Oral Copulation: A Constitutional Curtain Must Be Drawn

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INTRODUCTION

In relevant portions, California Penal Code Section 288 (a) states that any persons participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding 15 years. The statute does not distinguish between acts committed in private and acts committed in public or acts committed by spouses and acts committed by persons not married to one another. Furthermore, this provision fails to provide for the affirmative defense of consent and thus, it does contemplate the prosecution of both adult participants in the same act, even if both parties consented to the act.

In the exercise of its police power, each state has the right to enact laws to promote public health, safety, morals, and welfare. Traditionally, it has been recognized that penal statutes proscribing illicit sexual contacts constitute a legitimate and proper exercise of that power. In support of the contention that Section 288(a) is a valid exercise of its police power, the government has advanced certain interests, e.g., the protection of the young from sexual assault, the protection of public decency, and the prevention of the spread of venereal disease, which, if achieved by the statute, would tend to promote public health, safety, morals and welfare. It is the purpose of this article to determine whether these legitimate and substantial interests are of such a compelling nature as to justify the governmental infringement upon an individual's fundamental right to privacy as protected by the penumbra of specific guarantees of the First, Third, Fourth, Fifth and Ninth Amendments as incorporated in the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In addition to, and in light of, recent judicial expressions of opinions concerning separate and dis-

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1. CAL. PEN. CODE § 288(a) (West 1972).
tinct constitutional issues, this article will additionally explore the merits of the contention that Section 288(a), since it is based largely on Judeo-Christian principles of morality, is in violation of the Establishment-of-Religion Clause of the First Amendment of the United States Constitution.

THE RIGHT TO PRIVACY

The Supreme Court of the United States, over many years, and in a variety of decisions, has interpreted the Constitution to protect rights relating to sex and child bearing, marriage, and child rearing. In 1964, in *Griswold v. Connecticut*, the Supreme Court located the source of "zones of privacy" immune from governmental intrusion in the penumbras of specific guarantees of the Bill of Rights, "formed by emanations from those guarantees that help give them life and substance" and in the Ninth Amendment’s reservation of rights to the people. The Court in *Griswold*, in light of the particular facts of the case before it, couched the opinion in terms of marital privacy and concluded that the State's regulation of the use of contraceptives violated defendants' right to privacy as protected by the Constitution. In his concurring opinion, Justice Goldberg agreed that the concept of liberty protected those personal rights that are fundamental. He then determined that the language and history of the Ninth Amendment dictated that the concept of liberty is not so restricted so as to be confined to the specific terms of the Bill of Rights and concluded that, [to hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.]

That the protected area of privacy accorded to husband and wife includes sexual practices other than contraception has been recognized by various state and federal courts. The United States Court of Appeals, Seventh Circuit, by interpreting the *Griswold* decision as dictating that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty,

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8. Id. at 484.
9. Id. at 491 (Goldberg, J., concurring).
concluded that under Griswold, Indiana courts could not constitutionally interpret the Indiana sodomy statute as making private consensual physical relations between married persons a crime absent a clear showing that the state had an interest in preventing such relations which outweighed the constitutional right to privacy.\textsuperscript{11} In Buchanan v. Batchelor,\textsuperscript{12} a three judge District Court recognized that sodomy is such conduct which does not have the approval of the majority of the people and which is probably offensive to the vast majority, but, in the absence of some demonstrable necessity, such opinion is not sufficient reason for the state to encroach upon the liberty of married persons in their private conduct.

In light of these recent federal and state court decisions it would be proper to conclude that Section 288(a), as applied to atypical sexual behavior\textsuperscript{13} between consenting married individuals in private, is an unjustified invasion of the married individuals' constitutional right to privacy.\textsuperscript{14}

Does this constitutional right of privacy announced in Griswold inhere only in a member of a marital relationship, or does the Griswold rationale extend beyond the facts of that case so as to provide a constitutional right to privacy in sexual relations regardless of marital status? Several Supreme Court decisions indicate that the right does inhere in the individual, and not merely in the marital entity or its members. In Skinner v. Oklahoma,\textsuperscript{15} the Supreme Court concerned itself with the question of whether an Oklahoma statute, which provided for the sterilization of one criminal and not another where both had been convicted of offenses which were intrinsically of the same quality, was in violation of the Equal Protection Clause of the Fourteenth Amendment. In concluding that the statute was in violation of the Amendment, the Court held that procreation is fundamental to the very existence and survival

\textsuperscript{11} Id. at 875.
\textsuperscript{13} For purposes of this article, typical sexual behavior will be defined as genital-to-genital intercourse.
\textsuperscript{14} See People v. Wilson, No. A109940 (Superior Court of California, Los Angeles County) (1971), where Judge Landis concluded that Section 288(a) was unconstitutional as it applied to the private consensual conduct of a married couple where such conduct harmed neither party nor any third person.
\textsuperscript{15} 316 U.S. 535 (1942).
of the race without making any distinction as to a married or single person's right to procreate.\textsuperscript{16} In Stanley v. Georgia,\textsuperscript{17} the Court recognized that the state retains broad power to regulate obscenity, but the Court stated, "[f]or also fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy."\textsuperscript{18} On this basis, the Court concluded that the First and Fourteenth Amendments prohibited that power from extending to mere possession by the individual in the privacy of his own home.

In yet another line of cases, the courts have seemingly recognized that this constitutional right of privacy does in fact inhere in the individual, rather than solely in a member of a marital entity. The Supreme Court, in Roe v. Wade,\textsuperscript{19} determined that the right of privacy was broad enough to encompass a woman's decision whether or not to terminate her pregnancy. Earlier, the California Supreme Court, in People v. Belous,\textsuperscript{20} recognized that the fundamental right of the woman to choose whether to bear children followed from the Supreme Court of the United States and the Supreme Court of California's repeated acknowledgement of a right of privacy or liberty in matters relating to marriage, family, and sex. Thus, the court reasoned that a state statute which regulated the ability of a doctor to perform an abortion was a direct infringement of constitutional rights which could not be justified where the abortion was sought during the first trimester. The significance of the rulings in each of these "abortion decisions" is that the courts found that the privacy interest of a woman with regard to the control of her body in reproduction did not turn on the marital status of the woman.\textsuperscript{21} Implicit in these decisions is a willingness on the part of the courts to take cognizance of the fact that the right to sexual privacy encompasses the right of the individual to control the use and function of his or her own body.

Finally, in Eisenstadt v. Baird,\textsuperscript{22} the Supreme Court, in an attempt to dispel any doubt as to whether the right of privacy was limited to the concept of "marital privacy," firmly established that the right of privacy inhere in the individual by stating:

\textit{It is true that in Griswold the right of privacy in question inhere in the marital relationship. Yet the marital couple is not an inde-}

\textsuperscript{16} Id. at 541.
\textsuperscript{17} 394 U.S. 557 (1969).
\textsuperscript{18} Id. at 564.
\textsuperscript{21} In fact, the woman seeking the abortion in Roe v. Wade, 410 U.S. 113 (1973), was unmarried.
\textsuperscript{22} 405 U.S. 438 (1972).
pendent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion. ... 23

In Eisenstadt, the Court was concerned with whether there existed a recognizable state interest or ground of difference that rationally explained the different treatment accorded married and unmarried persons under the Massachusetts distribution-of-contraception law. After determining that a recognizable difference did not exist, the Court then reasoned that, under the rationale of Griswold, the right of privacy inhered in the individual, regardless of his or her marital status; whatever the rights of the individual might be, the rights must be the same for the unmarried and married alike. Thus, by providing dissimilar treatment for married and unmarried persons who were similarly situated, the Massachusetts statute violated the Equal Protection Clause of the Fourteenth Amendment. 24

While it is true, however, that the Eisenstadt decision literally rests on the Equal Protection Clause, analytically, the equal protection argument is an extension of a finding that the statute was in violation of the Due Process Clause. Any statute which violates the due process rights of a class of similarly situated persons necessarily violates the Equal Protection Clause when applied to only part of that class. In Eisenstadt then, the Court not only recognized the fact that Griswold dictated that the fundamental right to privacy in matters relating to sex, as protected by the Due Process Clause of the Fourteenth Amendment, inhered in a member of an existing marital relationship, but also that the Due Process and Equal Protection Clauses of the Fourteenth Amendment required that this fundamental right to sexual privacy be granted to unmarried persons. The importance of this extension of the Griswold decision is that a broad regulation of sexual conduct such as Section 288(a) cannot be saved constitutionally by excluding from its scope only the private consensual acts between individuals in a marital relationship. 25

23. Id. at 453.

24. Id.

25. See People v. Schwarz, No. A282165 (Superior Court of California, Los Angeles County) (1972), where on similar reasoning, Judge Dell concluded that Section 288(a) must fall under the Equal Protection Clause of the Fourteenth Amendment. See also, People v. Drolet, 30 Cal. App. 3d 207,
The right to privacy in matters relating to marriage, procreation, and sexual activity is a fundamental right. Although the courts do not sit as a super-legislative body to determine the desirability or propriety of laws enacted by the legislature, the courts have consistently held that the Constitution requires that where the exercise of fundamental rights is inhibited, the state may prevail only upon showing a subordinating interest which is compelling.

Although one Justice of the Supreme Court of the United States has already expressed doubt as to whether a state may constitutionally assert an interest in regulating any sexual act between consenting adults, and dicta to the same effect can be found in the decisions of both state and federal courts, it would seem reasonable to assume that California could assert certain legitimate interests in the regulation of atypical sexual activity between consenting adults. The scope of inquiry then focuses on whether these interests are of such a nature so as to outweigh the individual's right to sexual privacy as guaranteed and protected by the Constitution.

The interests most often advanced for the retention of criminal sanctions for the sexual act of oral copulation are the protection of public decency, the protection of the young from forcible sexual assault, and the prevention of the spread of venereal disease. Al-
though these considerations are recognized as valid state interests, this alone should not be sufficient for the statute to withstand a constitutional attack. Even though governmental purposes be legitimate and substantial, those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.33

By definition, public decency cannot be offended by private consensual acts between adults. If the particular challenged conduct is public in nature it is reasonable to conclude, in light of the threat of harm to the community, that the state does have a compelling interest in the regulation of this conduct which outweighs the individual's right to privacy. In addition, the individual will be left with the reasonable alternative of choosing to engage in this conduct in private. Therefore, the government interest in protecting public decency can be achieved by alternate means which would not affect the individual's fundamental right to privacy, i.e. a statute which makes criminal the public display of the act of oral copulation or the public solicitation of the act. However, the broad scope of Section 288(a) includes conduct which is private in nature and which does not result in the exposure of indecency to the public. Under these circumstances, the right of the individual to sexual privacy outweighs the state interest in the need to control such activity.34

Although it is true that the protection of the young from harmful sexual activity is a substantial and legitimate state interest, Section 288(a) does not restrict itself to the regulation of activity "forced" upon a minor but rather, the scope of the statute is such as to permit the state to regulate the constitutionally protected activity of consenting adults. A report made in England and later submitted to Parliament35 pointed out that a man who has homo-

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34. See In re Labady, 326 F. Supp. 924, 927 (S.D.N.Y. 1971) for similar language. See also A.L.I. Model Penal Code (Tentative Draft No. 4, 1955) at 277 which provides, "No harm to the secular interest of the community is involved in atypical sex practice in private between consenting adult partners."
35. Great Britain Comm. on Homosexual Offences and Prostitution Report, C.M.D. No. 247 (1957), also known as the Wolfenden Report.
sexual relations with an adult partner seldom turns to boys, and vice versa. Schur, in his book on homosexuality, emphasized that it is not clear why elimination of the legal ban on the private acts of consenting adults should increase the dangers of seduction. He concluded that since acts with like-minded adults would become somewhat freer, acts with minors might be expected to decrease.

It is also noteworthy to point out that several existing provisions of the California Penal Code have attempted to achieve this state objective of the protection of the young from harmful sexual activity by making unlawful the commission of lewd acts upon a child under fourteen, carnal abuse of a female under ten, the annoyance or the molestation of a child under eighteen, the abduction of a woman, the seduction or taking of a female for the purposes of prostitution, and sexual intercourse with a female under the age of eighteen.

The primary health interest advanced by the State in support of Section 288(a) is the prevention of the spread of venereal disease. To date, the government has been unable to offer the slightest scintilla of evidence that the incidence of venereal disease is higher among those who engage in atypical sexual acts than among those who do not. In fact, it has been found that nothing in present enforcement practices holds any potential for mitigating venereal disease among those who commit such acts. However, even if the government could produce evidence sufficient to persuade the courts that atypical sexual activity is a major cause of the spread of venereal disease, it is readily apparent that the state could just as effectively control this danger by resorting to reasonable alternative methods which would not infringe upon the individual's right to sexual privacy. Public health information distribution and treatment centers would seem to be a more satisfactory solution to the problem.

**The Establishment-of-Religion Clause**

In Western civilization, the repressive treatment of atypical sexual behavior as a crime is a direct legacy of the Judeo-Christian
view of sodomy as a sin. The very term “sodomy” comes from the biblical account of the destruction of the city of Sodom. The most forceful biblical proscriptions against homosexuality are: “Thou shalt not lie with mankind, as with womankind: it is an abomination” and “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination. They shall surely be put to death; their blood shall be upon them.”

Activities involving atypical sexual behavior were not a crime according to early common law, and jurisdiction of these offenses was left to the ecclesiastical courts. It was not until the sixteenth century that this form of activity became an offense cognizable in the civil courts, but the religious character of the offense continued to be recognized.

Recently some courts have adopted this line of reasoning in challenging the validity of statutes which regulated this form of adult sexual behavior. The Supreme Court of Alaska, in ruling the state sodomy statute unconstitutional for vagueness, cited the religious history and background of the crime of sodomy as a possible ground for an attack on its constitutionality based on the Establishment-of-Religion clause. In a recent New Mexico case, a dissenting judge stated,

The sodomy statute reflects a Judeo-Christian principle. Sodomy is deemed sinful and wrongful as a matter of theology. The prohibition is religious in origin and no secular justification exists for enforcement of this religious principle beyond the areas set forth in the Model Penal Code. Neither the legislature nor the courts have the power to impose with ecclesiastical fury religious principles upon ordinary innocent adults.

This line of attack has, arguably, the following constitutional basis. In Everson v. Board of Education, the Supreme Court of

46. GENESIS 19.
47. LEVITICUS 18:22.
49. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 216. (W. Lewis, Ed. 1900).
50. Id. at § 215.
52. State v. Trejo, 494 P.2d 173 (N.M. 1972). See also A.L.I. Model Penal Code (Tentative Draft No. 4, 1955) at 277 which states that this area of private morals is the distinctive concern of spiritual authorities.
the United States determined that the Establishment Clause meant at least that neither a state nor the federal government can set up a church and neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. By regulating atypical sexual behavior pursuant to Section 288(a), the State of California has passed a law which prefers the Judeo-Christian view toward this form of behavior. In McGowan v. Maryland, the Court declared that a law violates the Establishment Clause if its purposes are to use the State's coercive power to aid religion. Again, the argument can be made that Section 288(a) is a means by which the State is aiding the Judeo-Christian religions. Finally, in Lemon v. Kurtzman, the Court reaffirmed these prior tests and then went further by stating that a statute violates the Establishment Clause unless it satisfies all of the following requirements: (1) the statute must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and, (3) the statute must not foster an excessive governmental entanglement with religion. In light of the religious and historical information which has been set forth above, it would seem reasonable to conclude that the principal and/or primary effect of Section 288(a) is to advance Judeo-Christian beliefs and foster an excessive governmental entanglement with Judeo-Christian principles.

The above attack based upon the Establishment Clause is fallacious. The Establishment Clause cases cited above, with the exception of McGowan, were concerned with the use of tax proceeds for purposes of promoting religious education and are not apposite. In McGowan the Court indicated that, insofar as police statutes are concerned, they will not be invalidated under the Establishment Clause unless they serve no valid secular purpose or serve one only by means of compelling specific religious practices. Moreover, if a statute serves no valid secular purpose, then it will be deemed to be unconstitutional regardless of whether it serves a religious purpose. If, on the other hand, a valid secular purpose exists, the statute will not be invalidated simply because it coincides with religious tenets of some or all religions. Furthermore, it is not constitutionally proper to use relevant religious and historical information as the basis of a contention that, since this statute is so substantially based on Judeo-Christian notions of sexual moral-

56. 403 U.S. 602 (1971).
57. Id. at 612–13.
59. Id. at 442.
ity, then it must logically follow that this same statute does not serve any valid secular purpose. The religious origin of this statute is thus constitutionally irrelevant.

LIMITATIONS ON THE EXTENT OF STATE REGULATION

The arguments have already been made in support of the contention that Section 288(a) is unconstitutionally overbroad in that it is an attempt by the State to regulate atypical sexual behavior between consenting adults in private and as such constitutes an unconstitutional infringement on the individual’s fundamental right of privacy in matters relating to sex. Logically then, the next step is to inquire as to whether the state can constitutionally regulate any atypical sexual conduct involving consenting adults, and if so, to what extent. In one of the companion cases involved in the recent landmark obscenity decisions, 60 Paris Adult Theatre v. Lewis Slaton, Mr. Chief Justice Burger, speaking for a majority of the Court, stated that “for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, that [sic] is a step we are unable to take.” 61 However, Mr. Burger did acknowledge the fact that this fundamental right of privacy is not just concerned with a particular place, but with a protected intimate relationship, 62 and as such extended to the doctor’s office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved. 63

At what point can the state begin to regulate this form of conduct? It would appear reasonable to conclude that, at a minimum, the state could regulate the commission of atypical sexual behavior between consenting adults when the activity is conducted on commercial premises open to the public and within the plain view of the public. 64 The real problem develops when we consider the situation where two consenting adults are engaging in atypical sexual

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60. 41 U.S.L.W. 4935 (1973).
61. Id. at 4941.
62. Id. at 4940, n.13.
63. Id.
64. Id. at 4941. See also the language of Chief Justice Burger at 4940, n.13 where he states that “[o]bviously there is no necessary or legitimate expectation of privacy which would extend to marital intercourse on a street corner . . . .”
behavior, not in the confines of a bedroom in a home or in a hotel room, but rather in circumstances such as a parked car in a deserted drive-in movie theatre, or in a sleeping bag in the middle of a secluded forest, or in a small boat in an area of water not close to the public docking area. In United States v. Doe, the Court was confronted with this type of problem. There, the two defendants had engaged in atypical sexual behavior in a secluded area of a public park. The Court concluded that the constitutional right of privacy extends to individuals engaging in atypical sexual behavior in a quasi-public area (where the activity is not conducted within the plain view of the public and where no member of the public is harmed by the activity). This author endorses that Court's extension of the constitutionally protected zone of privacy which strikes an appropriate balance between the important competing private and public interests involved.

**Conclusion**

Since Griswold, there has not only developed a considerable body of legal precedent in support of the contention that the scope of laws pertaining to sexual morality should be limited; there has also developed a considerable change of attitude on the part of the public in matters relating to sex as well as the appearance of various studies which have questioned the states' ability to regulate this form of human behavior. It is the hope of this author that the Legislature or, if necessary, the courts, will limit Section 288(a) to bring it into harmony with the spirit of the Constitution and the mores of the people.

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