7-1-1973

Book Review: Sexual Freedom and the Constitution (1973)

Wayne McCormack
University of Georgia School of Law

BOOK REVIEW

Sexual Freedom and the Constitution. By Walter Barnett,[1] Albuquerque: University of New Mexico Press, 1973. Pp. v, 333.

Reviewed by Wayne McCormack[2]

Another book about sex? Hasn't the market reached its saturation point yet? After all, we have seen The Sensuous Female, The Sensuous Male, The Sensuous Person, Everything You Always Wanted to Know, and Some Things You Never Wanted to Know. These were my thoughts when I was asked to review this book by Walter Barnett. Of course, the recent spate of books about sex are "respectable" rather than "pornographic," representing the new substitute for the real thing. In our society it is permissible to read about the physiological technicalities of sex, thereby sating our curiosities in a way that this incredibly prudish society will deem healthy rather than finding out about life by experience or by fantasized description, both of which as we have all been taught are unhealthy. This rationalization makes sense particularly in light of the current craze for cracking down on obscenity under the Supreme Court's new guidelines.[3] At this point, my thoughts centered on the Supreme Court and I immediately understood the title of the book. This was to be a book about the sex lives of the Justices; it must be a sequel to Peyton Place, although I could hardly imagine how there would be much excitement in a book about Burger Place. Imagine my disappointment when I found that the book was actually a serious brief[4] against the constitutionality of the laws regulating our modes of sexual fulfillment.

Barnett begins by stating his abhorrence of all those laws dealing with sexual regulation such as sodomy, fornication, adultery, prostitution, incest and other "deviate" sexual behavior.[5] Because these are crimes without victims, diverting millions of dollars annually from more serious law enforce-

---

1 Professor of Law, University of New Mexico School of Law.

2 Assistant Professor of Law, University of Georgia School of Law.

3 *See* Miller v. California, 41 U.S.L.W. 4925 (U.S. June 21, 1973) and companion cases. It is obvious that prosecutors and courts are not planning to limit themselves to hard-core pornography. For example, the movie "Carnal Knowledge" has been found obscene under the new standards. Jenkins v. Georgia, 41 U.S.L.W. 2070 (Ga. July 2, 1973).

4 The book had its origin as an amicus brief filed in the case of Wade v. Buchanan, 401 U.S. 989 (1971), which challenged the Texas sodomy statute. W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION at vi (1973).

5 W. BARNETT, *supra* note 4, at 2, 7.

ment, they have been assailed time and again by legal scholars.[6] Barnett chooses not to justify a new attack by reference to these familiar lines of argument. Instead, he offers a refreshing justification for taking up the struggles anew; he finds that societal pressure may soon be ripe for doing away with these regulations because of the problems of overpopulation.[7] In effect, he challenges us to think of sodomy as a means of birth control. I cannot help but wonder what the Ecumenical Council will do with this one.[8]

Overpopulation proves, however, to be nothing more than a half-hearted justification for raising the issues. What he is really after is a broad-scale attack on the governmental regulation of sexual morals. The real reason is that they are an unjustifiable intrusion upon individual freedom. Now the argument takes on a serious nature. The author offers seven theories under which these statutes can be attacked.[9] For the sake of clarity and for the sake of dealing with what he perceives to be the most egregious governmental intrusions first, he attempts to focus on the methods of securing relief for homosexuals. The arguments are well-constructed, lawyerlike, showing good craftsmanship; the scientific data is interesting and informative, a good capsule for busy members of the "straight" world; and the prose is easy and entertaining in many places. It is worth reading, although it is certainly too late to expect much success with the Supreme Court. The tide has markedly turned back in the direction of puritanical notions of morality.

If we cannot expect success on the constitutional front in the foreseeable future, then we may accept the luxury of coming to grips with the core question of challenges to morality laws. Thus far no one, Barnett included, has been willing to face squarely the argument that decay in moral fiber weakens the country. One of the prime justifications for the so-called morals laws has always been that society needs a common bond of morality with which its members can identify. The most familiar debate upon this subject is that between Lord Devlin[10] and H.L.A. Hart[11] when the Wolfenden Report was issued with its recommendation for decriminalization of all sexual

---

6 H. L. A. HART, LAW, LIBERTY, AND MORALITY (1963); J. S. MILL, ON LIBERTY (1859); N. MORRIS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL (1970); E. SCHEER, CRIMES WITHOUT VICTIMS (1965). Recent and provocative challenges come from the Federal Crime Commission, a group composed predominantly of law enforcement officials, and the American Bar Association. The House of Delegates of the ABA adopted a resolution urging repeal of these laws. 42 U.S.L.W. 2098 (Aug. 14, 1973).

7 W. BARNETT, *supra* note 4, at 2-4.

8 The attitudes of various church groups are summarized. *Id.* at 124-28 n.46.

9 Each doctrine has a separate chapter: vagueness, right of privacy, establishment of religion, independent rights (a restated version of the right to privacy), equal protection, and cruel and unusual punishment (two versions).

10 P. DEVLIN, THE ENFORCEMENT OF MORALS (1959).

11 Hart, *Immorality and Treason*, 62 LISTENER, July 30, 1959, at 162.

acts between consenting adults in private.[12] Lord Devlin argued eloquently that the moral precepts of society should be enforced by the criminal law so that every individual could know at all times that his abstinence from immoral behavior was supported by a strong communal approbation. This sharing of moral bonds was viewed as essential to the continued well-being of the community because it represents the most basic shared sense of values giving a community its sense of identity. Without a shared sense of values, individuals do not view themselves as part of the community and the community ultimately falls apart. In short, without an imposed morality the fabric of society stands a very great chance of coming unwoven, hence the term moral fiber. As Durkheim puts it, anomie (lack of norms) slowly isolates each individual psychologically until he feels no need to contribute to society's well-being.[13]

Barnett responds to this argument with a simple paragraph in which he dismisses its claim to credibility. He notes that the argument

> usually infers that the general decline of other civilizations is traceable to a relaxation of sexual morals and especially to permissiveness about homosexuality. It is impossible to answer this argument, because we have no way of proving or disproving the hypothesis. Those civilizations are long since dead, and the information we have about them is scanty. To base the regulation of modern American society on reconstructed "lessons" of history is precarious; as one eminent historian has pointed out, if history teaches us anything at all, it is that there are no simple answers to be learned from it.[14]

The argument is entitled to more respect than this. It need not rely on histories of other civilizations; it may proceed from sheer logic and the force of current events.

It is tempting to point to the problems of Watergate, racial tension, the economy, crime in the streets and decry the permissiveness of modern society as the root cause; to say that people, especially people of a different generation or skin color, have no respect for the values that made this country great; to argue that the permissiveness of the courts has helped breed an attitude that the law is to be flouted rather than respected. From this could be constructed the hypothesis that a strict moral code is essential to the preservation of American society. As Barnett points out, there is no way of either proving or disproving this hypothesis. Under these circumstances, proper constitutional doctrine would seem to me to require that we

---

12 SCOTTISH HOME OFFICE, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (1957).

13 E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1947).

14 W. BARNETT, *supra* note 4, at 110.

respect the factual beliefs of the majority rather than put the burden of proof for these facts on the majority.[15]

What is true for constitutional doctrine, however, may not be true for legislative choice. Nor does the constitutional doctrine require more than deference to the legislative fact findings; the majority might appropriately have the burden of persuasion that its policy choice is necessary. Should not the majority be required to show that society does indeed have an overriding interest in self-preservation? Courts have always assumed that self-preservation is the fundamental goal of society as it is of an individual.[16] Perhaps it is time to question this basic assumption rather than continuing to argue about the factual questions. I would be reluctant to advocate social upheaval for the sake of nothing more than change, but neither would I discount too quickly the argument that a society's disintegration because of moral decay may be good. Out of ashes arise new forms of life. If it is indeed too late to expect Barnett's arguments to prevail in the courts, then we should take the opportunity for a serious debate on this issue that has yet to be addressed.

---

15 Proper allocation of the burden of proof of legislative facts is an exceedingly complex matter. Since 1937, the burden of disproving legislative assumptions in the field of economic regulation has been placed consistently on the challenger. Through the sixties the burden came to rest more often on the state in matters of individual noneconomic liberties. It is unlikely that a single standard for review could ever be found, and the position taken here is an ad hoc assessment based primarily on the recognized impossibility of proof either pro or con. 1 B. SCHWARTZ, RIGHTS OF THE PERSON 73 (1968).

16 *See, e.g.*, Dennis v. United States, 341 U.S. 494, 501, 509 (1951) (plurality opinion of Vinson, C.J.).