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# RESPECT FOR ME BUT NOT FOR THEE: REFLECTIONS ON THE IMPACT OF SAME-SEX MARRIAGE ON EDUCATION

*Charles J. Russo\**

## I. INTRODUCTION

When Carrie Prejean, Miss California in the Miss USA Pageant in April 2009, responded honestly to a question, expressing her belief that marriage should be between one man and one woman,<sup>1</sup> thereby eschewing same-sex marriage, she knowingly surrendered any chance of winning the crown, consigning herself to a second place finish.<sup>2</sup> While Prejean could have anticipated that her response to a politically correct

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1. Prejean responded that "I was being dared . . . to give a candid answer to a serious question. I knew if I told the truth, I would lose all that I was competing for . . . ." Kathryn Jean Lopez, *Why Won't NOW Stand Up for Carrie Prejean?*, CHI. SUN TIMES, Nov. 14, 2009, at 17, available at 2009 WLNR 23047182.

2. Prejean's precise answer was:

Well I think it's great that Americans are able to choose one way or the other. We live in a land where you can choose same-sex marriage or opposite marriage. And, you know what, in my country, in my family, I think that I believe that marriage should be between a man and a woman, no offense to anybody out there. But that's how I was raised and I believe that it should be between a man and a woman.

Gina Parker Ford, *Courage is Contagious*, LA PRENS: SAN ANTONIO (TX), May 24, 2009 at 4C, available at 2009 WLNR 11648999. See also Robert Kahn, *Miss California: Gay Answer Cost Me Miss USA Crown*, NEWSDAY (MELVILLE, NY), April 21, 2009, pagination unavailable online, available at 2009 WLNR 7426558.

inquisitor<sup>3</sup> might have cost her the crown, few could have foreseen the scorn that was heaped on her in the pageant's aftermath.<sup>4</sup> The vicious responses of Prejean's protagonists made it abundantly clear that the discourse about same-sex marriage, for some, has little to do with tolerance and everything to do with ideology,<sup>5</sup> an approach that bodes poorly for education.

The debate over same-sex marriage, particularly as it impacts education, is a battle royale that is becoming a societally defining contest over whose values will prevail in American, and other,<sup>6</sup> societies and schools. On the one hand are those who define marriage as a relationship between one man and one woman for the sake of becoming a family with their children.<sup>7</sup> On the other hand are activists who seek to re-conceptualize marriage as being between members of the same-sex, thereby potentially opening the door to legitimizing all

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3. For representative news commentary on the incident, see, for example, Editorial, *Beauty and the Beast: The Miss USA Contest Suns Family Values*, WASH. TIMES (D.C.), April 24, 2009, at A22, available at 2009 WL 7759971; James Rainey, *The Beauty and the Blogger*, L.A. TIMES, April 24, 2009, at 2, available at 2009 WLNR 7699888.

4. For a discussion of the impact of the treatment that Carrie Prejean was subjected to, see Maggie Gallagher, *The Carrie Effect*, NAT'L REV. ONLINE, March 8, 2010, available at <http://www.nationalreview.com/corner/195912/carrie-effect/maggie-gallagher>.

5. A year later, in May 2010, Miss Oklahoma, Morgan Elizabeth Woolard, was apparently denied the crown of Miss USA in the same pageant when she answered that she supported a recent statute from Arizona aimed at stemming illegal immigration. *Miss Oklahoma Named First Runner-Up in Miss USA Pageant After Answering Immigration Question*, FOXNEWS.COM, May 17, 2010, <http://www.foxnews.com/entertainment/2010/05/17/miss-oklahoma-named-runner-miss-usa-pageant-answering-controversial-immigration/>.

6. See, e.g., Marius Smit symposium piece (discussing same-sex marriage in South Africa). At present, seven countries recognize same-sex marriage: Belgium, Canada, Netherlands, Norway, South Africa, Spain, and Sweden. Timothy Garvey, *God v. Gays? The Rights of Sexual Minorities in International Law as Seen Through the Doomed Existence of the Brazilian Resolution*, 38 DENVER J. INT'L L. & POL'Y 659, 660 n.10 (2010).

7. See, e.g., Joshua K. Baker, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 BYU J. PUB. L. 569 (2004); Gerald V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 729 (2000); Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe?"*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 587 (1996); Lynn D. Wardle, *"Multiply and Replenish." Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001); Kevin J. Worthen, *Who Decides and What Difference Does it Make: Defining Marriage in "Our Democratic Federal Republic,"* 18 BYU J. PUB. L. 273 (2004).

sorts of possible permutations such as polygamy and polyandry.<sup>8</sup>

The unconscionable treatment meted out to Prejean and others who share her views, with the media paying scant attention to the intimidation that proponents of marriage are subjected to,<sup>9</sup> illustrates that some vocal supporters of same-sex unions are apparently willing to stop at nothing in imposing their views on society writ large. Amazingly, though, these same activists demand the very respect for their positions that they refuse to afford those with whom they disagree. In fact, the actions of an outspoken but influential minority demonstrate anything but tolerance for dissent as they punish, ostracize, and demonize supporters of marriage; again, this is far from the attitude that one would hope would be present in educational settings regardless of the level.

In pursuit of their goals, opponents of California's Proposition 8, which defined marriage as a union between a man and a woman, went on the offensive. Critics obtained the release of the names of donors who supported Proposition 8<sup>10</sup> and testified in its favor,<sup>11</sup> while the activist judge in the trial challenging its constitutionality attempted to televise the proceedings in clear violation of court rules.<sup>12</sup> Similarly, activists in Washington sought the release of signed petitions identifying supporters of Referendum 71, which unsuccessfully

8. For a discussion of some of these issues, see, for example, Larry Catá Backer, *Religion as the Language of Discourse of Same-Sex Marriage*, 30 CAP. U. L. REV. 221 (2002); Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy From the History of Polygamy*, 42 S.D. L. REV. 1023 (2005); Judith E. Koons, "Just" Married? Same-Sex Marriage and a History of Family Plurality, 12 MICH. J. GENDER & L. 1 (2005).

9. See, e.g., Colleen Carroll Campbell, *Attacks on Miss California Reveal Intolerance of Gay-Rights Activists*, ST. LOUIS POST-DISPATCH, April 30, 2009, at A 17, available at 2009 WLNR 8125440; Dahlia Lithwick, *The Fear Factor: Why Gay-Rights Opponents Won't Testify*, NEWSWEEK, July 5, 2010, at 33, available at 2010 WLNR 12692912.

10. Jesse McKinley, *Washington, Too, Joins States Divided Over Rights for Gay Couples*, N.Y. TIMES, Sept. 13, 2009, at A33 (also discussing Proposition 8).

11. See, e.g., Associated Press, *California: Proposition 8 Supporters to be Named*, N.Y. TIMES, Jan. 30, 2009, at A21; Dahlia Lithwick, *supra* note 9, at 33; Janet I. Tu, *If You Sign a Petition, Should Your Name be Private? Supreme Court Takes Up Case from Washington this Week Decision Could Affect Many Citizen-initiated Ballot Measures*, SEATTLE TIMES, April 25, 2010, at A1, available at 2010 WLNR 8645639.

12. Lisa Leff, *Judge in Gay Marriage Case Subject to Speculation*, ASSOCIATED PRESS, Aug. 6, 2010, available at 8/6/10 APALERTCA 10:12:58 (noting that at the Supreme Court quashed Walker's efforts to televise the proceedings at the eleventh hour).

attempted to repeal a state law increasing the rights of state-registered domestic partners, including same-sex domestic partners.<sup>13</sup> Of course, these same-sex activists ignore the potential impact that largely judicially imposed approval of gay marriage<sup>14</sup> is likely to have on families, children, and American education.

Against the preceding background, examples of the ramifications of same-sex marriage in education are beginning to emerge whether in K-12 public or non-public schools or higher education. In K-12 schools, controversies have surfaced over whether school officials can use gay friendly curricular material for young children,<sup>15</sup> whether religiously affiliated non-public schools are obligated to enroll children who are being raised by couples in same-sex unions,<sup>16</sup> and whether students can bring same-sex dates to proms.<sup>17</sup> In like manner, disputes have arisen in higher education, particularly in the context of graduate counseling programs where two students

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13. Tu, *supra* note 11, at A1. The Supreme Court affirmed that, while as a general rule ordering the release of petitions did not violate the First Amendment right of signers, such disclosure can be banned if individuals are able to demonstrate that they would be subject to harassment or intimidation on remand in *Doe v. Reed*, 130 S. Ct. 2811 (2010). See Adam Liptak, *Secrecy Rejected on Ballot Petitions*, N.Y. TIMES, June 25, 2010, at A22. For a critique of this case, see Ken Klukowski, *Marriage Petition Case Was Not a Defeat for Traditional Marriage*, TOWNHALL.COM, June 25, 2010, [http://townhall.com/columnists/KenKlukowski/2010/06/25/marriage\\_petition\\_case\\_was\\_not\\_a\\_defeat\\_for\\_traditional\\_marriage](http://townhall.com/columnists/KenKlukowski/2010/06/25/marriage_petition_case_was_not_a_defeat_for_traditional_marriage) (also describing how opponents of Proposition 8 published the names, street addresses, and maps to the home of supporters of the initiative).

14. See, e.g., *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (invalidating the Federal Defense of Marriage Act for violating the Due Process Clause of the Fifth Amendment: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife"). In the companion case of *Commonwealth of Mass. v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), the court invalidated the Act pursuant to the Tenth Amendment and the Spending Clause.

15. *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008).

16. Erica Meltzer, *Denver Archbishop Defends Sacred Heart of Jesus' Decision on Lesbians' Children at Boulder Preschool*, DAILYCAMERA.COM, March 13, 2010, [http://www.dailycamera.com/ci\\_14640646](http://www.dailycamera.com/ci_14640646); Lisa Wangsness, *O'Malley Post Cites "Good of the Child"—Cardinal Backs Hingham Catholic School Decision, Offers to Help Gay Couple*, BOS. GLOBE, May 20, 2010, at 1, available at 2010 WLNR 10384021. See also Charlie Danaher, *Tolerance Goes Both Ways*, DAILYCAMERA.COM, March 13, 2010, [http://www.dailycamera.com/ci\\_14665405](http://www.dailycamera.com/ci_14665405); Electra Draper, *Chaput's Right-eous Stands*, DENVER POST, May 21, 2010, at A01, available at 2010 WLNR 10556648.

17. See *Gays in America: Miss. Girlfriends' Plans for the Prom Hit a Snag*, DETROIT FREE PRESS, March 14, 2010, at A28, available at 2010 WLNR 5389060.

unsuccessfully challenged their dismissals for professing their religious beliefs that could not condone same-sex relationships and gay lifestyles.<sup>18</sup>

As an initial matter, it is imperative to emphasize that regardless of one's views on marriage and sexual preference, individuals on both sides of the divide should be free to express their good faith differences of opinion without being subjected to vituperative, ad hominem attacks on their persons and values such as occurred in the wake of the controversy over Proposition 8.<sup>19</sup> With this in mind, it is of paramount importance that the sexual preferences or religious beliefs of individuals aside, all should be treated with respect and dignity, a virtue that has somehow been lost in the increasingly acrimonious battle of the wills over values in the debate about same-sex marriage.<sup>20</sup>

At the same time, while this paper raises concerns about the potential impact of same-sex marriage on schooling, families, students, and communities, the author believes that civil unions or domestics partnerships can acknowledge the rights of individuals in such areas as inheriting property, qualifying for medical benefits, or being able to make medical decisions for their partners who may be incapacitated. However, based on the commonly accepted notion of marriage as being between one man and one woman, the larger debate on this topic aside as outside of the scope of this essay, the author maintains that individuals who share same-sex living arrangements cannot accurately describe their relationships as marriages even though this piece follows what is becoming convention in using the term "same-sex marriage."

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18. The court denied the university's motion for summary judgment essentially dismissing the student's claim in *Ward v. Members of the Board of Control of Eastern Michigan University*, 700 F. Supp. 2d 803 (E.D. Mich. 2010), but granted it in *Ward v. Wilbanks*, 2010 WL 3026428 (E.D. Mich. July 26, 2010). See also *Keeton v. Anderson-Wiley*, 733 F. Supp. 2d 1368 (S.D. Ga. 2010).

19. See *supra* notes 10–13.

20. In a particularly ugly example of how this controversy can get out of hand, the Supreme Court recently heard oral arguments in a dispute where members of a church sought "to publicize their message of God's hatred of America for its tolerance of homosexuality" by picketing a funeral for a soldier who died in Iraq. *Snyder v. Phelps*, 533 F. Supp.2d 567 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010). While not disputing one's right to free speech, however hateful, one must wonder about whether protestors should have chosen such a venue out of respect for the deceased, his parents, family, friends, and colleagues.

In light of attempts to legalize same-sex unions, coupled with President Barak Hussein Obama's desire to repeal the federal Defense of Marriage Act,<sup>21</sup> which was struck down by the federal trial court in Massachusetts,<sup>22</sup> this essay supports what is sometimes euphemistically referred to as traditional marriage and the long-recognized parental right to direct the education of their children,<sup>23</sup> while highlighting the impact that such a change might have on schooling. The remainder of this essay, then, is divided into three substantive sections. The first part reviews issues in education, while the second reflects on the implications of such a change. The third part of the essay offers policy recommendations on how interested persons can deal with the array of questions involving same-sex marriages or relationships and gay lifestyles that arise in schools. The paper rounds out with a brief conclusion.

## II. ISSUES IN EDUCATION

This section briefly examines litigation and controversies over same-sex marriage and gay lifestyles in educational settings. Clearly, the more immediate concern with regard to educational issues is in the world of K–12 schooling<sup>24</sup> in light of how curricula and programming can surreptitiously shape the minds of impressionable students. The use of stealth curricula, regardless of whether students are in public or non-public schools, is problematic particularly if their parents are not vigilant in monitoring the studies of their children. Even so, since graduate and undergraduate programs prepare counselors and teachers, it is important to keep abreast of

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21. Jane McGrath, *Obama, Proclaiming LGBT Pride Month, Pushes Repeal of Defense of Marriage Act*, CNSNEWS.COM, June 2, 2010, <http://www.cnsnews.com/news/article/66952>. For commentary on this Act, see, for example, Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365 (2005).

22. See *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008).

23. See *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) (“[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

24. A line of cases upholds the rights of students to express their sexuality in schools under the Equal Access Act, 20 U.S.C. §§ 4071 *et seq.*, see, for example, *Straights and Gays for Equality v. Osseo Area Schools—Dist. No. 279*, 540 F.3d 911 (8th Cir. 2008); *East High School Prism Club v. Seidel*, 95 F. Supp. 2d 1239 (D. Utah 2000).

developments on campuses because these students are poised to become the next generation of educators.

### A. K-12 Education

#### 1. Public schools

*Parker v. Hurley*<sup>25</sup> focused on instruction about same-sex marriage in a K-12 setting. In *Parker*, the parents of kindergarten and second grade students challenged school officials who refused to follow a 1996 Massachusetts statute<sup>26</sup> directing educators to provide parents with notice and an opportunity to excuse their children from instruction on sex education or human sexuality that conflicts with familial religious beliefs.<sup>27</sup> The curriculum at issue relied on materials that “portray[ed] diverse families, including families in which both parents are of the same-sex gender.”<sup>28</sup> When the first child was in kindergarten, his teachers read *Diversity Book Bag* and *Who’s in a Family*, materials which presented different kinds of families including single-parent, interracial, those without children, one with two fathers, and another with

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25. 514 F.3d 87.

26. MASS. GEN. LAWS ch. 71, § 32A reads:

Every city, town, regional school district or vocational school district implementing or maintaining curriculum which primarily involves human sexual education or human sexuality issues shall adopt a policy ensuring parental/guardian notification. Such policy shall afford parents or guardians the flexibility to exempt their children from any portion of said curriculum through written notification to the school principal. No child so exempted shall be penalized by reason of such exemption.

Said policy shall be in writing, formally adopted by the school committee as a school district policy and distributed by September first, nineteen hundred and ninety-seven, and each year thereafter to each principal in the district. ...

To the extent practicable, program instruction materials for said curricula shall be made reasonably accessible to parents, guardians, educators, school administrators, and others for inspection and review.

The department of education shall promulgate regulations ... to resolve any and all disputes arising under this section.

27. For other recent controversies involving sexuality and parental authority, although not homosexuality specifically, see, for example, *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005), *amended*, 447 F.3d 1187 (9th Cir. 2006) (refusing to enjoin explicit questionnaires about sexuality that were distributed to children in grades one, three, and five); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005) (refusing to enjoin the distribution of questionnaires including sexually explicit inquiries to secondary school students); *Brown v. Hot, Sexy and Safer Products*, 68 F.3d 525 (1st Cir. 1995) (refusing to sanction school officials for allowing an explicit sex education program in a high school as shocking to the conscience even where board policy required written parental consent for their children to receive such instruction).

28. *Parker*, 514 F.3d at 90.

two mothers; in second grade this same child was exposed to *Molly's Family*, in which a girl was embarrassed because she had a mommy and a mama.<sup>29</sup> Second grade classes also read *King & King*, the story of two princes who fall in love and marry.<sup>30</sup> The story ends with the princes kissing but the depiction superimposes a heart over their mouths.

As the dispute progressed, the father of the kindergarten child was arrested for refusing to leave school after demanding that officials notify him before any discussion of homosexuality was presented to his son's class; the trespassing charges he faced were later dropped.<sup>31</sup> About a year later, the mother of a second-grader complained that "[b]y presenting this kind of issue at such a young age, they're trying to indoctrinate our children. They're intentionally presenting this as a norm, and it's not a value that our family supports."<sup>32</sup>

The parents unsuccessfully filed suit in the federal trial court in Massachusetts.<sup>33</sup> The court rejected the parental claims that officials violated their rights to privacy and substantive due process in the upbringing of their children by exposing them to teaching on same-sex marriage at too young an age, their First Amendment right to the free exercise of religion, and for not notifying them and allowing them to remove their children from instruction involving the disputed books pursuant to commonwealth law.

On further review, the First Circuit affirmed a grant of summary judgment in favor of the school committee and various officials.<sup>34</sup> The court was of the opinion that educational officials did not significantly limit either the plaintiffs' parental rights to due process<sup>35</sup> or free exercise of religion.<sup>36</sup> The court thought that educational officials acted within the bounds of their authority in having teachers use

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29. *Id.* at 92–93.

30. *Id.* at 93.

31. *NEWS in Brief: Dad Dodges School Rap in Flap Over Gay Topic*, BOS. GLOBE, Oct. 21, 2005, at 14, available at 2005 WLNR 17089605.

32. Tracy Jan, *Parents Rip School Over Gay Storybook*, BOS. GLOBE, April 20, 2006, at B1, available at 2006 WLNR 6606392.

33. *Parker v. Hurley*, 474 F. Supp. 2d 261 (D. Mass. 2006).

34. *Parker*, 514 F.3d 78.

35. *Id.* at 102–03.

36. *Id.* at 105–06.

books that portrayed diverse families, including ones in which both parents were of the same gender.<sup>37</sup>

## 2. *Non-public schools*

Turning to non-public schools, two recent incidents involving Roman Catholic elementary schools demonstrated the potential to impact significantly both on the rights of parents to direct the education of their children and to religious freedom.<sup>38</sup> The concern about religious freedom is particularly disconcerting because just as proponents of same-sex unions sought to silence supporters of marriage,<sup>39</sup> so, too, other activists attempted to limit the voice of Catholic Church by depriving it of funds due to their disagreements with its pro-life teachings.<sup>40</sup> When controversies arose about placing children raised by same-sex couples in Catholic schools, the responses of religious leaders who had the opportunity to present a unified front in defense of Church teachings on education and marriage could not have been more different.

When two lesbians sought to enroll an eight-year-old third-grade boy in a Catholic school in Hingham, Massachusetts, the first woman, who is not a Catholic, used her full name on registration materials but only an initial for her partner who she referred to as her husband, supposedly a fallen-away Catholic.<sup>41</sup> Once the local pastor learned the facts, he rescinded the child's registration.<sup>42</sup> In response, the director of a program that provided scholarships for Catholic schools, and which is chaired by Cardinal Sean P. O'Malley of the Archdiocese of Boston, announced that it would discontinue funds to schools with what he described as exclusionary practices.<sup>43</sup>

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37. *Id.* at 107.

38. For an interesting discussion of how same-sex marriage might impact religious freedom, see SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY (Douglas Laycock, Jr., et al. eds., 2008). See also Maggie Gallagher, *Marriage Matters: For Kids, For Parents, and For Religious Liberty*, PUBLIC DISCOURSE, Oct. 31, 2008, <http://www.thepublicdiscourse.com/2008/10/122>.

39. See *supra* notes 10–13.

40. See, e.g., *Abortion Rights Mobilization v. U.S. Catholic Conference*, 495 U.S. 918 (1990) (refusing to disturb an order of the Second Circuit that reasoned, on remand from the Supreme Court, that a pro-abortion group lacked standing to challenge the tax exempt status of the Roman Catholic Church based on its pro-life teachings).

41. Wangsness, *supra* note 16, at 1.

42. *Id.*

43. *Id.*

Additionally, the Superintendent of Catholic schools for Boston not only declared that the Church did not prohibit the enrollment of children from same-sex unions in Catholic schools but also that she would call for the adoption of the policy to eliminate confusion in the future.

Cardinal O'Malley later offered what can only be described as a qualified defense of the parish priest's action as motivated by "the best interest of the child,"<sup>44</sup> joining the superintendent in offering to locate another Catholic school in which to enroll the child.<sup>45</sup> In attempting to recognize the complexity of the situation, and trying to mollify all parties,<sup>46</sup> O'Malley fell short of living up to the rhetoric he expressed in saying "that, regardless of the circumstances involved, we maintain our responsibility to teach the truths of our faith, including those concerning sexual morality and marriage."<sup>47</sup> Regrettably, O'Malley failed to defend the mission of Catholic schools as being designed to teach children in an environment wherein parents help to nature their shared Catholic faith.<sup>48</sup>

On the other hand, when a similar situation arose in Boulder, Colorado, after the pastor of a local parish refused to permit a lesbian couple to enroll the two girls that they were raising in a Catholic school, the response of the local Archbishop was starkly different from that of O'Malley. The Archbishop of Denver, Charles J. Chaput,<sup>49</sup> unequivocally defended the priest's action as consistent with Church teaching,<sup>50</sup> explaining that in light of the expectation that caregivers respect the values of the Catholic Church, "then partnering with those parents becomes very difficult, if not impossible."<sup>51</sup> Chaput added that "[t]hese students are always

44. Gail Besse, *Catholic Education for Children of Same-Sex Couples?*, NEW OXFORD REV., July/Aug. 2010, at 40, 41.

45. Wangsness, *supra* note 16, at 1.

46. In response to those who do not take a stand, see *Revelation* 3:15–16 (Jerusalem Bible, 1966) ("you are neither hot nor cold. I wish you were one or the other . . . but since you are neither, but only lukewarm, I will spit you out of my mouth.").

47. *Id.*

48. See POPE PAUL VI, DECLARATION ON CHRISTIAN EDUCATION [*GRAVISSIMUM EDUCATIONIS*] (1965), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651028\\_gravissimum-educationis\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html).

49. For an eloquent discussion of his views on the place of religious values in public life, see CHARLES J. CHAPUT, *RENDER UNTO CAESAR: SERVING THE NATION BY LIVING OUR CATHOLIC BELIEFS IN POLITICAL LIFE* (2008).

50. Draper, *supra* note 16, at A01; Meltzer, *supra* note 16.

51. Besse, *supra* note 44, at 43.

welcome so long as their parents support the Catholic mission of the school and do not offer a serious counter-witness to that mission in their actions.”<sup>52</sup>

### 3. *Extracurricular activities*

Controversy of a different nature ensued in Mississippi when a lesbian student sought to bring her girlfriend to the high school prom with the latter dressed in a tuxedo.<sup>53</sup> In response to a threat of litigation spearheaded by the American Civil Liberties Union challenging the school’s policy of requiring prom dates to be of the opposite sex, educational officials cancelled the prom. Unfortunately, the cancellation caused some members of the class to harass the student, causing her to transfer to another district.<sup>54</sup> In reaching a settlement agreement, the board agreed to pay the student \$35,000 plus attorney fees.<sup>55</sup> The board also adopted a nondiscrimination policy that includes sexual orientation and gender identity.<sup>56</sup>

## B. *Higher Education*

### 1. *Students*

Two similar cases from higher education may set the tone for the preparation of prospective educators and religious freedom. Students who voiced objections to same-sex relationships in light of their sincerely held religious beliefs were excluded from graduate counseling programs in part based on the American Counseling Association’s (ACA) Code of Ethics.

In *Ward v. Milbanks*<sup>57</sup> a federal trial court rejected the claim of a former graduate student in Michigan who alleged that university officials violated her First Amendment speech

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52. Danaher, *supra* note 16.

53. *See supra* note 16.

54. *Lesbian Teen’s Lawsuit Settled*, THE CLARION LEDGER (Jackson, Miss.) at A1, July 21, 2010, available at 2010 WLNR 14600753 (detailing the story of Constance McMillen at Itawamba Agricultural High School in rural Mississippi, who demanded that she be allowed to bring her girlfriend and wear a tuxedo, reporting that the school reached a financial settlement with the student).

55. *Id.*

56. *Id.*

57. 2010 WL 3026428 (E.D. Mich. July 26, 2010). *See also supra* note 18.

and religious rights, as well as her Fourteenth Amendment Due Process and Equal Protection rights when she was dismissed from her program for having expressed her religious beliefs in opposition to homosexual conduct. Based in part on the ACA standards, the court found that insofar as the actions of officials who required the student to place her personal beliefs aside and counsel a gay client during a practicum were working within the university's curriculum, they did not violate her Due Process rights.<sup>58</sup> The court added that since the student had a formal hearing at which she expressed her unwillingness to affirm behaviors that went against her religious beliefs, officials could dismiss her for failing to conform to the university's code of conduct.<sup>59</sup>

A federal trial court in Georgia, in *Keeton v. Anderson-Wiley*,<sup>60</sup> denied a student's request to enjoin university officials from expelling her from a counseling program when she refused to participate in a remedial program due to concerns voiced by peers and faculty members about her attitudes towards, and willingness to counsel, gays. The student charged that her forced participation in a "re-education" program due to her moral opposition to homosexuality constituted viewpoint discrimination in violation of the First Amendment and Free Exercise Clauses since doing so would have effectively required her to alter her beliefs.<sup>61</sup> As in *Ward*, the court in, in portraying the dispute as being over curricular control and ACA standards, not religion or values, granted deference to university officials in academic decision-making.<sup>62</sup>

## 2. Staff

In a dispute from Ohio that received little media attention, a faculty member at a public university who was gay unsuccessfully challenged a librarian's attempt to select a book, *The Marketing of Evil*, which calls homosexuality unnatural and dysfunctional, for inclusion in a reading program for incoming first year students on the ground that he felt

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58. *Ward*, 2010 WL 3026428, at \*7-\*8.

59. *Id.* at \*12-\*13.

60. 733 F. Supp. 2d 1368 (S.D. Ga. 2010).

61. *Id.* at 1373-74.

62. *See id.* at 1371.

harassed and unsafe.<sup>63</sup> Following an investigation, the book was included in the program. Although the librarian resigned, claiming that he was forced to do so, a federal trial court rejected his claims that university officials violated his right to free speech since his making the recommendation was not covered by the First Amendment.<sup>64</sup> The court specified both the that the former librarian failed to present a claim that his working conditions deteriorated to such a degree that he had an action for constructive discharge<sup>65</sup> or that he had standing to challenge the university's harassment and discrimination policy.<sup>66</sup>

More recently, in a second incident from Ohio, a former associate vice-president for human relations announced that she planned to sue officials at her a public university alleging that she was dismissed from her job of six years for writing a letter to the editor of a local newspaper.<sup>67</sup> The letter, which did not mention the institution, expressed the woman's displeasure with a local domestic partner statute in light of her Christian beliefs.<sup>68</sup> To date, the dispute has yet to be litigated.

### III. DISCUSSION

In his dissent in *Lawrence v. Texas*,<sup>69</sup> which invalidated a state sodomy law as applied to consenting adults, Justice Scalia wrote that "[i]t is clear from this that the Court has

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63. Joe Blundo, *Left vs. Right: All Opinions Should Be Heard*, DISPATCH.COM (Columbus, Ohio), May 2, 2006, <http://www.dispatch.com/live/contentbe/dispatch/2006/05/02/20060502-F1-01.html>.

64. *Savage v. Gee*, 716 F. Supp. 2d 709 (S.D. Ohio 2010). For a detailed discussion of the incident, see *From the Bench: Colleges and Universities*, 59 NEWSL. ON INTELL. FREEDOM 166 (2010), available at 2010 16780364.

65. *Savage*, 716 F. Supp. 2d at 720.

66. *Id.* at 721.

67. Meghan Gilbert, *Dixon Says Termination Violated Free Speech Right: Column Written as "Divine Mandate,"* TOLEDOBLADE.COM (Toledo, Ohio), May 15, 2008, <http://www.toledoblade.com/Education/2008/05/15/Dixon-says-University-of-Toledo-termination-violated-free-speech-right.html>. See also Editorial, *Color Trumps Christianity*, THE AUGUSTA CHRONICLE (Ga.), July 7, 2009, at A10, available at 2009 WLNR 16864834 (commenting on Dixon's dismissal and President Obama's desire to overturn the Federal Defense of Marriage Act); John Krudy, *Dixon to File First Amendment, Discrimination Suits*, TOLEDOFREEPRESS.COM, May 15, 2008, <http://www.toledofreepress.com/2008/05/15/dixon-to-file-first-amendment-discrimination-suits/>.

68. Gilbert, *supra* note 67.

69. 539 U.S. 558 (2003).

taken sides in the culture war departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”<sup>70</sup> Previously, Scalia decried what he described as the fact that “[t]he Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.”<sup>71</sup> In reflecting on the impact of teaching about same-sex marriage and other aspects of gay lifestyles, Scalia’s are all the more prescient.

Amid debates over teaching about same-sex marriage and related issues in schools, two positions have evolved. On the one hand are those who wish to continue pell-mell in teaching children at all levels about same-sex marriage without parental input. On the other hand are those who would stay the course, looking to find a balance between the rights of parents and educator-activists over who should control the content of public school curricula when disagreements arise regarding the way in which instruction about same-sex marriage might reshape school curricula.<sup>72</sup> The trick for educational leaders and the courts, then, is to balance the interests of those who advocate teaching about same-sex marriage and parents who do not wish their young children to be subject to teaching about this aspect of human sexuality from public school teachers.

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70. *Id.* at 602–03. *See also* Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1055 (9th Cir. 2006) (O’Scannlan, J., dissenting from en banc denial of a rehearing where educators suspended a student for wearing a t-shirt displaying the religious message that “Homosexuality is shameful,” quoting a commentator who described the order as “a tool for suppression of one side of public debates (about same-sex marriage . . . )”).

71. Bd. of Cnty. Comm’rs, Wabaunsee Cnty., Kan. v. Umbehr, 518 U.S. 668, 686 (1996) (Scalia, J., dissenting) (ruling that the First Amendment protected independent contractors from dismissal or the prevention of the automatic renewal of at-will government contracts in retaliation for exercising their right to freedom of speech).

72. Support for same-sex marriage seems to be increasing. *See Support For Same-Sex Marriage Edges Upward*, THE PEW FORUM FOR RELIGION & PUB. LIFE, Oct. 6, 2010, available at <http://pewforum.org/Gay-Marriage-and-Homosexuality/Support-For-Same-Sex-Marriage-Edges-Upward.aspx> (noting that 45% of respondents oppose legalizing same-sex marriage while 42% support doing so, a significant change since 1996 when the percentages were 65 and 27 respectively). *See also* ROBERT P. JONES & DANIEL COX, RELIGION AND SAME-SEX MARRIAGE IN CALIFORNIA: A NEW LOOK AT ATTITUDES AND VALUES TWO YEARS AFTER PROPOSITION 8 (2010), available at <http://www.publicreligion.org/objects/uploads/fck/file/CA%20Survey%20Report%20FINAL.pdf> (reporting that 51% of respondents would vote to allow gay couples to marry and that only 22% believed that its passage was good for California); Sara Lipka, *Approval of Gay Marriage Is Greater among College Freshmen than Americans at Large*, CHRON. HIGHER EDUC., March 16, 2010, <http://chronicle.com/article/College-Freshmen-Approve-of/64685/>.

Concomitantly, this essay does not advocate the exclusion of all controversial ideas in schools. Rather, the author believes that the better course is for educational leaders to address contentious topics head on, weighing reasonable parental requests, not yielding to pressure from outside special interest groups.

As educators take parental input into consideration, it is disingenuous for them to claim that teaching about same-sex marriage in K-12 is not about values. If anything, the debate over same-sex marriage is about whose values should prevail, upholding those that have formed the backbone of American society or those of progressives who would remake the Nation in their own vision by relying on judicial dictates. In fact, as the First Circuit noted in *Parker*, the book at the center of the controversy, *King & King*,<sup>73</sup> and similar materials,<sup>74</sup> was selected precisely because it “affirmatively endorses homosexuality and gay marriage. It is a fair inference that the reading of *King & King* was precisely *intended* to influence the listening children toward tolerance of gay marriage. That was the point of why that book was chosen and used.”<sup>75</sup> This decidedly sympathetic view of same-sex marriage is as value-laden as that of Christian parents who would prefer to support board policies allowing their children to pray and/or study the Bible in public schools. As important as tolerance and diversity are an argument can be made that diversity should cut both ways, respecting positions on both sides of controversies.<sup>76</sup>

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73. The original version was written by Linda de Haan and Stern Nijland (2002). This book led to a sequel, *KING & KING & FAMILY*, also authored Linda De Haan and Stern Nijland (2004).

74. Similar works, *HEATHER HAS TWO MOMMIES* by Leslea Newman (1990) and *DADDY'S ROOMMATE* by Michael Willhite (1990) also engendered controversy. See *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530 (N.D. Tex. 2000) (enjoining enforcement of a city resolution granting card holders of a public library the right to have the books moved from the children's area to the adult section on the basis that it violated patrons' First Amendment rights to receive information). See also Peter Parnell & Justin Richardson, *AND TANGO MAKES THREE* (2005) (recounting the story of how two male penguins in New York City's Central Park Zoo hatched and raised a female chick). For controversy over this book, see Jim Shur, *Parents Want Gay Penguins Book Blocked*, FOXNEWS.COM, Nov. 16, 2006, [http://www.foxnews.com/prINTER\\_friendly\\_wires/2006Nov16/0,4675,GayPenguinsBookFlap,00.html](http://www.foxnews.com/prINTER_friendly_wires/2006Nov16/0,4675,GayPenguinsBookFlap,00.html).

75. *Parker v. Hurly*, 514 F.3d 87, 106 (1st Cir. 2008).

76. For a commentary expressing a similar perspective, see Star Parker, *Does "Diversity" Mean Censuring of Differing Opinions?*, DESERT NEWS, May 19, 2008, at A11, available at 2008 WLNR 9429366.

The judiciary frequently voices its concern about the potential that educators have for unduly influencing children, at least when it comes to Christianity.<sup>77</sup> One can only wonder why the *Parker* court, for example, was so unconcerned with the impact of materials that it acknowledged as clearly favorable to one side as being any less capable of shaping the attitudes of young children, perhaps in a manner that conflicts with that of their parents on an issue that is far from resolved in society, potentially setting up interfamilial conflict. The First Circuit's suggestion, that if parents feared having their children exposed to ideas that they found offensive in school then they were free to discuss these matters at home, is too facile because judges do not hesitate to prevent the inclusion of religious activities, most notably prayer in schools, with which they disagree.<sup>78</sup>

Discussions over who should direct the education of children begins with *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*.<sup>79</sup> In *Pierce*, the Supreme Court upheld both the right of the state to exercise legitimate controls over all schools and the ability of parents to send their children to non-public schools as a means of satisfying Oregon's compulsory attendance statute.<sup>80</sup> More specifically, the Court ruled that state officials could not "unreasonably interfere with their liberty to direct the upbringing and education of their children under their control."<sup>81</sup> Yet, neither *Pierce* nor later case law on parental rights created a clear test to be used in

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77. See, e.g., *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (preventing a teacher from silently reading a Bible as he walked around in class while students read their own materials, on the basis that his doing so could influence their attitudes). But see *Eklund v. Byron Union Sch. Dist.*, 154 Fed. Appx. 648 (9th Cir. 2005). In *Eklund*, parents and students challenged a simulation unit on Islamic culture in a social studies course that, among other things, required students to wear identification tags displaying their new Islamic names, dress as Muslims, memorize and recite an Islamic prayer that has the status of the Lord's Prayer in Christianity as well as other verses from the Qur'an, recite the Five Pillars of Faith, and engage in fasting and acts of self denial. Petition for Writ of Certiorari at 3–13, *Eklund v. Byron Union Sch. Dist.*, 2006 WL 1519184 (May 31, 2006) (No. 05-1539). The court rejected the challenge, finding that the activities "were not . . . 'overt religious exercises' that raise[d] Establishment Clause concerns." *Eklund*, 154 Fed. Appx. 648.

78. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (prohibiting prayer at public school graduation ceremonies in part on the basis that it is psychologically coercive).

79. 268 U.S. 510 (1925).

80. *Id.*

81. *Id.* at 534–35.

evaluating when, or how seriously, parental concerns should be weighed in curricular challenges.

The daunting challenge of creating a universal judicial standard notwithstanding, courts should offer guidelines to help educators consider reasonable parental concerns, especially when they involve potential conflicts on such matters as human sexuality that are traditionally left to the realm of the families. As this debate plays itself out, the next section of this essay turns to practical recommendations about what may be done in dealing with teaching about same-sex marriage and related issues in schools.

#### IV. RECOMMENDATIONS

As school officials, parents, lawyers, and community members, regardless of the nature or level of educational institutions in which they are involved, address the sensitive topics related to the impact that same-sex marriage on education, they need to be mindful of the rights of all. To this end, interested participants may wish to consider the following ten interconnected recommendations when dealing with same-sex marriage so that all parties can attempt to deal with their differences respectfully.<sup>82</sup>

First, and foremost, educators should focus on the best interests of children<sup>83</sup> instead of pursuing their own agendas as

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82. For earlier discussions of some of these recommendations, see Charles J. Russo, "The Child is Not the Mere Creature of The State": *Controversy over Teaching about Same-Sex Marriage in Public Schools*, 232 EDUC. L. REP. 1, 16-17 (2008); 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 (2007).

83. Although this expression is often reserved to cases involving divorce, child custody, and adoptions in the United States, see, e.g., Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63 (1995); William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787 (2002); Sarah McGinnis, Note, *You are Not the Father: How State Paternity Laws Protect (and Fail to Protect) the Best Interests of Children*, 16 AM. U. J. GENDER SOC. POL'Y & LAW 311 (2007), it occupies a major role in international educational covenants to which the United States is a signatory, see, e.g., Declaration of the Rights of the Child, G.A. Res. 1386 (XIV) principle 7, U.N. Doc. A/RES/1386(XIV) (Nov. 20, 1959) ("The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents."). See also Convention on the Rights of the Child, G.A. Res. 44/25 art. 37, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) (in "all actions concerning children . . . the best interests of the child shall be a primary consideration.") which, as Justice Anthony Kennedy has observed,

social change agents. In other words, while diversity of perspectives may be important, educators should not lose sight of what students really need in their educational programming.

Second, in looking out for the best interests of children, educators should consider whether young students, in particular, may experience confusion when they are exposed to ideas in school that they cannot fully comprehend. For example, the original 1990 edition of *Heather Has Two Mommies*<sup>84</sup> included a discussion of how the birth mother of the pre-school child after whom the book was named was artificially inseminated by an anonymous donor. This can create difficulties for students as well as for their parents, who do not wish their children to be exposed to material that may be both beyond their developmental needs and abilities or supportive of a lifestyle that differs from the values espoused in their homes. This concern may be most profound for young children as the confusion may emerge at a time when they are beginning to explore their own nascent sexuality.<sup>85</sup>

Just as educators must take special care to safeguard the physical well-being of children in kindergarten and early

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“every country in the world has ratified save for the United States and Somalia, [and which] contains an express prohibition on capital punishment for crimes committed by juveniles under 18.” *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (affirming that the execution of individuals who were under the age of eighteen when they committed capital crimes violated the Eight and Fourteenth Amendments).

84. Newman, *supra* note 74; see also Editorial, *Teaching About Gays and Tolerance*, N.Y. TIMES, Sept. 27, 1992, at 416, available at <http://www.nytimes.com/1992/09/27/opinion/teaching-about-gays-and-tolerance.html> (reporting that HEATHER HAS TWO MOMMIES was included in the curriculum for first graders in New York City’s public schools). For a more detailed account of the controversy in New York City, see Josh Barbanell, *Under “Rainbow” a War: When Politics, Morals and Learning Mix*, N.Y. TIMES, Dec. 27, 1992, at 134, available at <http://www.nytimes.com/1992/12/27/nyregion/under-rainbow-a-war-when-politics-morals-and-learning-mix.html> (detailing how a school board in New York City refused to allow gay and lesbian relationships to be discussed in classes).

85. Relatively recent research in this area suggests that there are few differences between children raised in traditional and gay families. See ABBIE L. GOLDBERG, *LESBIAN AND GAY PARENTS AND THEIR CHILDREN: RESEARCH OF THE FAMILY LIFE CYCLE* (2010); Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter*, 72 J. MARRIAGE & FAMILY 3 (2010); Henry Bos & Theo G.M. Sandfort, *Children’s Gender Identity in Lesbian and Heterosexual Two-Parent Families*, 62 SEX ROLES 114 (2010); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 241 (2006); Fiona Tasker, *Same-Sex Parenting and Child Development: Reviewing the Contribution of Parental Gender*, 72 J. MARRIAGE & FAMILY 35 (2010). Even so, questions remain whether the impact of same-sex unions are as benign as these researchers suggest.

primary grades,<sup>86</sup> they should be expected to take additional precautions to protect young students from exposure to ideas with which they cannot deal since they may be most susceptible to being confused when exposed to materials that discuss intimate issues without parental guidance, consent, or input. One must wonder why educators, in their quest to impose their values on students, cannot recognize that parents might have legitimate concerns about the types of issues that their children are being exposed to in schools.

In light of the impact that inappropriate materials may have on children, a third recommendation emerges in partial response to the activist<sup>87</sup> ruminations of Judge Vaughn R. Walker in *Perry v. Schwarzenegger*,<sup>88</sup> who downplayed the role of having mothers and fathers direct the education of their children. The judge went so far as to declare that “Proposition 8 does not affect any First Amendment right or responsibility of parents to educate their children.”<sup>89</sup>

Rather than ignore the impact that significant curricular changes might have in shaping the attitudes of unsuspecting students, educational officials should consult with parents to afford them the opportunity to express their opinions.<sup>90</sup> Seeking parental involvement is important since this debate over same-sex marriage is occurring at a time when educators often decry the lack of parental involvement in the education of their children. Yet, when it comes to human sexuality, as reflected by much of the litigation discussed in this essay, school officials suddenly deem parental input unnecessary. While certainly not suggesting that parents should be able to

86. For cases imposing a higher standard of supervisory care on educators when dealing with young children, see, for example, *Enright by Enright v. Busy Bee Playschool*, 625 N.Y.S.2d 453 (N.Y. Sup. Ct. 1995); *Santana v. City of New York*, 722 N.Y.S.2d 545 (N.Y. App. Div. 2001); *Doe v. Lorch*, 788 N.Y.S.2d 754 (N.Y. App. Div. 2005).

87. For a discussion of the role of the judiciary, see Charles J. Russo, *Judges as Umpires or Rule Makers? The Role of the Judiciary in Educational Decision Making in the United States*, 10 EDUC. L.J. 33 (2009).

88. 704 F. Supp. 2d 921, 1000 (N.D. Cal. 2010), *stay denied*, 702 F. Supp.2d 1132 (N.D. Cal. 2010), *stay granted*, 2010 WL 3212786 (9th Cir. 2010).

89. *Id.*

90. For discussions of the importance of parental input, see, for example, JOYCE L. EPSTEIN, SCHOOL, FAMILY, AND COMMUNITY PARTNERSHIPS: PREPARING EDUCATORS AND IMPROVING SCHOOLS (2010); Angela Calahrese Barton et al., *Ecologies of Parental Engagement in Urban Education*, 33 EDUC. RESEARCHER 3 (2004); Dory Lightfoot, “Some Parents Just Don’t Care” *Decoding the Meanings of Parental Involvement in Urban Schools*, 39 URBAN EDUC. 91 (2004).

over-ride the legitimate curricular control of school officials<sup>91</sup> or be able to impose a “heckler’s veto,”<sup>92</sup> one wonders how much educators can hope to accomplish if they ignore legitimate parental concerns over the instruction that their children receive about same-sex marriage and other sensitive topics involving human sexuality.

Fourth, unlike what occurred in *Parker*<sup>93</sup> and a line of other cases dealing with human sexuality in schools,<sup>94</sup> educators who are committed to proceeding with instruction on same-sex marriage should develop materials that are age-appropriate.<sup>95</sup> While it may well be inevitable, and even desirable, to expose students to emerging issues in human sexuality, educators must develop programs that are pedagogically age and developmentally appropriate for children. Conversely, curricular materials that are inappropriately grounded run the risk of causing more harm than good if they lead to misperceptions about sexuality in the minds of young, impressionable students. In addition, since many young children, particularly those in pre-schools and early primary grades, may not understand material about same-sex marriage and human sexuality, educators should present subject matter in a manner that they can comprehend while respecting legitimate parental concerns.

Fifth, even though such a law was defeated in Oklahoma,<sup>96</sup> states and/or local school boards should consider following the

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91. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273(1988) (recognizing that school officials have the right to curricular and other activities “so long as their actions are reasonably related to legitimate pedagogical concerns”).

92. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001) (Thomas, J., dissenting) (permitting a religious group to use public school facilities, noting that the Court is unwilling “to employ Establishment Clause jurisprudence using a modified heckler’s veto, in which a group’s religious activity can be proscribed on the basis of what . . . members of the audience might misperceive”).

93. 514 F.3d 87 (1st Cir. 2008).

94. See, e.g., *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005), *amended*, 447 F.3d 1187 (9th Cir. 2006); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005); *Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525 (1st Cir. 1995).

95. For such a statute, see CAL. EDUC. STAT. ANN. § 59133(a) (“Instruction and materials shall be age appropriate”), which also directs that “[i]nstruction and materials shall encourage a pupil to communicate with his or her parents or guardians about human sexuality.”

96. H.B. 2628, 51st Leg., 2d Reg. Sess. (Okal. 2008). See Michael McNutt, *Bill Seeking Parental OK Narrowly Rejected: Permission Slip Not Required for Sex Ed Class*, OKLAHOMAN, March 12, 2008, at 4A, available at 2008 WLNR 5054949.

lead of a Massachusetts<sup>97</sup> statute mandating parental notification in matters involving instruction about human sexuality. By adopting such an approach, jurisdictions and/or boards can open channels of communication with parents that can help to reduce tensions in districts for the betterment of students.

Sixth, educators should consider permitting objecting parents to opt-out of or be provided with alternative programming for their children with regard to same-sex marriage and relationships<sup>98</sup> based on religious and cultural differences. Alternatively, officials who are committed to proceeding with instruction about same-sex marriage in the face of parental concern might consider offering programs to cover material in a less explicit format than the discussion of artificial insemination in the original version of *Heather Has Two Mommies*.<sup>99</sup> Further, officials should consider permitting an array of perspectives as with other elements of sexuality programs and family planning that included abstinence along with condom distribution.<sup>100</sup> Educators should work with parents in this regard rather than proceed with the assumption that same-sex marriage is inevitable as a natural progression of events.

Seventh, school board policies should address same-sex partnerships in extra-curricular activities. Even though it is widely accepted that since participating in such events as school proms are privileges and not rights,<sup>101</sup> as witnessed by

97. MASS. GEN. LAWS ch. 71, § 32A (2010).

98. See 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 (2005) (discussing heterosexuality and homosexuality).

99. See Newman, *supra* note 74.

100. For an article discussing parental rights in sexuality education, see Jeffrey F. Caruso, *Sex Education and Condom Distribution: John, Susan, Parents, and Schools*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 663 (1996). For an article supportive of the abstinence approach, see Michael J. Fucci, *Educating Our Future: An Analysis of Sex Education in the Classroom*, 2000 B.Y.U. EDUC. & L.J. 91 (2000). For articles critical of including discussions of abstinence in sex education classes, see, for example, James McGrath, *Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional*, 38 U.S.F. L. REV. 665 (2004); Amy Schwarz, *Comprehensive Sex Education: Why America's Youth Deserve the Truth About Sex*, 29 HAMLINE J. PUB. L. & POL'Y 115 (2007).

101. For cases agreeing that extracurricular activities are privileges, not rights, see, for example, *Lowery v. Euwerard*, 497 F.3d 584 (6th Cir. 2007); *Palmer v. Merluzzi*,

the incident in Mississippi that led to a settlement agreement, boards will have to craft policies carefully to facilitate participation for all in order to avoid being charged with discrimination by same-sex couples.

Eighth, the United States must preserve the freedom of religion guaranteed by the Free Exercise Clause of the First Amendment.<sup>102</sup> This cherished right is at renewed risk in light of the Supreme Court's recent decision in *Christian Legal Society v. Martinez*,<sup>103</sup> wherein it remanded a dispute to the Ninth Circuit for a final determination of whether the organization could be required to admit members who did not subscribe to its religious values. To this end, Congress and state legislatures should adopt proactive measures preventing opposing activist groups from initiating litigation to remove public funding from religious, non-public K-12 schools that have long served as bastions of religious freedom. More specifically, legislation should recognize Title VII-like exemptions<sup>104</sup> for religiously affiliated non-public schools based on bona fide faith registration/attendance requirements as articulated by Archbishop Chaput of Denver<sup>105</sup> to protect them from the threat of litigation in the event that they refuse to enroll children of same-sex couples.<sup>106</sup>

868 F.2d 90 (3d Cir. 1989); *Pirschel v. Sorrell*, 2 F. Supp. 2d 930 (E.D. Ky. 1998); *Braesch v. DePasquale*, 265 N.W.2d 842 (Neb. 1978).

102. According to the Religion Clauses of First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The Supreme Court applied the First Amendment to the States through the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (vitiating the convictions of Jehovah's Witnesses for violating a law forbidding the solicitation of funds for religious, charitable, or philanthropic purposes without prior approval of public officials).

103. 130 S. Ct. 2971 (2010). For a commentary on this case, see William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of Christian Legal Soc'y v. Martinez*, 261 EDUC. L. REP. 473 (2010).

104. 42 U.S.C. § 2000e-2(a). In relevant part, the statute reads:

It shall be an unlawful employment practice for an employer:

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

105. See Besse, *supra* note 44, at 43; CHAPUT, *supra* note 49; Danaher, *supra* note 16; Draper, *supra* note 16, at A01; Meltzer, *supra* note 16.

106. For a discussion of a proposed model statute affording protection to religious

Ninth, Title VII-like protections should also apply to faculty members,<sup>107</sup> students,<sup>108</sup> and staff members<sup>109</sup> in higher education who dissent from campus orthodoxies with regard to same-sex marriage and gay lifestyles based on their sincerely held religious beliefs. Protection of this nature is essential in higher education not only because faculty members should be free to exercise academic freedom in the event that they address, but do not advocate their sincerely held religious beliefs or those of their religious traditions in classrooms because their teachings will impact K–12 schools, particularly those that are religiously affiliated, in shaping the next generation of educators. These protections should also apply to standards of accrediting bodies such as ACA in the wake of both *Ward* and *Keeton*, as well as to academic departments on campuses, requiring officials to try to make reasonable accommodations<sup>110</sup> in working with students who voice good-faith exemptions based on their sincerely held religious beliefs.

Tenth, educators and their lawyers should review their policies annually, typically between school years, not during or immediately after controversies since placing time between controversies and modifying policies affords better perspectives. The value in reviewing policies regularly is that, in the event of litigation, evidence of doing so can help to convince courts that educators are doing their best to be up-to-date safeguarding the rights of all in school communities in the face of rapid changes in the world.

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institutions, see Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW J.L. & SOC. POL'Y 307 (2010).

107. See Kathryn Jean Lopez, *Moral Victory at the U of I*, CHI. SUN-TIMES, Aug. 1, 2010, at A22, available at 2010 WLNR 15310738 (discussing the reinstatement of an adjunct faculty member at the University of Illinois whose employment was terminated because a student objected both to an e-mail that he sent and his teaching in a theology class that the Roman Catholic Church believes that homosexual acts are sinful). See also *Another Victim of Institutional Coddling*, NEW OXFORD REV., Sept. 2010, at 12 (providing background on this controversy). Subsequently, a faculty panel decided that although the adjunct could not be dismissed due to his comments about gays, questions emerged about his professional competence, especially due to his incorrect definitions of utilitarian thought. Scott Jaschik, *Academic Freedom Verdict*, INSIDEHIGHERED.COM, Oct. 18, 2010, <http://www.insidehighered.com/news/2010/10/18/howell> (also linking to the faculty report).

108. See *supra* notes 57–62 and accompanying text.

109. See *supra* notes 63–68 and accompanying text.

110. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (addressing reasonable accommodations to allow public school employees to meet religious obligations under Title VII).

## V. CONCLUSION

As the increasingly acrimonious debate over same-sex marriage and related issues associated with gay lifestyles continues, one can only hope that the discourse can be respectful. While it may be too much to expect individuals on both sides of the divide to reach an acceptable compromise, they at least owe to children to ensure that their disagreements do not impact negatively of the quality of education that students receive.