

Dear Wisconsin Senators and Representatives:

As experienced criminal law attorneys in Wisconsin, we write to inform you of potential criminal legal implications of the proposed constitutional amendment to ban legal civil unions and gay marriage. It is our opinion that this proposed amendment, if enacted as written, could result in the criminal prosecution of same-gender couples for violations of Wisconsin statutes §§767.04 and 767.30 which establish significant criminal penalties for people who leave Wisconsin to get married and possibly to obtain legal civil unions. Same gender marriages or civil unions are currently legal in numerous countries and three states.

Though criminal prosecution of gays and lesbians may seem far-fetched, it is important to remember that in our lifetimes it was illegal for whites to marry people of another race. The seminal case in which the United States Supreme Court determined that it was unconstitutional to ban marriage between members of different races is *Loving v. Virginia*, 388 U.S. 1 (1967). In that case, the Lovings were convicted of violating a Virginia statute which made it illegal for interracial couples to leave the state of Virginia to be married and then return to Virginia and reside together as a married couple. That statute is almost identical to current Wisconsin Statutes 765.04 and 765.30(1)(a), which provide criminal penalties for people who marry in other states or countries in an effort to “circumvent” Wisconsin marriage laws.

If the proposed constitutional amendment passes, then the legislature will be creating a new class of criminals: people in long-term committed relationships who seek only legal recognition and protections for their relationships and their children similar to the protections offered their peers. In other words, the Wisconsin Legislature will be reenacting Virginia’s stance, only with a new brand of people. Such discrimination and unequal protection cannot stand in a free and tolerant society. Though some may argue that criminal prosecution is unlikely, the fact is that miscegenation statutes were prosecuted less than 40 years ago, and by raising the bar with a constitutional amendment, criminal prosecution of gays and lesbians is entirely possible in Wisconsin.

The amendment will also increase the likelihood of criminal prosecution of members of the clergy and family members who choose to solemnize and support the relationships of same-gender couples. Wisconsin Statute 765.30(2)(c) establishes significant criminal penalties for anyone who “intentionally participates in or in any way aids or abets any false or fictitious marriage.” Many religious leaders of all faiths currently conduct union and commitment ceremonies that mirror marriage ceremonies in everything but the signing of a marriage license. Friends and family members from around the country come to participate in and witness such ceremonies. These persons could all be vulnerable to criminal prosecution.

An unintended consequence of this amendment would be to make criminals out of legally married Wisconsin residents while allowing unmarried gay and lesbian residents to avoid criminal prosecution for similar behaviors. Wisconsin still prohibits adultery, making it a felony for a married person to have sex outside the marriage, or for an unmarried person to have sex with a married person. Wis. Stats. §944.16.

If gays and lesbians are prohibited from becoming legally married, and if even their faith-recognized commitments are not accorded a similar status, then they will avoid criminal penalties for sexual activity outside of those relationships, while married heterosexuals who engage in extramarital

sex will be felons. While adultery has not been prosecuted in Wisconsin in approximately 30 years, if we are to use the constitution to legislate the private lives of Wisconsin citizens, we ought to at least be consistent in our approach, utilizing the laws already in existence to enforce any behaviors known to be contrary to the benefit of marriage.

The irony, of course, is that the adultery statute and similar criminal penalties legislating personal behavior are designed to promote marriage, commitment, and caring for one another. That is exactly what same-gender couples seek: the benefits, but also the responsibilities that come with marriage or civil unions. In response, the legislature proposes to make these people criminals. Such a result is contrary to the constitution and the traditions of Wisconsin in protecting the private lives of citizens and promoting long term commitments between people.

Your response to this proposal will be historic and remembered. It is up to you: do you wish to be recalled as someone who had the courage to step outside of the rhetoric and say couples seeking commitment are not criminals, or do you choose your company with the likes of those who would throw the Lovings in jail for making the most sacred of vows to each other.

Sincerely,

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