AMERICAN ASSOCIATION
FOR
PERSONAL PRIVACY
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1 September 1998

Mr. Ira Glasser, Executive Director
American Civil Liberties Union Foundation
125 Broad Street
New York City, N.Y. 10004-2400

Dear Mr. Glasser:

As one who has for many years been working in the field of sexual civil liberties, I have become increasingly concerned regarding the A.C.L.U.'s position with respect to certain gay and gender issues. On the one hand, one cannot help but be deeply impressed with the A.C.L.U.'s record regarding women's and gay issues as a whole, but when those issues are specifically narrowed to the matter of domestic partnership, I find a serious myopia regarding some fundamentals of civil liberties.

The problem begins with the refusal of many domestic partnership plans to include heterosexuals within their ambit on the specious ground that herosexuals have open to them the option of matrimony, which homosexuals do not have. This is a Hobson's choice. Millions of heterosexual Americans have rejected matrimony as an answer to their needs for interpersonal bonding. It is estimated today that a majority of newlyweds in the United States have had cohabiting experience either between themselves or with others, and thousands of cohabitors never marry at all.

The underlying problem is the fact that the institution of matrimony has never been secularized in this country, civil marriage to the contrary notwithstanding. There is no legal difference whatsoever between a civil marriage and a church wedding. Both are subject to the same rules and regulations, which are enforced by the same administrative and judicial agencies of the state. Though less numerous now, these rules and regulations differ little in their essentials from those in effect when the only administering and enforcing authority was the Christian church. Whether or not the matrimonial ceremony be civil or religious, the legal core of matrimonial jurisprudence continues to rest on the residual legacy of the old ecclesiastical canons. Wedlock, it is true, is no longer a life sentence. Release is possible through divorce, and adultery is no longer a crime in many states. But as broad as these changes have been, marriage is still essentially a Christian institution, the parameters of which are set by the state, and within which the various religious denominations -- both Christian and non-Christian -- operate.

In the criminal field the laws against bigamy, sodomy, incest, and polygamy, together with the rules operating in the civil field, such as those regarding failure to consummate, testimentary and testimonial privileges, and custodial arrangements, testify to the chasm which exists between domestic partnership and matrimony in terms of the respective responsibilities involved. Domestic partnership is a secular creation,

based entirely on the need in modern societies for interpersonal bonding, irrespective of procreational intentions. Marriage rules continue to be relics of a religious past, enforcing ecclesiastical regulations through the secular arm of the state governments, which are supposed to operate on the principle of separation of church and state. Here the laws of matrimony must be distinguished from secular statutes that criminalize offences such as murder and larceny, which, like marriage, have religious roots. The difference lies in the fact that crimes such as murder and larceny have long since been desacralized. Their proscription stands on independent secular grounds quite distinct from those which once constituted their religious warrant. The rules surrounding matrimony have never been subjected to any secular test, nor has the institution itself been genuinely desacralized.

To claim that heterosexual couples who wish to bond as domestic partners have marriage as an option -- and therefore should be prohibited from becoming domestic partners -- is tantamount to prohibiting all Gentiles from converting to Judaism, on the ground that they are acceptable as members in the established state church, from which all Jews are barred. The purpose of such rules in the past was to protect the state religion from losing members to heretical creeds. This is precisely the rationale of some leaders of the religious right, who are quietly prepared to accept domestic partnership if necessary as long as it remains a gay ghetto institution, open only to homosexuals, in the same way that a Christian would have been denied the right to have a Jewish marriage in the middle ages. In this manner, today's religionists hope to protect the institution of matrimony from the rising tide of heterosexual cohabitors, who constitute the greatest challenge to marriage in Christian history. Religionists fear that, if domestic partnership were made available to heterosexual couples, large numbers of such couples would choose to become domestic partners rather than husbands and wives.

For the A.C.L.U. to flout hallowed principles of church-state separation and to ignore the rank injustice to heterosexuals reflected in its present policy is nothing short of a return to the ecclesiastical concept of segregation by religious faith in the field of domestic relations. The practice of redressing discrimination against a minority by counter-discrimination against the majority is both unacceptable and inequitable, and is the handmaiden of segregation. In this case it has led the A.C.L.U. to defend a practice which does not even meet the standard of "separate but equal" required by the Plessy court more than a century ago. Domestic partnership is a secular institution, which is intended to confer the benefits of matrimony upon those who do not wish, or who are unable, to assume the religious responsibilities which attach to civil and religious marriage alike. To suggest an equivalency between domestic partnership and matrimony is to make a mockery of the term. A Canadian court, without even the benefit of a fourteenth amendment, recently invalidated a domestic partnership program involving segregation for reasons of sexual orientation identical in principle to that which you are attempting to uphold.

It is my understanding that you are a prime force behind the current A.C.L.U. practice of defending "gay only" domestic partnership programs. This policy will come up for discussion at your forthcoming conference in Washington later this month, and again at your national board meeting in October. I hope that at these meetings you and your office will redeem the A.C.L.U.'s historic role by recognizing the justice of the heterosexual claim to equal treatment in all domestic partnership arrangements as well as the church-state issue that is involved.

The favor of a reply will be appreciated.

Very sincerely yours,

Arthur C. Warner

Arthur C. Warner
Executive Director

cc: William F. Reynard, Esq.