10-1-1968

Constitutional Law -- State Interference with Private, Consensual Marital Sexual Relations

R. Thomas Farrar

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation
Available at: http://repository.law.miami.edu/umlr/vol23/iss1/11

This Case Noted is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.
light of the newly found illegality of private discrimination, some toughening of present federal regulations regarding construction financing can be expected.

Jones v. Alfred H. Mayer Co. will, of course, draw no commendation from those who judge a decision by the degree of judicial restraint therein. Yet, the realization that it goes far to attack that which spawns segregated housing—so debilitating to the Negro and his quest for equality—earns for this case a mark high in "the jurisprudence of a nation striving to rejoin the human race."

MARTIN ENGELS

CONSTITUTIONAL LAW—STATE INTERFERENCE WITH PRIVATE, CONSENSUAL MARITAL SEXUAL RELATIONS

Cotner pleaded guilty to his wife's charge that he had committed "the abominable and detestable crime against nature" with her in violation of the Indiana sodomy statute. Neither the wife's affidavit nor the statute provide for compensatory damages—which is true for § 1982—prevented a court from awarding them.


1. The "crime against nature" in more common parlance is termed "sodomy." Sodomy historically and medically refers to anal intercourse, or buggery, but the statutes on sodomy include all manner of sexual activity conceived by someone, somewhere, at one time or another, to be "unnatural"; and this means, of course, in this sexually repressed society, almost every variety of sexual activity other than "natural" coitus. Sodomy laws thus cover, in one state or another, not only buggery, but fellatio (oral-genital contact with the male), cunnilingus (oral-genital contact with the female), homosexual behavior, bestiality (sex contact with animals), necrophilia (sexual contact with the dead) and even mutual masturbation. Hefner, The Legal Enforcement of Morality, 40 U. CoLo. L. REV. 199, 210 (1968) (footnotes omitted).

In Fine v. State, 153 Fla. 297, 300, 14 So.2d 408, 409 (1943), the Supreme Court of Florida lamented that:

We have experienced some difficulty in determining precisely what unnatural sexual acts do, and what do not constitute the crime. This is largely due to the reluctance legal authors have shown to detail the facts they were considering, because they are always so shocking. This aversion was voiced by Blackstone in his Commentaries over one hundred and fifty years ago: "I will not act so disagreeable a part, to my readers as well as myself, as to dwell any longer upon a subject the very mention of which is a disgrace to human nature." A similar attitude has been expressed about even particularizing in the formal charge ....

2. The court held that he had standing to complain of unconstitutional state invasion of marital privacy even though his wife was the complainant. Cotner v. Henry, 394 F.2d 873, 875 n.2 (7th Cir. 1968), cert. denied, 37 U.S.L.W. 3123 (1968).

3. Burns' IND. STAT. ch. 169, § 10-4221 (1965), quoted id. at n.3. The Florida statute, FLA. STAT. § 800.01 (1967), is substantially similar. Other Florida statutes prohibit "any unnatural and lascivious act," FLA. STAT. § 800.02 (1967), lewd and lascivious behavior, FLA.
mentioned the use of force, and no Indiana courts had construed the statute as requiring force.\textsuperscript{4} Cotner later filed a petition for habeas corpus in a federal district court, challenging the statute as unconstitutionally vague\textsuperscript{5} and his conviction as an unconstitutional invasion of his right of marital privacy. The petition was dismissed for failure to exhaust state remedies and for lack of merit.\textsuperscript{6} On appeal to the United States Court of Appeals for the Seventh Circuit, \textit{held}, reversed: Absent a clear showing of a compelling state interest, as through proof of use of force, a criminal sodomy statute is constitutionally inapplicable to private, consensual physical relations between married persons. \textit{Cotner v. Henry}, 394 F.2d 873 (7th Cir. 1968).\textsuperscript{7}

\begin{flushleft}
\textsuperscript{4} Cotner later filed a petition for habeas corpus in a federal district court, challenging the statute as requiring force.
\textsuperscript{5} The court of appeals did not consider the claim of vagueness, although a charge of commission of a "crime against nature" would appear to be patently vague and ambiguous. Strangely enough, courts have upheld such statutes over a charge of vagueness, even in a case in which the charge contained Latin phrases! See English v. State, 122 Fla. 77, 164 So. 848 (1935). Apparently, then, the "crime against nature," whatever acts it contemplates (see note 1 supra), is akin to obscenity, which cannot be defined but is known when seen, or the fog, which can be seen but not grabbed. It is suggested that the crime is susceptible of explicit definition and should not be so vaguely charged. Murder and maim are not particularly delicate offenses, yet elaborations upon them have not been considered to have soiled the statute books.
\textsuperscript{6} The problem of exhaustion of state remedies was magnified by the statement of the Indiana Supreme Court in Koepke v. Hill, 157 Ind. 172, 178, 60 N.E. 1039, 1041 (1901), in which the court observed that "[i]f a federal question were duly presented, we would be constrained to follow the decisions of the Supreme Court of the United States." Although the district court held that under Pritchard v. State, 246 Ind. 577, 210 N.E.2d 372 (1965), Cotner could have presented his claim for relief to the state courts by a motion to vacate the sentence, the court of appeals held that such a motion must be presented within term time, which here had expired, under Snow v. State, 245 Ind. 423, 199 N.E.2d 469 (1964). Although this allowed the court of appeals to reach its determination of the merits of Cotner's claim, it resulted in the court's opinion in some respects appearing to be more a lecture than a holding. See note 4 supra.
\end{flushleft}
Decisions of the United States Supreme Court "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Drifting from these evanescent irradiations is the right of marital privacy, a right within the ambit of protection of the Fourteenth Amendment. The release of Charles O. Cotner marks the first faltering step since Griswold v. Connecticut in the development of a meaningful right of general privacy, a right at times conspicuously absent in this, "the land of the free."

In Griswold the Supreme Court held that criminal sanctions may not permissibly be imposed upon the use of birth control devices by married couples. Although there is no explicit constitutional guaranty of a right of marital privacy, the Court reasoned that such a right is penumbral to the freedoms by the first, third, fourth and fifth amendments, buttressed by the ninth amendment. The combination of these creates a constitutionally protected zone of individual privacy and private associations.

"The import of the Griswold decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty," and the import of Cotner v. Henry could well

---

6. The ninth amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The concurring opinion of Mr. Justice Goldberg in Griswold placed a great deal of emphasis upon the ninth amendment, although the opinion of the Court used it primarily as reinforcement for its conclusion that a right of marital privacy is constitutionally protected. See Beaney, The Griswold Case and the Expanding Right to Privacy, 1966 Wis. L. Rev. 979 (1966); Comment, The Bedroom Should Not Be Within the Province of the Law, 4 CASE W.L. REV. 115 (1968); Comment, Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality, 14 U.C.L.A. L. REV. 581, 602-603 (1967); Kelsey, The Ninth Amendment of the Federal Constitution, 11 IND. L.J. 309 (1936); B.B. Patterson, The Forgotten Ninth Amendment (1955); and Redlich, Are There "Certain Rights ... Retained by the People?", 37 N.Y.U.L. Rev. 787 (1962).
7. The principles underlying the Supreme Court's decisions prior to Griswold implied that a more basic right, a right of individual privacy, is inherent in the protections afforded the individual in the first and fifth amendments and the home in the third and fourth. See, e.g., NAACP v. Alabama, 357 U.S. 449 (1958) (freedom of association and individual privacy); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to educate one's children as one chooses); and Meyer v. Nebraska, 262 U.S. 390 (1923) (right to study the German language in a private school). The underlying basic right which the Court recognized in Griswold is that of individual privacy and freedom. 381 U.S. at 482-86. See Beaney, supra note 10. The Griswold decision belatedly has given constitutional underpinnings to the right of privacy, a right first postulated in 1890. See Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890).
9. This quotation is hardly surprising, for even before Griswold it was noted that the Supreme Court "could hold that the Ninth and Tenth Amendments reserve to a married couple the right to maintain the intimacy of the marital relationship without governmental interference . . . ." Redlich, Are There "Certain Rights . . . Retained by the People?", 37 N.Y.U.L.
be the beginning of a trend toward the protection of private, non-marital sexual relations between consenting adults. To extend the right of privacy to aberrational sexual conduct, such as homosexuality, in areas outside the marital bedroom would not be a particularly unusual result. To

Ref. 787, 809 (1962). In discussing the Colorado sodomy statute, Colo. Rev. Stat. Ann. § 40-2-31 (1963), in the light of Griswold, it was noted that:

This statute does not exclude commission of the crime by persons married to each other. However, unless an apparently unnatural act were to take place in the view of others, in which case it would fall within the "open lewdness" statute (Colo. Rev. Stat. Ann. § 40-9-15 (1963)), its enforcement might well constitute an interference with marital privacy equivalent to that held violative of the Constitution on due process grounds in Griswold v. Connecticut. And, if it were held applicable to married persons acting in private, it would likely fall under the category of one of the more frequently violated statutes on the books. Stimmel, Criminality of Voluntary Sexual Acts in Colorado, 40 U. Colo. L. Rev. 268, 278 (1968) (footnote omitted). See also Beaney, The Griswold Case and the Expanding Right to Privacy, 1966 Wis. L. Rev. 979 (1966); Comment, The Bedroom Should Not Be Within the Province of the Law, 4 Calif. W.L. Rev. 115 (1968); Comment, Sodomy Statutes—A Need for Change, 13 S.D.L. Rev. 384 (1968); and Comment, Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality, 14 U.C.L.A.L. Rev. 581 (1967).

13. See Beaney, supra note 12; Comment, The Bedroom Should Not Be Within the Province of the Law, supra note 12; and Redlich, supra note 12. "[T]he proscription of deviate sexual behavior between consenting adults is not within the proper scope of legislative endeavor." Comment, Deviate Sexual Behavior: The Desirability of Legislative Proscription, 30 Albany L. Rev. 189, 196 (1966).

14. To do so might not have any significant impact upon heterosexual mores.

The position of the criminal law as a force influencing sexual morality is not strong. If what the psychiatrists have been telling us is correct, and it may not be entirely accurate, the important inhibitions against unacceptable sexual behavior are internalized in the home, during early childhood when an individual is wholly unaware of the criminal law . . . . Fisher, The Legacy of Freud—A Dilemma for Handling Offenders in General and Sex Offenders in Particular, 40 U. Colo. L. Rev. 242, 258 (1968) (footnote omitted). See also Comment, Deviate Sexual Behavior: The Desirability of Legislative Proscription, 30 Albany L. Rev. 291, 293-94 (1966); and Comment, Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality, 14 U.C.L.A.L. Rev. 581, 595-97 (1967).

To regulate sexual conduct which does not involve harm to others is an attempt to regulate morality. It should be noted that the American Law Institute "voted against including private homosexuality not involving force, imposition or corruption of the young as an offense in the Model Penal Code." Model Penal Code § 213.2, Status of Section (Proposed Official Draft, 1962). The Institute's proposal to exclude from the criminal law all sexual practices not involving force, adult corruption of minors, or public offense is based on the following grounds. No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities . . . . Model Penal Code § 207.5, Comment (Tent. Draft No. 4, 1955). See also M. Ploscowe, Sex and the Law 213 (1951). It has been suggested that a fourth consideration, protection of the family, might be included as a harm in which there is a state interest, thus justifying laws prohibiting incest. See Note, Deviate Sexual Behavior Under the New Illinois Criminal Code, 1965 Wash. L. Q. 220, 232-33 (1965).

A re-examination of laws regulating sexual conduct is currently in vogue not only in the United States but in other countries, as indicated by the Wolfenden Report in England, Great Brit. Comm. on Homosexual Offenses and Prostitution Report, C.M.D. No. 247 (1957). Illinois has responded to the need for reform by eliminating its sodomy statute. The existence and enforcement of this [the Illinois sodomy] statute produced several problems: (1) a lack of notice that the conduct in a particular situation was illegal; (2) a pattern of uneven enforcement; (3) the possibility of widespread blackmail; (4) the creation of serious guilt feelings among persons engaging in this behavior; and (5) a pattern of uncontrollable deviate behavior. Note, Deviate Sexual Behavior Under the New Illinois Criminal Code, supra, at 220.
require proof of a compelling state interest, as opposed to merely a rational basis, in criminally proscribing conduct such as homosexual behavior is the next logical step, even if such activity is not "an association for as noble a purpose as any involved in our [the Supreme Court's] prior decisions."

Although both Griswold and Cotner dealt with marital privacy, the precedents upon which the Griswold decision rested dealt with a more general right of privacy and association. In NAACP v. Alabama the Court "protected the 'freedom to associate and privacy in one's associations,' noting that freedom of association was a peripheral First Amendment right." It is this "freedom to associate and privacy in one's associations" which, coupled with a right of privacy in aberrational sexual conduct, should under the fourteenth amendment result in requiring a compelling state interest to be shown in imposing criminal sanctions upon private sexual conduct, inside or outside of marriage.

This example of modern legislative acumen is not without its irony, however. The Illinois lawmakers did remove the state's sodomy statute, but they left standing the statutes against fornication and adultery. Illinois is thus in the unique position of permitting all so-called "perversion," both heterosexual and homosexual, while prohibiting normal sexual intercourse.

It is obvious that we are still a very long way from establishing sane sex law anywhere in these United States. Hefner, The Legal Enforcement of Morality, 40 U. Col. L. Rev. 199, 221 (1968).


Regardless of their nobility of purpose, sexual offenses are common. The Kinsey Report noted that up to 95% of the male population may at one time or another violate the law. A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male 550-51 (1948). Professor Ploscowe points out, however, that Kinsey's statistics are probably exaggerated because not all states have all the laws upon which Kinsey relied. M. Ploscowe, Sex and the Law 137 (1951). Nonetheless, the common occurrence of violations leads to an uneven enforcement of the laws. "In a recent ten-year period in New York City, the only three cases of homosexual sodomy involving female defendants were dismissed, while 'tens of thousands' of male defendants were arrested and convicted." Comment, Deviate Sexual Behavior: The Desirability of Legislative Proscription, 30 Albany L. Rev. 291, 298, citing Bowman & Engle, A Psychiatric Evaluation of Laws of Homosexuality, 29 Temp. L.Q. 273, 281 (1956).


18. A compelling state interest could be shown where the particular offense involves force, corruption of the young or public offense. The three basic values in legislation of sexual standards are primarily the prevention of forcible sexual relations, the protection of minors and incompetents, and the prevention of public indecency. See Ploscowe, Report to the Hague: Suggested Revisions of Penal Law Relating to Sex Crimes and Crimes Against the Family, 50 Cornell L.Q. 425 (1965); See also Model Penal Code § 207.5, Comment (Tent. Draft No. 4, 1956); M. Ploscowe, Sex and the Law 213 (1951).

Judge Duffy in his dissent in Cotner v. Henry disagreed with the imposition of a force requirement to show state interest, saying:

I take it that if Cotner had shot his wife in the privacy of their bedroom, the majority of the panel which heard this appeal would not proclaim that there is a difference between a crime committed in the bedroom and otherwise. I take it that in such a case there would be no claim of "... an unwarranted invasion of marital privacy under the Fourteenth Amendment."

This statement of the judge was elaborated in the petition for certiorari by the state:

If the views of the Court of Appeals are followed, married persons would be shielded from prosecution of an age old crime while others committing the very same activity
Should the Supreme Court uphold or later follow Cotner, as logically it should, the first effect probably would be upon laws prohibiting homosexuality. However, even regarding laws in which there is more obviously a state interest, such as fornication and indecent exposure, the Griswold and Cotner rationale would appear to require proof of compelling state interest or necessity in order for convictions to be upheld. The result may be that states will constitutionally be required to enact a penal law, such as that proposed by the American Law Institute, which, with a rational and secular basis for proscribing sex crimes in which the state has a compelling interest, will nonetheless safeguard the right to life, libertine and the pursuit of happiness.

R. Thomas Farrar

would be subject to prosecution. Following this rationale, what other crimes would the constitutional right to privacy make inapplicable to married persons? Where would the courts draw the line? Whether a man beats his child, a stranger or his wife, the activity still constitutes the crime of assault and battery. Whether a man shoots his child, a stranger or his wife, the activity still constitutes the crime of murder. Likewise whether a man commits the crime of sodomy with a child, a stranger or his wife, the activity still constitutes the crime of sodomy. A husband and wife's right to privacy should not shield them from what would otherwise be a criminal act. Petitioner's Brief for Certiorari at 8, Henry v. Cotner, petition for cert. filed, 37 U.S.L.W. 3097 (U.S. July 28, 1968) (No. 342).

Aside from its value as an example of a classic non sequitur, the argument points out why the Griswold rationale should not be limited to marital privacy. Given a right of privacy, the state should be required in its curtailment of that right to prove a compelling interest in doing so. As the Supreme Court pointed out in Griswold, 381 U.S. at 481-82, the test of the validity of the state's action cannot be that of a mere rational basis but must require proof of a substantial interest or necessity. If there is a right, as the Court in NAACP v. Alabama and elsewhere has indicated there is, the right should be available to all.

Not all of mankind desire or need privacy, but for those who do, a freedom to determine the extent to which others may share in one's spiritual nature, and the ability to protect one's beliefs, thoughts, emotions, and sensations from unreasonable intrusions are of the very essence of life in a free society.


It should be noted that even between spouses, the use of force may at times be lawful, as for example a husband's immunity from prosecution for the rape of his wife. See 44 Am. Jur. Rape § 29 (1942). While the marriage itself may constitute an implied consent to the use of force to achieve intercourse with a wife, a better distinction is that the force is being used to effect a sexual relation which is approved by society. The same force used to effect a disapproved sexual relation, as for example sodomy, could be sanctioned because force not only debars any consensual nature of the relation but also indicates that the coerced conduct is not that contemplated by the marriage relationship. It constitutes the act not of a married couple to which society could imply consent, but the act of a married person.

19. See notes 14 and 15 supra.

20. The requirement that a state show a compelling interest in a particular offense would not affect convictions involving corruption of the young, e.g., Lason v. State, 152 Fla. 440, 12 So.2d 305 (1943), or even forcible sodomy with one's wife, e.g., Mahone v. State, —Ala.—, 209 So.2d 435 (1968). See also note 7 supra. Statutes involving, for example, sexual assaults upon a child, e.g., Fla. STAT. § 800.04 (1967), are clearly unaffected by the holding in Cotner. However, with the advent of "the Pill," the compelling state interest in prosecutions under fornication statutes, e.g., Fla. STAT. § 798.03 (1967), may be considerably more difficult to show.