

1971

Constitutional Law—Sodomy Statutes: The Question of Constitutionality: *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970)

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Recommended Citation

John F. Simmons, *Constitutional Law—Sodomy Statutes: The Question of Constitutionality: Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), 50 Neb. L. Rev. 567 (1971)

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CONSTITUTIONAL LAW—SODOMY STATUTES: THE QUESTION OF CONSTITUTIONALITY. *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970).

I. INTRODUCTION

Although the winds of change have created some ripples,¹ the ancient crime of sodomy remains on the books in Nebraska and forty-six other states² despite repeated attacks by commentators³ and renunciation by the Model Penal Code.⁴ Reinforced by Scripture⁵ and public sensibilities, sodomy statutes resisted constitutional attack until 1969, when the United States District Court for the Northern District of Texas in the case of *Buchanan v. Batchelor*⁶ found the Texas sodomy statute, essentially similar to those of almost all other jurisdictions, unconstitutional, and enjoined its enforcement.

Most sodomy statutes have been interpreted to cover all “unnatural” sexual relations between persons of the same or different sex, or between man and beast. Because of the nature of the acts involved, there has been reluctance to require detailed description in the statutes. Although the tendency has been to shed these in-

¹ Six states, Connecticut, Kansas, Illinois, New York, Minnesota, and Utah, have recently repealed or significantly modified their sodomy statutes.

² Connecticut, Kansas, and Minnesota do not punish sodomy.

³ Cantor, *Deviation and the Criminal Law*, 55 J. CRIM. L.C. & P.S. 441 (1964); Note, *Criminal Law—Consensual Homosexual Behavior—The Need for Legislative Reform*, 57 KY. L. J. 591 (1969); Note, *Criminal Law—Sexual Offenses—Sodomy—Cunnilingus*, 8 NAT. RESOURCES J. 531 (1968); Note, *Sodomy Statutes—A Need for Change*, 13 S.D.L. REV. 384 (1968); Note, *Crimes Against Nature*, 16 J. PUB. L. 159 (1967); Note, *Deviate Sexual Behavior: The Desirability of Legislative Proscription*, 30 ALBANY L. REV. 291 (1966); Note, *Sex Laws in Ohio: A Need for Revision*, 35 U. CIN. L. REV. 211 (1966).

⁴ The Model Penal Code prohibits deviate sexual intercourse only where it is accomplished through force, involves adult corruption of minors, or is accompanied by a public offense. See MODEL PENAL CODE § 213.1 (Prop. Off. Draft, 1962).

⁵ LEVITICUS 18: 22–23; LEVITICUS 20: 13; DEUTERONOMY 23: 17.

⁶ 308 F. Supp. 729 (N.D. Tex. 1970).

hibitions in favor or more explicit wording, twenty-six states⁷ still follow the example of the original English sodomy statute of 1533,⁸ which describes the prohibited acts only as "the detestable and abominable vice of buggery, committed with either man or beast."

Such wording plainly leaves much to judicial construction. Thus the most common constitutional attack on such sodomy statutes has been their vagueness. No sodomy statute has fallen to such an attack.⁹ State courts, although inconsistent among themselves in their interpretation of similar statutes,¹⁰ have uniformly held that the statute sufficiently defines the offense, usually relying on the common law or on past decisions.¹¹

Another line of constitutional attack, adopted by many commentators, is that sodomy statutes violate individual privacy to an extent unwarranted by legitimate state interest. State courts generally reject these attacks on the grounds that sodomy regulation is a proper legislative function.¹²

The Nebraska Supreme Court has had little opportunity to construe the Nebraska sodomy statute,¹³ as only five sodomy prosecutions have reached that court, the last being in 1948.¹⁴ In none of

⁷ Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Hawaii, Idaho, Indiana, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Tennessee.

⁸ 25 Hen. 8, c. 6 (1533).

⁹ In *Harris v. State*, 457 P.2d 638 (Alas. 1969), the phrase "the crime against nature" as used in the Alaska sodomy statute (ALASKA STAT. § 11.40.120 (1962)) was declared void for vagueness. However, the statute included the word "sodomy" which was held not unconstitutionally vague, thus saving the constitutionality of the statute.

¹⁰ See *Harris v. State*, 457 P.2d 638 (Alas. 1969).

¹¹ *E.g.*, *State v. White*, 217 A.2d 221 (Me. 1966). In *Perkins v. North Carolina*, 234 F. Supp. 333 (W.D.N.C. 1964), it was said that on its face the North Carolina sodomy statute (N.C. GEN. STAT. § 14-177 (1969)) was unconstitutionally vague, but that past decisions of the state courts prevented a holding of unconstitutionality.

¹² *People v. Ragsdale*, 177 Cal. App. 2d 676, 2 Cal. Rptr. 640 (1960); *People v. Rhinehart*, 70 Wash. 2d 649, 424 P.2d 906, cert. denied, 389 U.S. 832 (1967).

¹³ NEB. REV. STAT. § 28-919 (Reissue 1964): "Whoever has carnal copulation with a beast, or in an opening of the body except sexual parts with another human being, shall be guilty of sodomy, and shall be imprisoned in the Nebraska Penal and Correctional Complex not more than twenty years."

¹⁴ *Redmon v. State*, 150 Neb. 62, 33 N.W.2d 349 (1948); *Sledge v. State*, 142 Neb. 350, 6 N.W.2d 76 (1942); *Clark v. State*, 114 Neb. 818, 211 N.W. 16 (1926); *Abbott v. State*, 113 Neb. 517, 204 N.W. 74 (1925); *Kinnan v. State*, 86 Neb. 234, 125 N.W. 594 (1910).

these decisions were constitutional objections to the statute discussed. The court referred obliquely to the propriety of such legislation in *Kinnan v. State*.¹⁵ There the original Nebraska sodomy statute,¹⁶ very similar to the English statute of 1533, was held to exclude acts of fellatio, and a conviction based on such acts was reversed. Having reached its decision, the court commented: "It is to be regretted that acts so infamous and disgusting have not been declared to be a felony by the legislature of this state, and we trust that the lawmakers will speedily remedy this defect."¹⁷

II. THE PRELUDE TO BUCHANAN

The fountainhead from which the *Buchanan* decision eventually sprung was the well-known case of *Griswold v. Connecticut*.¹⁸ In that case a Connecticut statute prohibiting the use of contraceptives was held unconstitutional. The opinion of the court, written by Mr. Justice Douglas and joined by three others, held that the First Amendment "has a penumbra where privacy is protected from governmental intrusion,"¹⁹ and concluded that the marriage relationship is within this penumbra, making marital privacy a constitutional right.

Griswold, with its seeming recognition of a constitutional right of privacy, was quickly seized upon as a weapon against sodomy statutes. Attacks based upon *Griswold* were generally rejected, the courts restricting *Griswold's* application to marital privacy, and holding unmarried defendants to be without standing to raise a constitutional attack.²⁰

In *Cotner v. Henry*,²¹ however, there clearly was no standing problem, for the conviction was based on the accusations of the defendant's wife. The Seventh Circuit was apparently the first court to consider *Griswold's* effect on sodomy statutes, and found in favor

¹⁵ 86 Neb. 234, 125 N.W. 594 (1910).

¹⁶ Law of February 25, 1875, p.26, § 1, [1875] Nebr. Laws 1875 (repealed 1913): "That the infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term not less than one year and my [may] extend to life."

¹⁷ 86 Neb. at 237, 125 N.W. at 595. In 1913 the legislature enacted what is, except for a minor change, the present Nebraska sodomy statute, which covers acts of fellatio. See *Sledge v. State*, 142 Neb. 350, 6 N.W.2d 76 (1942).

¹⁸ 381 U.S. 479 (1965).

¹⁹ *Id.* at 483.

²⁰ *Harris v. State*, 457 P.2d 638 (Alas. 1969); *Jones v. State*, 85 Nev. 411, 456 P.2d 429 (1969).

²¹ 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968).

of the defendant: "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."²² Therefore the Indiana statute under which Cotner was convicted could not be constitutionally interpreted as making private consensual physical relations between married persons a crime in the absence of a showing of state interest in preventing such relationships. The court opined, however, that the statute could be construed by the Indiana courts as being inapplicable to married couples or as prohibiting acts of sodomy between married couples only when accompanied by force.²³ The court then reversed the conviction because Cotner had been allowed to waive his right to a trial and plead guilty without understanding the necessary elements of the charge against him, that is, that an allegation of force was necessary and consent of the spouse was a defense to the charge.

III. THE BUCHANAN DECISION

Alvin L. Buchanan, a confessed homosexual, had twice been arrested and charged with sodomy under Article 524 of the Texas Penal Code, which provides:

Whoever has carnal copulation with a beast, or in an opening of the body except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.

Buchanan requested the designation of a three-judge court to consider his prayers for, *inter alia*, a declaratory judgment on the constitutionality of the statute. The court was of the opinion that there was serious question as to whether Buchanan alone had standing to raise the issue upon which the case eventually turned, the constitutional rights of married couples. Unusual developments, however, eliminated the standing problem. Michael Gibson and his wife Janet were granted leave to intervene, alleging that Buchanan

²² 394 F.2d at 875.

²³ IND. ANN. STAT. § 10-4221 (1956): "Whoever commits the abominable and detestable crime against nature with mankind or beast; or whoever entices, allures, instigates, or aids any person under the age of twenty-one (21) years of age to commit masturbation or self-pollution, shall be deemed guilty of sodomy, and on conviction shall be fined not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1000) to which may be added imprisonment in the state prison not less than two years (2) nor more than fourteen (14) years."

did not sufficiently protect the interest of married persons fearing prosecution for private acts of sodomy. Similarly, Travis Strickland was granted leave to intervene, alleging that Buchanan did not protect the interest of homosexuals who fear prosecution for acts of sodomy committed in private.

The court first rejected the contention that it should abstain from ruling on the constitutionality of the statute until the Texas courts had an opportunity to do so. The first of its two reasons for refusing to abstain was the lack of availability of a state forum where the issues would be litigated; for this proposition the court cited *Dombrowski v. Pfister*²⁴ and *Zwickler v. Koota*.²⁵

The court's second reason for rejecting the abstention argument was that "there exists in Article 524 no question of statutory interpretation for which the courts of this State would be of assistance in resolving."²⁶ The court noted that Article 524 did not distinguish between acts committed in public or in private, homosexual or heterosexual acts, by married or unmarried persons. "Indeed it plainly appears that Article 524 applies to private consensual acts between married persons and private acts of sodomy between homosexuals."²⁷

It will be noted at this point that the *Buchanan* court went a significant step beyond *Cotner*. That decision, dealing with a statute which drew none of the distinctions which were lacking in Article 524, provided that the Indiana courts could construe the statute as being applicable to married couples in the absence of a showing of force, and thus declined to hold it unconstitutional.

The *Buchanan* court also rejected a challenge to the standing of the Gibsons to raise the constitutional rights of married persons. The state pointed out that no married couples had been charged with sodomy under Article 524, and thus the Gibsons had no real fear of future prosecution. As supporting authority, *Poe v. Ullman*²⁸ was relied upon. In *Poe* the plaintiffs sued for a declaratory judgment that certain Connecticut statutes prohibiting the use of contraceptive devices and the giving of advice in their use were un-

²⁴ 380 U.S. 479 (1965). The *Dombrowski* court held that the abstention doctrine is inappropriate where a statute is justifiably attacked on its face as abridging free expression.

²⁵ 389 U.S. 241 (1967). In *Zwickler*, the Court held that to require the plaintiff who has commenced proceedings in federal court to await the determination of a state court action might chill exercise of the very constitutional right he seeks to enforce.

²⁶ 308 F. Supp. at 731.

²⁷ *Id.*

²⁸ 367 U.S. 497 (1961).

constitutional. These statutes had been in existence since 1879 but there had never been a bona fide prosecution under them.²⁹ The Supreme Court dismissed, holding there was no real controversy.

The *Buchanan* court distinguished *Poe* by noting that from 1963 through July 3, 1969, there had been 451 arrests under Article 524 in the city of Dallas alone. From this the court concluded:

While the record does not reveal any arrests of married persons the statute is definitely being enforced and since the Gibbons have admitted being in violation there is a real threat of prosecution from a District Attorney who takes pride in the manner in which he has enforced the law.³⁰

The *Buchanan* court further noted that *Dombrowski*, decided four years subsequent to *Poe*, "clearly holds that where an overbroad statute is on the books there is a 'threat of prosecution.' If *Dombrowski* does not overrule *Poe*, it appears that *Poe* should be strictly construed to limit its effect to the peculiar circumstances of that case."³¹

The *Buchanan* opinion devotes considerably less space to the merits than to matters of standing and justiciability. The state's right to regulate sexual promiscuity or misconduct was recognized, with sodomy being particularly mentioned. However, it was emphasized that such regulation "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."³² Although sodomy was "probably offensive to the vast majority,"³³ that was not sufficient reason for the State to interfere with the physical relationships of married couples. "In conclusion, Article 524 is void on its face for unconstitutional overbreadth insofar as it reaches the private, consensual acts of married couples."³⁴

²⁹ A test case to determine the constitutionality of the statutes was brought in 1940. *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940). After the supreme court of errors held the statutes constitutional, the informations against the defendants were dismissed.

³⁰ 308 F. Supp. at 735.

³¹ *Id.*

³² 308 F. Supp. at 733 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Griswold* in turn quoted *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).

³³ 308 F. Supp. at 733.

³⁴ *Id.* at 735.

IV. IMPLICATIONS OF BUCHANAN

Only two states, New York³⁵ and Illinois,³⁶ have sodomy statutes which are inapplicable to married couples. Thus all other sodomy statutes are vulnerable to attacks based on *Buchanan*. Yet it would not appear that a wholesale judicial nullification of sodomy statutes is in the offing. The *Buchanan* court appeared willing to continue the practice of allowing only married persons to raise the rights of married persons. Therefore, the only cases in which a sodomy statute could be declared unconstitutional under *Buchanan* would be one in which a truculent spouse accuses his mate, as in *Cotner*, or where an interested married couple is allowed to intervene, as in *Buchanan*.

It is noteworthy that the *Buchanan* court did not discuss the claims of Mr. Strickland, the intervener on behalf of homosexuals who "do their thing" in private. A clue to the court's thoughts about Strickland's arguments may be gleaned from the fact that in discussing "cases citing *Griswold* which have some significance in the interpretation of Article 524,"³⁷ the court noted *Travers v. Paton*,³⁸ which held that *Griswold* was only applicable to protect the sexual relations of married couples. At any rate, the court's ruling that Article 524 is unconstitutionally broad because it reached the private acts of married couples would seem to suggest that homosexual acts, and heterosexual acts between unmarried couples, whether committed in public or in private, are proper subjects of prosecution under sodomy statutes.

In thus restricting its interpretation of *Griswold*, the *Buchanan* court followed in the footsteps of numerous other courts which have applied *Griswold*, insofar as sexual relations are concerned, to married couples only.³⁹ This position is strongly indicated by the mar-

³⁵ In New York, "deviate sexual intercourse" within the meaning of the Penal Code applies only to persons not married to each other. See N.Y. PENAL LAW § 130.00 (McKinney 1967). For comment on the New York law, see Plesgrove, *Sex Offenses Under the New Penal Law*, 32 BROOK. L. REV. 274 (1966).

³⁶ ILL. ANN. STAT. ch. 38, art. 11 (Smith-Hurd 1964). The committee comments to article II state: "The Article is not intended to proscribe any sexual conduct between consenting adults unless such conduct adversely affects one of the key interests sought to be protected." For comment on the Illinois law, see Wexler, *Sex Offenses Under the New Criminal Code*, 51 ILL. B.J. 152 (1962); Note, *Deviate Sexual Behavior Under the New Illinois Criminal Code*, 1965 WASH. U.L.Q. 220.

³⁷ 308 F. Supp. at 732.

³⁸ 261 F. Supp. 110 (D.C. Conn. 1966).

³⁹ In *Sturgis v. Attorney General*, —Mass.—, 260 N.E.2d 687, 690 (1970), it was held that *Griswold* "affirmed 'beyond doubt' the right of the state . . . to enact statutes regulating the private sexual lives of single

majority opinions in the *Griswold* decision. Justice Douglas, writing the opinion of the court, was careful to confine the ground for decision to the right of marital privacy. Justice Goldberg, joined by Justice Brennan and Chief Justice Warren in a concurring opinion, concluded by pointing out that this decision "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."⁴⁰ Justice White noted in his opinion that "the State's policy against all forms of promiscuity or illicit sexual relationships, be they premarital or extramarital," is "concededly a permissible and legitimate legislative goal."⁴¹ Justice Harlan adopted his dissenting opinion in *Poe v. Ullman* in which he said:

[T]o attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.⁴²

Obviously the "right of privacy" which the Court found implied in the Constitution cannot be without limitation, and it seems clear that the Court believed that the right to privacy in sexual matters did not extend beyond the marriage relation. Thus, no direct authority is present in *Griswold* for a holding that unmarried couples, be they homosexual or heterosexual, are free to do as they please without regard to statutory regulation.

The state of the law after *Buchanan*, while an improvement over past law, remains unsatisfactory. The impact of the decision is to extend governmental protection to various physical activities when carried out by members of one class, married couples, while denying this protection to those who are not of that class. The easy justification for this discrimination has always been the government's interest in protecting the marriage relationship, "the foundation of the family and of society, without which there would be

persons" See also *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966); *Travers v. Paton*, 261 F. Supp. 110 (D.C. Conn. 1966); *People v. Hurd*, 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (1970); *People v. Frazier*, 256 Cal. App. 2d 631, 64 Cal. Rptr. 447 (1968); *People v. Roberts*, 256 Cal. App. 2d 488, 64 Cal. Rptr. 70 (1967); *Jones v. State*, 85 Nev. 411, 456 P.2d 429 (1969).

⁴⁰ 381 U.S. at 498-99.

⁴¹ *Id.* at 505.

⁴² 367 U.S. at 546.

neither civilization nor progress."⁴³ In the light of contemporary questioning as to whether the traditional man-woman relationship really does or should occupy this exalted status in our society,⁴⁴ it is highly questionable whether membership in the class of married persons is a proper basis for discrimination under the criminal law.

However, *Buchanan* provides a tool with which to attack sodomy statutes, one aspect of this discrimination. Married couples could intervene in other actions as the Gibsons did in *Buchanan*, and, with the *Buchanan* decision as precedent, the chances of having almost any sodomy statute declared unconstitutional would appear to be good. The specter of this happening may motivate state legislatures to remodel their sodomy statutes to conform to constitutional requirements. If in the process there is some thoughtful consideration of the proper relationship of sex and the criminal law, the effect of *Buchanan* will be one for which future generations can be grateful.

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⁴³ *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

⁴⁴ See *TIME*, Dec. 28, 1970, at 34.

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