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People v. Onofre:
Can the State Peek Into Your Bedroom?

By Matthew Thomas Robinson

Without fanfare, a social/sexual revolution has taken place this year in Western New York. In a thoughtful opinion by Justice Doerr of the Supreme Court, Appellate Division, Fourth Department, §130.38 of the Penal Law of the State of New York was declared violative of both the State and the Federal Constitutions. The noteworthy case, People v. Onofre, 72 A.D. 2d 268 (1980), deals directly with the important question of State regulation of activity involving consenting adults in private. The issue, while important to us all, is critically important to both the gay and lesbian communities. The decision was hailed by Susan Cowell of the Gay Alliance of Genesee Valley as "...something we've worked hard for. It's a major victory." (Rochester Democrat and Chronicle, 1/25/80).

On April 29, 1977, Ronald Onofre was charged with, among other things, the crime of consensual sodomy. Section 130.38 of the Penal Code provides that "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person." Deviate sexual intercourse is defined in §130.00 (2) as "...contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva." The statute clearly prohibits homosexual activity as well as various forms of common heterosexual conduct, but only to the extent that the heterosexual conduct is between unmarried persons. The prohibition is not limited to public conduct, but extends as well to the sanctity of the bedroom.

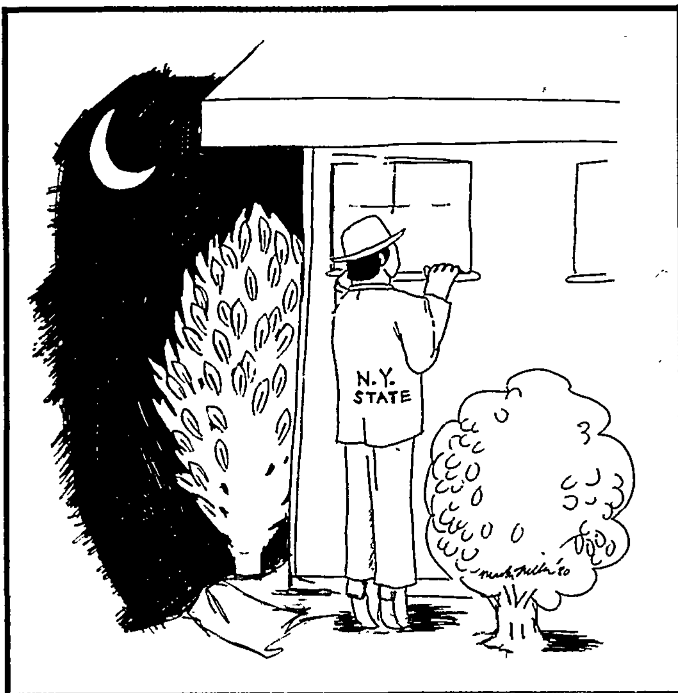
Onofre provided an ideal setting in which the courts in this state could review a controversial law in the light of changing social attitudes and mores. The facts of the case were not in dispute and the defendant pleaded guilty at the trial level. Ronald Onofre was convicted of the crime of engaging in "deviate sexual intercourse" with another man in the privacy of his own bedroom. The act was engaged in by competent, consenting adults.

On appeal, both Onofre and the People identified five basic issues for the court to decide. The first was whether a United States Supreme Court's decision in Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199 (1975), affirmed without opinion 425 U.S. 901 (1976), is controlling authority in this case. Doe was a civil action seeking a declaratory judgment and permanent injunction from prosecution under a Virginia statute similar to section 130.38 brought by a gay community group in Richmond. The Supreme Court refused to overturn the lower court's decision but did not deliver an opinion. The People argued that Doe was binding on the New York Court because the situation was sufficiently similar to the one presented by Onofre. The court, however, agreed with Onofre that Doe was distinguishable on several important points. The court noted that Doe was a civil case, not involving a criminal conviction and that the action asked for an injunction from prosecution, not a declaration of constitutionality. Judge Doerr pointed out that there is a very different situation where appeal is from an actual conviction of a crime, requiring a substantially greater degree of scrutiny than where the action is civil seeking only injunctive relief.

A second issue raised on appeal involved a possible violation of the Establishment Clause. The First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Article I, Section 3 of the New York State Constitution bar the intrusion of religious matters into government activities. Onofre argued that the law was, at least in part, religiously motivated by pointing to the history of anit-sodomy "statutes" and "laws" throughout the fundamentalist Judeo-Christian heritage. The People posited that the law (the current statute enacted in 1967) was not religiously based, that the proscribed activity is generally morally reprehensible. Onofre then tied the enactment of the statute to a religious purpose extensively citing the legislative history of the law. Interestingly, the Bartlett Commission (set up to make recommendations to the State Legislature regarding the passage of the new penal code) in 1964 found that "criminal prosecution [for] several acts privately and discreetly engaged in between competent, consenting adults serves no salutory purpose." However, the influence of religiously based opposition proved potent enough that the Legislature disregarded the earlier recommendation of the Bartlett Commission. One witness, testifying on behalf of the Roman Catholic Church with regard to the passage of the new Penal Code, urged that consensual sodomy must remain a crime because: "We

must take every reasonable step to inhibit [homosexuality's] spread and to eradicate it."

A third, and perhaps the most important issue raised was one of privacy. An Amicus Curiae brief, submitted for Onofre by the National Committee for Sexual Civil Liberties, pointed out that wording in the New York State Constitution (Article I, Sections 3, 6, 8, 9, 11, 12) guarantees similar fundamental rights to privacy that have been "read into" the Federal Constitution. Onofre contended that the fundamental right to privacy prevents the State from entering his bedroom to regulate private activity between consenting adults. The Supreme Court has developed and articulated the modern right to privacy over the past 16 years. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court recognized a privacy right of married couples to make decisions on the use of contraceptives. This decision made it clear that there existed a sacred "zone of privacy" into which the State may not intrude. Stanley v. Georgia, 394 U.S. 557 (1969), extended the privacy right to the possession of obscene material for the purpose of sexual stimulation in the seclusion of one's own home. It would seem that the Court is making clear that an individual has the right to make basic, personal decisions affecting him/herself, free from unwarranted governmental intrusions. Finally, in Eisenstadt v. Baird, 405 U.S. 438 (1972), the Supreme Court extended those "penumbral rights" established in Griswold and expanded in Stanley concerning fundamental decisions affecting their bodies, to unmarried persons making procreation judgements. Onofre contended that the privacy right prohibited the State from intruding into decisions concerning the control of his own body in personal relationships. He asserted that the rights of privacy and liberty guarantee personal autonomy for the individual. Further, Onofre argued that his home is to be afforded a special sanctity and reverence.



The State responded that the cases Onofre relied on were inapplicable because of significant factual differences (i.e., Griswold and Eisenstadt both focus on the question of bearing children). The People urge that to expand the right of privacy to two homosexuals who wish to engage in consensual sodomy, even in the seclusion of their own home, would be an unwarranted expansion. The State further contended that "the right of privacy does not apply to the crime of consensual sodomy." (emphasis in original)

Justice Doerr declared that "Personal sexual conduct is a fundamental right protected by the right to privacy because of the transcendental importance of sex to the human condition, the intimacy of the conduct, and its relationship to a person's right to control his own body..." The court found that the privacy right was broad enough to include sexual acts between non-married persons, including intimate, consensual homosexual conduct. Justice Doerr admonished that the decision, with respect to the privacy issue, must be very strictly construed. He emphasized that we can not lose sight of the fact that we deal here with two competent, mutually consenting adults in the privacy of their own home.

The fourth issue raised by Onofre involved Equal Protection. The right of Equal Protection afforded under the New York State and the United States Constitutions is the same. Onofre asserted that under the statute he is not afforded the same protection as, for example, married couples. The statute specifically makes illegal conduct that would be legal if carried out by a married couple. This is a distinction not permitted by Eisenstadt. The amicus brief also pointed out that "No one can seriously suggest that any questions of health are involved; presumably married persons who engage in acts of sodomy are no more threatened than unmarried persons who refrain from doing so." The People assert that the distinction between married persons and non-married persons is a valid one as a means "to uphold the societal interest in the basic institution of marriage..."

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Finally, there is a Due Process argument, not easily understood, embracing both the privacy and the Equal Protection issues. Onofre contended that the statute is both unreasonable and arbitrary because it does not afford him the due process of law guaranteed by the Constitution. The State contended that the statute does not violate any due process rights because it is a reflection of the general population's "sincere moral conviction that consensul sodomy is unacceptable..." The State pointed to the fact that there have been numerous efforts in the legislature to remove the statute from the books and all have failed.

In ruling on the constitutionality of a statute, such as §130.38, the court must take into account the interests of both the State and the individual. Here, for example, the State may claim that the statute serves to help insure the health and safety of the citizenry, promote the institutions of marriage and the family, as well as to generally promote morality. Justice Doerr rather summarily dismisses these State contentions in his opinion as being superficial and unsubstantiated. He sensitively pointed out that "Equally important in the community of man would seem to be some degree of toleration of ideas and moral choices with which one disagrees." The interest of Onofre and countless thousands of unmarried gay and straight citizens is freedom from governmental intrusion into the most private and intimate activity in which they may choose to engage.

In a telephone conversation, Justice Doerr reiterated his opinion that with regard to personal, private, consensual conduct or sexual activity, it is not the province of the State to regulate. The State has no legitimate interest in this type of regulation. He stressed, however, that the opinion was to be narrowly construed. When asked whether or not it was the job of the courts to make such a finding when the Legislature has not seen fit to remove the statute from the books after repeated attempts, he firmly replied it was, in a situation like that presented by Onofre.

After a finding by the Appellate Division that the statute was unconstitutional, the State decided to appeal to the highest court in New York State, the Court of Appeals. The case, joined with some other similar cases, was argued before the Court of Appeals on October 8, 1980. A decision is expected virtually any day now (it may have been handed down prior to publication). Judge Doerr expressed confidence that if the Court of Appeals reached the merits of the case, that the Appellate Division decision would stand. Unfortunately, a procedural technicality (having to do with the right of appeal in New York State of one who has plead guilty to a charge) may prevent the court from reaching the merits of the case. In the interest of stare decisis, the Court of Appeals may be required to reverse the Appellate Division decision. In any event it is hoped that the other cases argued with Onofre will permit the court to rule on the merits of Onofre.

People v. Onofre is an interesting and an important case to us all. It is important, if not for the right to freedom of private sexual preference, then for the reemphasis of the idea that a tyranny of the majority will not be tolerated in this State. We must never lose sight of the fact that we deal with human beings and human emotion. It is peculiarly the province of the law and of lawyers, in balancing the factors involved in any given situation, to fashion the working rules under which we deal with each other on a day to day basis. The attitudes of society are constantly changing, now perhaps more and faster than ever. The law ought to keep abreast of, and be sensitive to those changes. It must be cognizant of what is myth and what is reality in our world.

Robert Abrams in his capacity as Attorney General of the State of New York made these remarks opening a 1979 conference at the New York University School of Law entitled "Law and the Fight for Gay Rights":

> The issue of privacy, when broadly defined, should encompass the right to one's life uninhibited, no matter how controversial or conventionally unacceptable that lifestyle is. Defined this way, the right of privacy is a central issue for the gay community. It is a central issue for racial, ethnic, and religious communities and for women. Intense opposition to all of these groups often focuses on the right of individual members to make personal life style decisions unacceptable to the majority...Thus, this broadly defined privacy right is of concern to each of these groups. It is a common interest in which all are linked and around which all could join forces to achieve the basic rights that each is seeking. (emphasis added)

For better or worse, all who are unmarried fall under the purview of section 130.38 of the Penal Law. We ought to look forward to a forthcoming ruling by the Court of Appeals. ●