

To Tom Coleman

NATIONAL COMMITTEE
FOR
SEXUAL CIVIL LIBERTIES

Co-Chairmen:
Prof. Walter E. Barnett
Albuquerque, New Mexico

Dr. Arthur C. Warner
Princeton, New Jersey

18 OBER ROAD
PRINCETON, NEW JERSEY 08540
(609) WA4-1950

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Dear Tom,

Thank you for your good letter of the 23rd inst; allow me to welcome you as a member of our committee. Your name will be formally added as soon as new membership lists are mimeographed. From now on you will be kept informed of all important committee developments. In this connexion, I am sure I need not remind you that, regardless of what policy on publicity may be adopted by the prospective National Gay Law Conference, all information you receive from our committee must be considered confidential. As previously indicated, we have found this to be essential if our work is to be successful.

As soon as you have some spare time, I hope you will let Craig and me know what you can do to supply Craig with suitable envelopes for mailings and also with committee stationery.

Now with respect to your "Single Persons' Bill of Rights". I regret that I am unable to offer much assistance by way of statistics or references to any studies or reports. What I am about to write deals with the subject primarily on policy grounds, since I deem any constitutional objections to be rather thin. You will also note that my discussion deliberately avoids any consideration of homosexuality, at least so far as taxation is concerned. This is done deliberately, since homosexuality has no direct bearing on arguments in favour of a single persons' bill of rights. Not all gay persons are single; some have de facto spouses in every legitimate sense of the word except that the relationship is not recognized by the law. Equity requires that these "married" gay persons should be treated for tax purposes -- and for some other purposes as well -- in the same way as married heterosexuals, but this question clearly does not come within the purview of single persons' rights; it is another subject. Thus, whilst the enactment of single persons' legislation is vital to most gay persons, and would redress long-standing injustices, it does not follow that it is a "gay" issue in the sense that the matter of homosexuality should be raised in discussing why such legislation should be adopted.

I am not going to discuss the matter of marital status in connexion with insurance, credit, employment, or housing. Suffice it to say that, in my view, it is relevant and proper under some circumstances to enquire into marital status before issuing insurance, granting credit, hiring a potential employee, or renting an apartment. I think the long history of discrimination against blacks has obscured for many of us just what it is that makes any action discriminatory. Too many people automatically assume that any racial classification is ipso facto discriminatory. This is not necessarily so. The essence of discrimination is its arbitrary character, the fact that the reason used to justify it is without rational support. For example, to bar an applicant for whatever it is he is seeking -- a constitutional right, a job, the franchise, admission to a school -- for reasons of race constitutes no logical or rational ground for the exclusion. It is the absence of a logical connexion between the reason for the exclusion and that which the applicant is requesting which makes the exclusion discriminatory. Thus a reason which is not discriminatory when used to bar someone from admission to one area may be discriminatory when used to bar him from another. It may be reasonable and

non-discriminatory to exclude all persons under a certain height from admission to a police academy, but arbitrary, and hence discriminatory, to bar them from an academy of music. When you suggest that, if it could be statistically demonstrated that blacks, as a class, are higher insurance risks than whites, it would nevertheless be discriminatory, and probably unconstitutional as well, to refuse them insurance or to charge them proportionately higher insurance rates, you are indulging in circular reasoning. The answer is that, if it could be empirically demonstrated that blacks, for reasons inherent in their race, were higher insurance risks than whites, then it would not be discriminatory to charge them higher insurance rates. (Suppose it could be scientifically demonstrated that something in black skins had a chemical effect on the products of combustion so that the risk of fire was substantially increased in buildings inhabited by black people compared with those inhabited by whites. Would it be discriminatory under those circumstances to have higher insurance rates on black-inhabited homes than on white-inhabited ones? I, myself, am not sure of the answer, but it poses a nice question.) At any rate, to treat blacks differently from whites becomes discriminatory only when the difference in treatment bears no rational relationship to any clearly demonstrable difference between the races which can in equity be shown to warrant a difference in treatment. The law should not be blind to racial or other differences between people. What it may not constitutionally do, and should not do, is to use those differences for arbitrary or unjust -- hence discriminatory -- purposes. Discrimination does not exist even though conditions for admission to an area are based on differences between groups, provided those differences are of a demonstrable kind and the differential classification is equitably justified. For instance, certain maladies are known to be confined, or almost entirely limited, to certain races or groups -- blacks in the case of sickle-cell anemia, Jews in the case of goiter. Would it be discriminatory to require only blacks to be examined for the presence of sickle-cell anemia or only Jews to be examined for the presence of goiter? Again, I am not sure, but I think these questions need to be considered.

In sum, it is precisely because we know that the supposedly inferior attributes commonly ascribed to blacks are not racial attributes at all, and that, to the extent that they do exist in the case of some blacks, they are a consequence of non-racial factors ranging all the way from economic deprivation to ghetto-imposed handicaps, that we summarily dismiss the use of all racial differences as inherently discriminatory. What all of us should realize is that, when we speak of racial barriers to admission as being discriminatory, we are really indulging in a form of linguistic shorthand. What we really mean is that racial barriers to admission are arbitrary, that they are in no way relevant to the object for which admission is being sought, and that therefore they are discriminatory. Similarly, most of us jump to the conclusion that all racial, religious, or ethnic classifications are discriminatory per se. Whether or not they are discriminatory depends on the manner in which they are used. If the racial, religious, or ethnic reason adduced to support the classification be for the purpose of denying an applicant admission to a public school, then the classification is patently discriminatory and unconstitutional as well. But if the purpose be to gather statistical information for the census, then the classification may be eminently reasonable, non-discriminatory, and also constitutional.

The matter of marital status is no different. It is not a discriminatory classification per se. Furthermore, unlike racial and religious classifications in the past, it has not been employed historically as a blatant instrument of oppression or bigotry. Where it has been, and continues to be, used, a prima facie case can often be made to justify it. You and I may take issue with some of the data adduced in its support, but this hardly warrants blanket condemnation of the classification as inherently discriminatory for all purposes. No doubt in some instances the evidence in support of classifying by marital status is unconvincing or downright erroneous. Where this situation obtains, it behooves us to work to have the classification removed. But it does not follow that one can say as a matter of general principle -- much less that it should be part of a single persons' bill of rights -- that all classifications on the basis of marital status in the area of insurance, credit, employment, and housing should be done away with.

All this only proves that, so far as gay people are concerned, it is the discrimination against homosexuals, and not that against single persons, which is the

true villain in the areas of insurance, credit, employment and housing. It is against this form of discrimination that our efforts should be expended.

I regret that everything I have discussed so far has really constituted a foreword. Let me now consider the manner in which our tax system taxes single persons at higher rates than married ones. What follows are some of the points I should raise were I writing a brief on the subject.

1. The Social Policy Argument -- All human societies, and particularly western societies, have always contained large numbers of unmarried adults. A host of different reasons account for the existence of single persons. Some are a consequence of social conditions over which the individuals involved have little or no control. Others are a result of deliberate human choice. Examples of the first are bachelors, widows and single women in war-devastated lands unable to find spouses because the high rate of male casualties has reduced the supply of prospective husbands. Examples of the second are monks, priests, and nuns, who deliberately eschew marriage as part of their callings, and divorced persons, who deliberately ended their married status. However, this second category is far broader than the reference to ecclesiastics and divorced persons would indicate. It includes all persons, minors and adults, who, for whatever personal reason he or she may have, do not marry. At any given time this group includes those who have postponed marriage for economic or other reasons. We need not examine too closely into what these personal reasons may be. In any free society, the decision not to marry ought to be as free from State sanctions as the decision to marry, though this does not deny the right of reasonable and equitable State regulation of either status, whether single or married. For our purposes it is proper to examine what classes of persons are to be found amongst this second group of single persons, i.e., those who deliberately do not marry. Certainly a significant proportion of this group consists of persons who, for psychic or sociological reasons -- reasons which are presently little understood -- do not marry because of involvement in their careers. The extent to which many persons never marry because they are "married" to their work is a phenomenon which deserves sociological study, but that it accounts for a significant number of single persons is evident from even cursory observation. There are many persons for whom their single status is intimately connected with their creativity. In truth, their singleness may be the sine qua non of that creativity. Examples abound, from the dedicated school teacher whose total energies are absorbed in his or her teaching to the creative geniuses of history who never married and who seem to have become what they were precisely because the totality of their energies was devoted to their life-work. (This, after all, is the rationale for the requirement of priestly celibacy; it would have merit were it made voluntary rather than being forced.) In this regard, it is noteworthy that there never was a "Mrs." Einstein. For a state to tax such single persons at a higher rate than married persons is to place a penalty on ability and creativity. The social consequences of such a tax system are too ominous to discuss.

2. The Equity Argument -- There is much validity in the old adage that "two can live as cheaply as one." The converse is also true in the sense that the per capita living expenses of a person living alone are higher than those for someone living with another person. By definition, most single persons live alone. Thus they pay more for everything they buy, either because they must buy in smaller quantities and therefore pay higher unit prices for almost everything, or they must buy in larger quantities than they need and are then confronted with unavoidable waste. Compounding this situation is the fact that, statistically, the average and median ages of single persons as a group are lower than those comprising the married group, if only because some of those in the singles group consist of persons who are not yet married, but who plan to marry later on in life. Now it is well known that, up to a certain age -- which varies with different occupations -- earnings tend to be a function of age, that is, earnings increase as one gets older. Since the average and median ages of those in the married group are higher than those in the singles group, their earnings are higher than those in the singles group. (If it be argued that married persons also have larger expenses because of the existence of children, the answer is that our tax system already provides for this in the form of deductions for dependents.) Thus, for the Government to tax single persons at higher rates than married persons constitutes a double injustice, since it requires those whose per capita living expenses are higher and whose average earnings are lower to pay higher taxes. This is discrimination with a vengeance.

When this discrimination is part of an income tax, the injustice is even worse, since such taxes are supposed to be based on the ability to pay principle, that is, progressive in character, with the rate of tax proportionate to the income.

3. The Argument from Human Liberty -- Were our Government to tax members of one religion at a rate higher than that imposed on those belonging to other religions, or to tax blacks at higher rates than whites, the public outcry would be deafening, and properly so. Furthermore, such a tax scheme would be immediately struck down as unconstitutional. Yet, in reality, the situation is little different when the law taxes single persons at higher rates than married persons. This is not to deny the right of Government to regulate either marriage or the single state, so long as those regulations are equitable and reasonable, e.g., the requirement that a licence must be obtained in order to marry and that in many states a blood test is required before that licence may be issued. The objection to a higher tax on single persons than on married ones stems from the fact that it constitutes a de facto form of financial sanctions against single persons inappropriate for a Government supposed to rest on a devotion to human liberty. This is true even though such a tax system may pass constitutional muster and even though it can be argued that, in theory, all taxes are a form of financial sanctions against those on whom they are imposed. Virtually all taxes, even the most regressive ones, are based on the theory that the tax constitutes a return for some tangible economic or other benefit for which a person may rightfully be expected to pay. Thus a sales tax taxes the assumed benefits of the sale to the customer, a property tax the supposed benefits deriving from the ownership of the property, an exit tax the benefits stemming from the ability to leave the jurisdiction, etc., etc. The only such tax which comes to mind that does not appear to tax some benefit, economic or otherwise -- other than the higher tax rate on single persons -- is a head tax. But even that levy has the merit that it is imposed on all persons indiscriminately. No doubt legislators have justified higher tax rates on single persons on the ground that they supposedly have lower family expenses than have married couples. But the burden of the equity argument above was to demonstrate that this is not necessarily so. The opposite may be closer to the truth. If, then, we strip away the supposed economic rationale for higher taxes on single persons, we are left with the bald fact that it is nothing but a head tax, though a discriminatory one, which is levied on one particular class and which cannot be justified by postulating any supposed economic benefit to the taxpayer for which the tax is a payment. As such, it bears comparison with more obvious attempts to impose burdens on persons for reasons of marital status by Governments which can make no pretence to any concern for human liberty. For it is precisely in totalitarian societies that the State goes to the greatest lengths to control not only the marriage state, but the entire process of child-bearing and child-rearing. This is understandable, since the birth rate determines the size of a nation's labour force, the number of men who can be inducted into its military forces, and the number of mouths its economy will have to feed. Where the State controls all means of production, it must, of necessity, also control the production of children. In such societies, matters like birth control, abortion, fornication, marital intercourse, and the incidence of marriage must be state-controlled and supervised. The laws on these subjects in such societies vary as those dictating government policy assess the State's changing military, economic, and social requirements. Two contemporary examples come to mind. Confronted by a surging population, which threatens in really Malthusian terms to overwhelm its economic resources, the Chinese Communist government has switched from ignoring the existence of birth control to a national policy of fostering it. Not only is birth control now taught and encouraged in Communist China, but the Chinese are urged to postpone marriage and to postpone sexual intercourse. Fornication is severely frowned upon since this can lead to unwanted births. Abortions are freely allowed and sterilization is encouraged. All this represents a complete about-face from the former policy, which was based on the belief that China's huge population was needed for military reasons. This view, which was in vogue before China had any nuclear capability, was supposed to have stemmed from the notion that, in any future nuclear holocaust, Russia and the United States would each lose 200 million people, almost their entire populations. China would lose three times as many -- 600 million people -- but there still would be 200 million Chinese left to take over the world after the war.

At the moment, the pendulum in Soviet Russia has moved in the opposite direction. Labour productivity in Russia has risen much more slowly than in

most countries of Western Europe or in the United States, and much more slowly than was originally envisaged in the several five-year plans since the end of World War II. Consequently, there is a growing dearth of labour, even though the Soviet system makes far greater use of female labour than do most industrial nations. To make matters worse, from the Russian point of view, the birth rate has been steadily falling -- one of the seemingly ineluctable consequences everywhere of advanced industrialization. To remedy the growing labour shortage, Soviet planners have discussed curtailing the present automatic right to abortion. Housing regulations have already been changed so that preference in the allocation of new apartments now goes to married couples with more than a certain number of children. The extent to which Fascist Italy and Nazi Germany used the instruments of state power to foster large families as one aspect of their national policy of military power and aggression is a matter of history. The question arises whether this kind of demographic manipulation by the State, even though veiled within a tax structure, is compatible with our national concern for human liberty. On the one hand numerous offices within our Government are deeply involved in attempts, through education and other voluntary means, to reduce the birth rate in the hope that a rate of zero increase in that rate can be reached soon enough and maintained for long enough to avoid the ultimate cataclysm. Our present tax structure favouring married couples is clearly inconsistent with these goals.

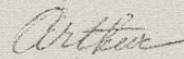
4. The following argument is submitted tentatively. I give it no name. You may think it rubbish. It stems from a belief that the entire matter of the tax rates as between single and married persons can be looked at from an entirely different perspective. One might argue that governments in history have traditionally presided over the competing claims of the breeders and the thinkers within their midst. In primitive, agricultural societies, when, to borrow from Hobbes, life was "nasty, brutish, and short", the Biblical injunction to "be fruitful and multiply" had logic on its side. There was then a need to maximize the population in every possible way merely to insure an adequate supply of hands to perform all the necessaries for human survival. Hence government policy could be expected to favour the breeders of human beings. In today's demographic world such a policy, if persisted in, can lead only to Armageddon. Consequently, the sooner our Government alters its domestic policies to favour its thinkers over its breeders, the better it will be able to cope with current demographic problems. Such a policy would also tend to improve the population in terms of quality as well as in terms of size to the extent that a breeding population is less given to ratiocination. In view of the enormity of the population problem, it may not be sufficient merely to equalize the tax rates as between single and married persons. There may be good warrant for a tax policy which rewards childlessness and penalizes fecundity. This would mean applying present married persons' tax rates to single people and present single persons' tax rates to married people who have no more than two children. There would then be a progressively higher tax for married couples for each additional child over two. Presumably the tax rates would be equalized for single persons and childless married persons.

If it be argued that this would discriminate against married people with children, it should be pointed out that the present system discriminates against single persons not only in the amount of taxes they are required to pay, but in the manner in which taxes are spent. An inordinately high percentage of taxes on all government levels goes to support child or child-rearing activities. The schools are a prime example, and they account for a large part of our tax money. Married persons not only pay proportionately less of their income in taxes than do single persons, but, through their children, they are direct beneficiaries of more tax-supported activities than are single persons. The ostensible discrimination in favour of single persons which argument #4 proposes would hardly offset the inequities presently working against single persons in other areas of our tax system.

I had not planned to extend this so long. For what it is worth, I hope it may be of some help. All good wishes for the New Year.

cc: Walter E. Barnett
Craig W. Patton, Esq.
Michael Miller, Esq.
William B. Kelley
R. A. Laud Humphreys

Very sincerely,



Arthur