North Carolina Central Law Review

Volume 5
Number 2 *Volume 5, Number 2*

Article 21

4-1-1974

Sexual Freedom and the Constitution

Joseph K. Adams

BOOK REVIEWS

Sexual Freedom and the Constitution. By Walter Barnett. University of New Mexico Press. Pp. 333.

> It is easy to stand up for the rights of a black as a human being, but hard to side with a 'queer.' No matter how closely the white civil rights enthusiast tries to identify with the plight of the Negro, blackness can never rub off on him. The aura of 'immorality' can.
>
> Barnett

Unabashedly and incisively Walter Barnett has thrust a barrister's gauntlet into the bowels of the Judeo-Christian-hetero-sex-procreational-ethic-syndrome. Neither shrill nor pedantic, Barnett's well documented literary brief builds methodically on case law and expert testimony, a sinewy support for the homophile—histrionically persecuted under the nebulous and subjectively defined sodomy laws.

Barnett's focus on *sodomy*, a term he explains as the most inclusive for the set of criminal laws prohibiting "unnatural" sex acts, was motivated by the wide range of constitutional arguments capable of being leveled against its criminalization. These arguments furnish a comprehensive index against repressive sex laws generally.

An adumbration of Barnett's handling of the void-for-vagueness doctrine, the first of his constitutional sextet debunking the sodomy shibboleth, provides the reader with the measure of thoroughness that continues unbroken throughout the book.

After brief analysis of Supreme Court opinion, Barnett posits three basic guidelines for the vagueness doctrine:

> a) Whether every layman ought to know that the conduct in question is *so* wrong that it is likely to carry a criminal penalty.
>
> b) Whether the conduct is capable of more precise definition.
>
> c) Whether the statute is more uncertain than the mine run of statutes.

In loose fashion this triumvirate outlines the parameters of the ban on ex-post-facto legislation. Blackstone's definition of sodomy, which typifies current statutory language, must offer a jarring contrast: "The infamous *crime against nature.*" This is not, the reader is reminded, an enactment "prompted by the Sierra Club to prevent the spoilation of Nature." Exactly what the crime is, however, amounts to little more than a reflection of each judge's personal notion of sexual propriety. Were it not for the felonious nature of sodomy, much of the confusion caused in interpretation would prove a source of amusement. Barnett introduces Mervyn Touchet, second Earl of Castlehaven in the Irish, who in 1631 was tried before the House of Lords, convicted and executed for having emitted between

the thighs of his manservant while the latter was engaged in intercourse with Castlehaven's wife. On the question of whether sodomy had been committed where only proof of emission, not of penetration, had been adduced, their lordships received back from the justices an affirmative answer. The point that is never lost however is that there are ferocious penalties ranging, in the vast majority of states, from three years to life.

Since sexual acts are a deeply significant form of communication, Barnett forcefully argues that "a substantial social interest exists in knowing precisely the boundaries of prohibited conduct." As he does in his subsequent chapters, Barnett closes by weighing the utility of his void-for-vagueness argument. To the self-raised charge that this tack is merely diversionary and can result only in a re-writing of the statute in clearer terms, Barnett responds,

> In today's climate of opinion, any tactic which compels a reconsideration of the sodomy laws holds a fair chance of bringing about substantive, as well as formal revision.

He then relates the facts and holding of a 1971 case decided by the Supreme Court of Florida which held a sodomy statute unconstitutional for vagueness. (Franklin v. State, 257 So. 2d 21).

With facile clarity, Barnett develops his five remaining doctrines: The *right of privacy*, relying primarily on *Griswold v. Connecticut* and its progeny to establish what is in his words "a massive breach in the wall of traditional constitutional wisdom surrounding sodomy laws"; a breach of the First Amendment *Establishment Clause* caused by the unholy alliance of church and state and reflected in the demonstrably religious origin of the sodomy statutes; a *due process* violation based on the fundamental right of sexual fulfillment, again relying on *Griswold v. Connecticut; cruel and unusual punishment*, relying principally on *Robinson v. California* to establish a two pronged test applicable to homosexuals:

a) helplessness to change the status
b) involuntary acquisition

Finally, Barnett presents an *equal protection* argument. The commonly acknowledged discriminatory application of the sodomy laws against homosexuals is scrutinized for its rational relationship to the furtherance of an appropriate social objective.

Barnett earns further credit for not leaving his client in the closet while presenting his challenge. In order to put flesh and blood in his equal protection and cruel and unusual punishment arguments, Barnett, in Brandeis style, plumbs the sacramental assumptions of psychiatry. Depicted therein is a welter of conflict about the nature of sexuality, entirely based on irrefutable presumption. Initially, there was the Bieber bugbear founded upon the "inherent tendency in every human being toward heterosexuality."

This conclusively established the pathological nature of homosexuality because the individual was fighting against his own innate tendencies. Subsequently, Lorenz's greylag goose, imprinted at birth with human parentage, demonstrated a lack of any inborn mechanism guaranteeing heterosexual attraction. Thus, the very damaging question of the inherency of human heterosexuality was opened. Amidst the furor Barnett depicts the homosexual's fight for equilibrium in a society that saddles him with a "sin-sick syndrome."

As a concluding comment I should like to say that the book is well worth reading. It is neither mawkish nor mulish. Barnett has left little room for aught but agreement and therein may lie his only real difficulty. How many readers dare to be convinced themselves and thereby suffer the pangs and panic of sexual re-orientation, at least in their thinking?

KIMBALL HAINES HUNT

Impeachment: The Constitutional Problems. By Raoul Berger.* Cambridge, Mass: Harvard University Press, 1973. Pp. 345. $14.95.

The somewhat dark and unknown subject of impeachment is very much on the minds of Americans because of Watergate. This book, however, was not created in response to that particular political event. Mr. Berger, in an attempt to promote a better understanding, or at least an understanding, of the constitutional grant of power to impeach, resorts to an extensive historical analysis from the first appearance of impeachment in the thirteenth century to its present-day usage by the U.S. Congress. To grasp the place of impeachment in the constitutional scheme, Mr. Berger feels that we must understand its use in the past—for history was the most obvious source of information that the Framers of the Constitution knew by which to judge the future.

The Framers, steeped in English history, were well aware of the struggle for parliamentary supremacy during the thirteenth, fourteenth, and fifteenth centuries. It was during this period that the great treason statute, 25 Edw. III, was enacted. From this statute Parliament claimed the power to declare acts of the King's ministers treasonable retrospectively. The impeachment process developed from the bloody treason trials that resulted. Parliament, it is true, asserted virtually unlimited powers of impeachment, but as Mr. Berger suggests throughout the book, the Framers had no intention of

*Mr. Berger, with an L.L.M. from Harvard, has served as chairman of the Administrative Law Section of the American Bar Association and as Regents Professor at the University of California. He is the author of numerous legal periodicals and of *Congress v. the Supreme Court* and is Charles Warren Senior Fellow in American Legal History at Harvard.

conferring such power upon Congress. Conscious of the unscrupulous use of impeachment in the hands of Parliament, the Framers sought to prevent such excesses that might disrupt the other branches by the much-feared legislative branch.

Probably the most important question today, which is addressed by Mr. Berger, concerns the proper meaning to be given to the constitutional phrases "high crimes and misdemeanors." He tells us that the phrase, despite the practices indulged in by Congress in the past, is not an empty bottle to be filled with whatever meaning the legislature thinks appropriate. Nor, on the other hand, is it a term of fixed meaning whose denotations may be derived by examination of criminal law heretofore enacted by Congress. "High crimes and misdemeanors" are not merely important violations of the criminal law. We must turn, as Berger points out, to English history from which our constitutional provisions took their meaning. For these ancestors, "high crimes and misdemeanors" were categorized as political crimes against the state. However, even this category is not subject to dictionary definition.

Another of Berger's primary concerns is to demonstrate that although impeachment is a proper means for removal of judges for misbehavior, it ought not to be the sole means for accomplishing this worthy end. The Framers conceived impeachment chiefly as a bridle upon the President, and they would have been astonished to learn that impeachment had sunk to the ouster of little judges soiled by corruption. Article III provides that judges "shall hold their office during good behavior." Mr. Berger suggests that the original design for removal of lower judges was by a judicial, not a legislative, proceeding borrowed from English law called scire facias. When the Framers employed "good behavior," a common law term of ascertainable meaning, with no indication that they were employing it in a new and different sense, it might be presumed that they adopted the judicial machinery—scire facias—that went with it. Mr. Berger deplores the fact that the grand design of the Framers has been distorted by our preoccupation with judicial impeachment. Impeachment for him belongs in that important tradition for which it was created—to preserve the government.

The Constitution provides that the Senate "shall have the sole power to try" all impeachments. This clause has been interpreted as barring judicial review of the trial of impeachments, and the Supreme Court has consistently refused review on the grounds that impeachment is a political question. Mr. Berger argues that by using the term "try" the Framers intended to distinguish between initial power to "try" a case and an appeal from a case arising under the Constitution, which presents a question of law as opposed to a question of fact. It seems awkward that a citizen may invoke the judicial machinery against an unconstitutional five-dollar fine, but not against an unconstitutional impeachment and removal from

public office. For the Congress to be the final judge of the boundaries of its own power was never intended.

In evaluating the uses of impeachment Mr. Berger reminds us that we should not forget its political inception and continued political coloration. Impeachment was essentially a factional weapon from its first appearance in Parliament in 1386. The drawing of political lines goes to the motivation behind most impeachments. Such party taint was evident in the impeachment of two famous Americans—President Andrew Johnson and Justice Samuel Chase. The impeachment and trial of Johnson, as Mr. Berger views it, "represented a gross abuse of the impeachment process, an attempt to punish the President for differing with and obstructing the policy of Congress. No valid grounds, legal or otherwise, existed for impeachment; it was a great act of ill-directed passion." Mr. Berger contends that the chief lesson which emerges from the Johnson trial is that inevitably an impeachment of a top official such as the President will become colored with partisan politics. Therefore such power must be exercised with extreme caution and in extreme cases by men of fair thinking.

Some of the much-mooted questions about impeachment are answered by Mr. Berger in his scholarly and well-documented book. The light reader may find the legal and historical analysis which underlies impeachment boring; but for those concerned with today's events, this timely publication should be of particular interest.

JOSEPH K. ADAMS