

Post Office Box 909
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Professor Walter E. Barnett
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Dear Walter:

Frankly, my previous letter's strictures about publicity were meant much more for Mr. Royce's assurance than as an admonition to you to be super-cautious. I never envisaged that you would publish anywhere than in a law journal and that reference to the case would be anything more than merely part of a long article, but I felt I had to repeat his expressed requests. As I see it, the case is in the public domain, and Mr. Royce's attitude strikes me as just a wee bit closety although with a novel twist--closety on the part of a presumed straight person in supposed behalf of a gay person. So if I were you I would go ahead and cite the case.

As mentioned, Newsweek plans a cover story around the end of June, possibly during Gay Pride Week.

Although I haven't looked at it lately and don't have it in front of me, it seems to me that the Labady opinion by Judge Mansfield of S.D.N.Y. cites Griswold in support of homosexuals' right of privacy, or at least comes close to doing so, at least in dictum. I did some reading on the right of privacy last year in connection with the new Illinois Constitution which sets up a right of privacy (undefined) by specific constitutional enactment. The materials that I looked at then seemed quite undecided and even doubtful about the future of Griswold as applied to others than married couples, but nonetheless I have been most optimistic and continue to be optimistic that if not sooner than later the courts will begin applying Griswold in an enlightened way to protect gay people's rights (among others'), especially as social attitudes keep gradually changing (the Supreme Court seems, after all, to follow social mores). I have never held much hope for the line of argument that anti-homosexual laws are establishments of religion, etc., and as a matter of fact tend to regard the argument as something of a sophism, since we know quite well that condemnatory attitudes exist very independently of a specific theological basis and are frequently grounded in non-theological postulates. In other words, I have for some time felt that the argument was doomed because in the hundreds of years that have passed since anti-homosexual laws' prototypes were enacted in a specifically theological or theocratical context, ample dilution of the exclusively theological basis for them has occurred so that courts are not going to be easily persuaded to recognize a direct line of succession from Henry VIII's (or whosever) civil-alias-religious enactments unto present-day, perhaps 19th-century, enactments, even if the latter do partly incorporate antique language ("abominable crime against nature," etc.) directly traceable back. Nineteenth- and 20th-century legislators are clever enough to support anti-gay enactments with sociological arguments, etc., however specious, which no doubt on the face of them would pass judicial scrutiny from the viewpoint solely as to whether or not they contravene church-state separation.

So I am glad to hear that you regard the right-of-privacy argument as one of the most promising lines of attack on sodomy laws--and, I should think, by extension, on any other enactments or governmentally-fostered institutionalizations that have the effect of placing homosexual citizens on an unequal footing with others simply because of their private activities or thoughts or emotions. An additional advantage of the right-of-privacy approach, of course, is that in its general concept it is highly attractive to a diverse spectrum of political theoreticians--from the right to the left--and, the sympathetic groundwork having been easily laid in the general aspect, the more specific aspect of right of privacy as applied to homosexuals may the more easily be perceived and accepted by some who might otherwise find statutory liberalization unpalatable; and in any case once a general right of privacy has been established by statute there would be more grist for the judicial mill so far as adjudication of gay people's rights is concerned, even though that specific hoped-for ~~xxxx~~ interpretation may not have been foreseen by framers of right-of-privacy statutes. (Cf. other Federal constitutional guaranties of right in their original understanding vis-a-vis their present-day applications.)

Isn't there a case in the Supreme Court this term involving application of Griswold to single heterosexual persons, or has that already been decided?

How do you see the future of the National Committee now that you are indeed back in New Mexico and separated from Arthur Warner by expensive distance? Given enough perseverance and time, I can't imagine that some foundation--even the Playboy Foundation--wouldn't fund the committee. After all, the Playboy Foundation recently funded a Mattachine Midwest function to the tune of \$250 for a guest speaker's air fare (the function is after all not to be held, and the \$250 will be returned, but the principle was more or less established). This particular example is not to be broadcast widely, because the facts are not general knowledge yet, but I offer it merely as an illustration.

Incidentally, Arthur Warner called me today and said that some of us in Chicago (specifically, Bill Brackett and I) ought to draw up some presentation for the Congressional subcommittee considering the new Federal criminal code which would point to Illinois' experience with homosexual law reform. I told him I would try to get such a project under way, but what with a legal workshop coming up in 10 days in connection with Gay Pride Week, and the possibility of a presentation being made to a National Lawyers Guild convention in Boulder in July, and the usual press of working for a living and trying to help maintain the administrative framework of a gay organization (Mattachine Midwest), I don't know whether I'll be able to do it. Arthur said you thought it would be a good idea, and I will try. I am sure you agree on how much there is to do and how few the resources are to do it.with.

I hope I have addressed this letter correctly-- you say that I should address you at the University of New Mexico, but the only address on your letter or envelope was the one I have used. Should I use an office address?

Best regards,

Bill Kelley