduced in any health or sexual health curriculum, and if it were, schools would have broad opt-out policies enabling parents to remove their children from any such curriculum. However, it is possible that same-sex marriage may indirectly be introduced in diversity education. In such a case, parents would not have a right to opt-out, but the benefits of diversity education for all children likely outweigh any potential negative influence.

Even if the concept of same-sex marriage were introduced in schools, the important marriage values of providing a stable environment for children and defining legitimate procreation would not be undermined. Research shows that children of same-sex parents are as normal as children raised in heterosexual families and that homosexual parents, as well as heterosexual parents, make good parents. In the school setting, it is more likely that same-sex marriage discussions in relation to diversity education would create a more stable environment for children. In addition, the introduction of same-sex marriage will unlikely indoctrinate children to become gay themselves. Modern research studies indicate a strong biological basis for homosexuality with individual-specific environmental factors has the potential to trigger a predisposition for homosexuality. The mere recognition of same-sex marriage in schools is probably insufficient to trigger a predisposition for homosexuality, especially in light of the fact that homosexuality is already incorporated into sexual education, and other environmental factors such as family, religion and the media, have a greater coercive influence on children.

This Note neither purports to judge the moral merits of legalizing same-sex marriage in California nor attempts to know the full extent of the

influence Proposition 8 would have on children. This Note simply analyzes Proposition 8 campaign claims regarding same-sex marriage in education and the potential influence same-sex marriage education might have on children. The relevant data leads to the conclusion that these claims exaggerated the influence that legalizing same-sex marriage would have on students in order to distort the views of the majority on same-sex marriage. With marriage being one of most important rights that laws afford to citizens, it is necessary, as responsible citizens, to seek out and promulgate only accurate information with which informed decisions can be made. Failing to do so not only harms same-sex couples, but also harms Californians and their children when laws do not accurately reflect their views.