

IN RESPONSE

Question 2: A Necessary Defense of Marriage

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By William H. Stoddard, Esq. and G. Mark Albright, Esq.

Question 2 was as simple as it sounded. In its entirety, the proposed amendment read: “Only a marriage between a male and female person shall be recognized and given effect in this state.” This common sense amendment was proposed in response to a very real attempt by some activist groups to redefine marriage. The context of the Question was not mentioned in last month’s article but is very important in understanding why Question 2 became necessary. It is what it claimed to be: a simple affirmation of one of the longstanding elements of a traditionally defined marriage.¹

In the 1970's, there were several cases in which same-sex couples sued to force their states to redefine marriage to include same-sex couples. These attempts were all soundly rejected. Then, in 1993, the Hawaii Supreme Court ruled because the state’s marriage law mentioned the gender of the parties involved, it was presumptively a form of sex discrimination. The Court then remanded the case for trial to allow the state to prove it had a valid reason for its “discriminatory” policy.² In 1996, after trial, the court ruled the state had not met its burden and the attorney general again appealed to the Hawaii Supreme Court.³ While this was happening, a same-sex couple in Alaska challenged that state’s marriage law. This time, a trial court judge ruled the state constitution’s right to privacy included a fundamental right to “choose a life partner.”⁴ A lawsuit by three same-sex couples challenging Vermont’s marriage laws was decided in 1999 when the Vermont Supreme Court ordered the Vermont Legislature to offer the benefits of marriage to same-sex couples.⁵ Additional lawsuits are now pending in Massachusetts, New Jersey and Indiana, all seeking to force those states to issue marriage licenses to same-sex couples. Lawsuits are being utilized in all of these efforts to accomplish goals which are opposed by the vast majority of citizens and could, therefore, never be realized through democratic means.

In response to these attempts to rewrite social policy through litigation, legislators and citizens from all over the country have acted by reaffirming marriage in their own laws. In fact, in 1996, the U.S. Congress overwhelmingly passed the Defense of Marriage Act, which was signed by President Clinton.⁶ This law provides one state cannot be forced, against its own public policy, to recognize a same-sex “marriage” contracted in another state. This Act defines marriage to mean “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 wife.” Likewise, the Full Faith and Credit Clause does not require a state to apply another state’s laws “in violation of its own legitimate public policy.”⁷ Question 2, therefore, ensures the public policy of Nevada is clearly and permanently enunciated so as to ensure Nevada receives the full protection of the Federal Act and of the “public policy” exception to the Full Faith and Credit Clause. In fact, the Federal Defense of Marriage Act has already been effectively relied upon by a Georgia court to reject a Vermont “civil union.”⁸ Question 2 was designed to assure a similar result in Nevada.

Without a law like Question 2, if one state court were ever to mandate marriage licenses for same-sex couples, activist in other states could travel to that state to marry and then return home trying to get their home state to recognize the out-of-state same-sex marriage. If this were successful in Nevada, not only would Nevada's law be dramatically altered, but it would have been altered by an activist court in *another* state. This is clearly not acceptable. Any such dramatic alteration of Nevada law should be made by the people of Nevada, not judges, let alone judges in other states. Question 2 ensures this democratic principle is respected. Two years ago, Question 2 passed in Nevada with 70 percent voting in favor of a constitutional amendment.

None of this was mentioned in last month's article which attempts to paint the people of Nevada as being out of the mainstream and irrational for trying to protect the state's definition of marriage. However, in support of this characterization, the article relied on many errors and omissions.

For example, the October article states marriages and civil unions are "routinely celebrated" in Europe, but in fact, only the Netherlands has redefined marriage to include same-sex couples (and this only happened in 2001). Some modest recognition of unmarried partnerships (generally excluding, for instance, the right to jointly adopt children) is granted in a number of other European countries but not in others, such as England, and none of these countries call the recognition "marriage." While it is true that two trial courts in Canada have ruled the country's definition of marriage should be scrapped, another court in British Columbia held the Canadian Charter of Rights and Freedoms actually forbids the redefinition of marriage to include same-sex couples.

Contrary to the claims of the October article, only a tiny minority of states have statewide domestic partnership registries. Extremely modest benefits are allowed for all unmarried couples in Connecticut and Hawaii, and California allows a few more benefits for registered same-sex couples.⁹ Vermont's law goes furthest by creating a statute for same-sex couples to receive the benefits of marriage, although the statute makes it very clear Vermont's definition of marriage is still the union of a man and a woman.¹⁰ As noted previously, the Vermont law was only enacted because of an order from the Vermont Supreme Court, i.e. as the result of a lawsuit, which would have been less likely to succeed if a Question 2 type measure were contained within the Vermont constitution. New York and Massachusetts have no such registry and even the local domestic partnership ordinances in Massachusetts have been ruled invalid for exceeding municipal authority.¹¹ The local laws mentioned are also extremely modest with most providing only symbolic recognition of same-sex couples and other unmarried couples.¹²

The October article claims there are 1.5 million same-sex couples who would be affected by laws like Question 2, but in reality the 2000 U.S. Census reported less than half that number.¹³ Likewise, the article claims "scientific studies have uniformly debunked the myth children experience any negative effects whatsoever because of being raised in gay or lesbian households." However, in a recent review, University of Southern California sociology professors Judith Stacey and Timothy Biblarz reviewed 21 studies from the body of research purporting to examine homosexual parenting.¹⁴ Stacey and Biblarz found serious problems with both the methodology and the conclusions of the studies, notwithstanding their personal support for parenting by homosexual couples.¹⁵ Notably, the authors acknowledge "there are no studies of child development based on random, representative samples of (same-sex couples headed) families."¹⁶

In approving Question 2, the voters of Nevada would not only join Alaska and Nebraska in amending their state constitutions, but also the people of Hawaii, who amended their

constitution in 1998 to allow the legislature to define marriage as the union of a man and a woman in response to the court case described previously.¹⁷ In addition, the people of California enacted Proposition 22 in 2000 which added language very similar to Question 2 to its family code (and which can only be removed by another ballot proposition).¹⁸ Similar laws have now been enacted in 33 states through the legislative process, declaring their public policy to not recognize same sex marriages.¹⁹ Nevada sought to preserve the traditional definition of marriage as the vast majority of its sister states and Congress have done. On the other hand, no state legislature has enacted laws permitting same-sex marriages.²⁰

Question 2 was simple and to the point. It clarified and reaffirmed the definition of marriage in Nevada law and guarantees it will be preserved from attempts to use contrary laws or court rulings from other states to override it. Question 2 does not remove any current protections from people who are not married and does not send any negative message about the worth of any group of citizens. The Question would also protect the right of the people of Nevada to decide the fundamental charter by which they will be governed. It is a common sense solution to a real threat.

In a time when many seem to have lost their understanding of the significance of marriage and the family, Question 2 was a careful protection of the unique relationship between a man and a woman which is the foundation of the family, the basic unit of society. No one is harmed by Question 2, but future generations may benefit from its passage, regardless of how they personally feel about marriage. It would not only affirm the definition of marriage, but also the fundamental right of the people in Nevada to decide such questions for themselves, through democratic means, rather than having the state's public policies dictated by another state's courts.

ENDNOTES

1. See 1. W. Blackstone, Commentaries on the Laws of England. The understanding of English common law was marriage was a contract entered into by a man and a woman. See also, Joel Prentiss Bishop, Commentaries on the Law of Marriage §29 (1856) defining marriage as “a civil status existing in one man and one woman legally united for life,” and recognizing marriage as the most important civil institution “the very basis of the whole fabric of civilized society.” §32. The United States Supreme Court has recognized that marriage creates “the most important relation in life” and has “more to do with the morals and civilization of a people than any other institution.” *Maynard v. Hill*, 125 U.S. 190, 205, 8 5.Ct. 723 (1888).

2. *Baehr v. Lewin*, 852 P2d 44 (Haw. 1993).

3. *Baehr v. Miike*, 1996 WL 694235 (flaw. Cit. Ct. 1996).

4. *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. 1998).

5. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

6. Pub. L. 104-199, 100 Stat. 2419 (Sep. 21, 1996) (codified at I U.S.C. §7 and 28 U.S.C. §1738C (2000)).
7. Nevada v. Hall, 440 U.S. 410, 99 5Cr. 1182 (1979).
8. Burns v. Burns, 253 Ga. App. 600, 560 S.E. 2d 47 (Ga. App. 2002).
9. See Connecticut House Bill No. 5763 (2002); 1997 Hawaii Laws, Act 383 (HB 118); California Assembly Bill 26 (1999); California Assembly Bill 25 (2001).
10. 15 Vt. Stat. Ants. § 1201 (“‘Marriage’ means the legally recognized union of one man and one woman.”).
11. Connors v. City of Boston, 430 Mass. 31, 714 N.E.2d 335 (Mass. 1999)
12. See William C. Duncan, Domestic Partnership Laws in the United States: A Review and Critique 2001 BYU LAW REVIEW 961 (2001).
13. Associated Press, Households Headed by Gays Rose in the 90’s, Data Shows THE NEW YORK TIMES, Aug. 22, 2001, at A1? (reporting 600,000 same-sex couples in the United States).
14. Judith Stacey and Timothy Biblarz, (How) Does The Sexual Orientation of Parents Matter?, 66 AM. SOCIOLOGICAL REV. 159 (2001).
15. Id., at 174.
16. Id., at 26.
17. Haw. Const., art. I, Sec. 23.
18. Cal. Fain. Code §308.5 (“Only marriage between a man and woman is valid or recognized in California”).
19. See David Orgon Coolidge & William C. Duncan, Reaffirming Marriage: A Presidential Priority, 24 HARVARD J. OF L. & PUB. POL’Y. 623, 631 (2001), also noting in the 2000 presidential election campaign, all Democratic and Republican candidates for president and vice president opposed the legalization of same sex marriage.
20. Pam Greenburg, State Laws Affecting Lesbians and Gays, LEGISBRIEF, April/May 2001 at 1. 325 West Liberty Street