

MAN, HIS DOG AND BIRTH CONTROL: A STUDY IN COMPARATIVE RIGHTS

THE recent development of oral contraceptives for dogs¹ presents a new question concerning the scope of the Connecticut birth control statute.² The drug, known as prodox,³ has a twofold effect; it reduces the bitch's⁴ desire to engage in sexual intercourse;⁵ and it prevents conception should intercourse occur despite the reduced desire.⁶ Preventing procreative intercourse by reducing desire is a form of involuntary abstinence, not a form of proscribed contraception. Hence, if reduced desire were the only result of administering the drug no violation of the Connecticut statute would occur. But since administering the drug may result in artificial contraception in any given case, presumably it falls under the statutory proscription.

The statute, however, should not be read to allow direct prosecution of bitches, although they are privy to the forbidden act. Not only is the drug not self administered, but arguably it is administered against the will of the bitch. For, if given the opportunity, she would undoubtedly object to an act which, in effect, rendered her sexually unappealing,⁷ thereby depriving her of a considerable portion of her neighborhood consortium. Generally, no personal responsi-

1. New York Times, April 14, 1961, p. 31, col. 1.

2. CONN. GEN. STAT. REV. § 53-32 (1958). The statute provides that any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned.

It is implemented by a general accessory statute which provides that "any person who assists, abets, counsels, causes, hires, or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." CONN. GEN. STAT. REV. § 54-196 (1958). Application to certain classes of humans has previously been questioned. See note 16 *infra*.

3. The compound is a synthetic version of progesterone, one of the hormones that regulates the female reproductive cycle and prepares the organs for pregnancy. Prodox, according to Dr. Stocking, director of the Upjohn Company's veterinary division, has been 100% effective in preventing estrus in trials that lasted up to two years. It is expected that the drug will be made available through prescription at a nominal cost to interested dog owners New York Times, *supra* note 1.

4. The drug is also being tried on cats, and trials have shown it to be effective. See New York Times, note 1 *supra*. Discussion here, however, will be limited to dogs. Since oral contraceptives for cats are not available to the public, consideration at this point would be premature and of academic interest only.

5. The drug, by suppressing heat, will inhibit the menstruation cycle of the bitch. As any dog-follower knows, it is this menstrual fluid which arouses the sexual instincts of the male. Conversely, suppression of the cycle reduces sexual desire in the female.

6. Undoubtedly, there will be those of the species lusty enough to overcome by force of will and desire these medicinal inhibitions.

7. Cf. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 642-87 (Philadelphia & London ed. 1953).

bility attaches to an involuntary act.⁸ Moreover, the administrator of the drug must be a "person"⁹ to come under the proscriptive language of the statute, and although Connecticut has broadly construed the term person to extend to corporations, labor unions and other inanimate bodies,¹⁰ it has never recognized the dog as a "person" (unless incorporated, of course).¹¹ Finally, a long line of cases holds that criminal guilt will not attach to those incapable of understanding the nature and quality of the act proscribed.¹² Therefore, the successful prosecution of bitches seems unlikely.¹³

Furthermore, it could be argued that the statute does not even apply to dog owners, on the ground that the Legislature intended to regulate only human sexual activity. Since dog contraception is but a recent development, it was clearly not contemplated by the legislature at the time of the statute's enactment. But this fact alone need not be determinative. Situations unforeseen by legislators will always arise and make it necessary for courts to engage in what Mr. Justice Cardozo denominated "interstitial legislation."¹⁴ The Connecticut statute has survived six general revisions, repeated attempts at amendment and repeal and even thoughtful criticism by our most learned legal journals.¹⁵ This history, together with repeated judicial refusals to modify the blanket statutory prohibitions,¹⁶ strongly suggests that the enactment will be read as proscribing any device which prevents any conception. Moreover, because of the paucity of enforcement against humans,¹⁷ retention of the statute as presently construed serves only to produce contempt for the law.¹⁸ If construed to

8. See, e.g., ALI MODEL PENAL CODE § 2.01(1) (Tent. Draft No. 4, 1955).

9. See note 2 *supra*.

10. See, e.g., *Rosenthal v. Dunplay*, 18 Conn. Supp. 271 (1953); *Connecticut Brewing Co. v. Murphy*, 81 Conn. 145, 70 Atl. 450 (1908).

11. Few dogs are incorporated.

12. See, e.g., *M'Naghten's Case*, 10 Cl. & Fin. 200 (H.L. 1843); *Commonwealth v. Novak*, 399 Pa. 199, 150 A.2d 102 (1959). *But cf.* *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) (conviction possible unless mental disease or defect present) and the paucity of dog psychiatrists would make it difficult to obtain expert testimony in a Durham jurisdiction.

True, it is said that in 1594 a dog was found guilty in a court of law in Leyden, Holland, executed by hanging before a cheering populace and then drawn and quartered. But Holland is a civil-law jurisdiction.

13. Even assuming, *arguendo*, the possibility of successful prosecution, the fact that most dogs are judgment proof, i.e., have few assets of any monetary value, would go far toward rendering a conviction nugatory.

14. See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98-141 (1921).

15. See Note, 70 *YALE L.J.* 321, 322 n.9. *But see* very generally *HARV. L. REV.* (*semble*).

16. "In view of the language of the statute, there are no exceptions permitted." *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940). See also *Buxton v. Ullman*, 147 Conn. 48, 156 A.2d 508 (1959); *Tileston v. Ullman*, 129 Conn. 84, 26 A.2d 582 (1942).

17. *State v. Nelson*, *supra* note 16, is the only prosecution under the statute in its 82 year history.

18. See *Time Magazine*, March 10, 1961, pp. 49-50. While such statutes may not produce universal disrespect for law, they do promote a more whimsical attitude towards

apply to dog owners, however, the statute would be given new meaning and a real purpose.

Assuming a construction which did apply the statute to dog owners, a court would then have to consider whether such application constituted a deprivation of property without due process of law. Courts have long recognized that the dominion exercised by a dog owner over his dog differs in kind from that exercised over inanimate possessions.¹⁹ As Chief Justice Appleton correctly observed: "From the time of the pyramids to the present day, from the frozen pole to the torrid zone, wherever man has been there has been his dog!"²⁰ Moreover, Connecticut no longer considers property interests in dogs as merely "base."²¹ Since this classification was dependent solely on whether the animal was fit to eat or of use as a beast of burden,²² its rejection suggests a recognition that purely economic criteria are inapplicable in evaluating the impact of legislative restrictions on the dog owner's right freely to exercise control over his dog. Consequently, in the context of a challenge to the Connecticut birth control statute, the dog owner's rights would "come to the Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."²³

law enforcement than is common. See, *e.g.*, the remarks from the bench of Frankfurter, J., about the intentions of persons buying contraceptives:

A person might not buy them for use. Some people might just want to collect them. People collect all sorts of queer things. Some people collect matchboxes. I know a man who collects sausage containers.

Id. at 50.

19. Rightfully the dog as a companion is most affectionately regarded by all persons who truly estimate loyalty and friendship as factors in smoothing the path of this world's existence.

Shadoan v. Barnette, 217 Ky. 207 (1927).

"Dogs are not outlaws and have some rights." *Wojewoda v. Rybarczyk*, 246 Mich. 641, 225 N.W. 555 (1929). The association between man and his dog has historically been intimate and of great value. See *Citizens Rapid Transit Co. v. Dew*, 100 Tenn. 317 (1898) (trolley ran over dog lying on the track while looking at birds flying overhead).

Large amounts of money are now invested in dogs and they are extensively the subjects of trade and traffic. They are the Negro's associates, and often his only property, the poor man's friend and the rich man's companion and the protector of children, hearthstones and henroosts. *Ibid.*

20. *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 423 (1884), (Appleton, C.J., dissenting).

21. See *Griffin v. Fancher*, 127 Conn. 686, 20 A.2d 95 (1941); *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175 (1862); *Geer v. Connecticut*, 161 U.S. 519 (1896).

When we call to mind the small spaniel that saved the life of William of Orange and thus probably changed the current of modern history . . . and the faithful St. Bernards, which rescue travelers caught in storms . . . in . . . the Alps, the claim that the nature of the dog is essentially base . . . will not receive ready assent.

Mullaly v. People, 96 N.Y. 365, 24 Hun. 656 (1881).

22. See, *e.g.*, *Thurston v. Carter*, 112 Me. 361, 92 Atl. 295 (1914); *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82 (1868); and cases collected Annot., 33 A.L.R. 796.

23. *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

To be upheld against constitutional challenge, the statute must be shown to further some legitimate legislative policy.²⁴ The purpose of birth control statutes was clearly stated by the Supreme Judicial Court of Massachusetts: "Manifestly they are designed to promote the public morals, in a broad sense public health and safety. Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the state and nation a virile race. . . ."²⁵ Yet paradoxically, while the purpose of the statute when applied to humans is to discourage promiscuity, its application to dog owners would produce precisely the opposite result. It would effectively prevent a dog owner who desired to curb his dog's promiscuity, from employing this anaphrodisiac to achieve this end. But to argue that this statute should not be applied to dog owners because it prevents them from inhibiting promiscuity in their dogs is to postulate a legislative intent to regulate dog morals which probably does not exist.^{25a} Furthermore, the Connecticut legislature has indicated a desire to protect dogs against the cruelty of their owners.²⁶ Application of the birth control statute to dog owners can be shown to be in keeping with this humane policy.²⁷ If a dog owner is allowed to administer this drug, the bitch, unexpectedly found unappealing by the opposite sex, and thus deprived of her sensual sustenance,²⁸ may suffer a severe loss of self-confidence and social status.²⁹ Moreover, since not all dog owners would want to control their pet's passions in this way, an almost unbearable burden would be placed on those bitches to whom the drug was not administered and who therefore retained their attraction to males.^{29a} It is pre-

24. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

25. *Commonwealth v. Allison*, 227 Mass. 57, 62, 116 N.E. 265, 266 (1917).

25a. Generally it is only in the area of human behavior that these most intimate social relationships are regulated by the government to carry out some local conception of good morals. *But cf.* *Time Magazine*, June 1, 1959, p. 19, and 188 *NATION* 527 (1959), for reports of the extension of a local public policy against miscegenation to cover the marriage of a white rabbit to a black rabbit, as depicted in a children's picture book.

26. *CONN. GEN. STAT. REV.* § 22-329 specifically provides that:

The Commissioner, state warden, any deputy state warden or any warden may interfere to prevent the perpetration of any act of cruelty upon any dog or other animal, and any person who interferes with or obstructs or resists any of them in the discharge of such duty shall be fined not more than \$50 or imprisoned not more than 30 days.

Connecticut has not uniformly favored the dog. Unlike many states, a dog in Connecticut does not get one free bite. See, e.g., *Hanson v. Carroll*, 133 Conn. 505, 52 A.2d 700 (1947).

27. Cruelty to animals may consist in overworking, underfeeding, or deprivation of proper sustenance. *State v. Bosworth*, 54 Conn. 1, 4 Atl. 248 (1886).

28. See note 27 *supra*.

29. See generally ROYCE, *A FACTUAL STUDY OF EMOTIONALITY IN THE DOG* (Wash. ed. 1955).

29a. *Cf.* J. Goldstein, *A Note on Stigma, Status Degradation, and Status Elevation Ceremonies*, in appendix to Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543, 590 (1960).

cisely because the Connecticut legislature can³⁰ and should take an interest in the well-being of all of the state's dogs that this statute *should* be applied to dog owners so as to prevent interference with what Professor Fowler Harper of the Yale Law School calls "the most intimate and sacred experiences in life."³¹

Enforcement of this statute against offending dog owners should present fewer detection problems than enforcement of the statute as presently construed, since changes in dogs to whom the drug has been administered would be noticeable. Were private citizens encouraged to report any unusual lack of sexual interest observed in neighborhood bitches, affidavits by such citizens might be regarded as establishing a presumption justifying compulsory physical examination of such dogs.³² Should this examination indicate that the drug had in fact been administered, the burden of proof might then be shifted to the dog owner to establish lack of culpability.

30. The law . . . leaves . . . [the dog's] . . . status and the regulation of his existence to be fixed by the legislature as it in its wisdom sees proper in the lawful exercise of its police power.

Shadoan v. Barnette, 217 Ky. 207 (1927).

The law has very properly considered . . . [dogs] . . . in a class by themselves . . . they have always been the subject of special and peculiar regulations.

Woolf v. Chalker, 31 Conn. 122, 81 Am. Dec. 175 (1862).

31. Cf. Brief for Appellant, *Buxton v. Ullman*, *probable jurisdiction noted*, 362 U.S. 987 (1960) (Nos. 810 & 811, 1959 Term, renumbered Nos. 60 & 61, 1960 Term), *motion to postpone argument until February Term granted*, 29 U.S.L. WEEK 3101 (Oct. 11, 1960); *oral argument heard*, 29 U.S.L. WEEK 3257 (March 7, 1961).

32. Statutory procedure already exists for compulsory physical examination of dogs. CONN. GEN. REV. STAT. § 22-361 (examination for rabies). The question of adequate justification for the invasion of the bitch's privacy may be raised, cf. *Sibbach v. Wilson*, 312 U.S. 1 (1941) (Frankfurter, J., dissenting), but since the dog desires her owner to discontinue the illegal practice, her acquiescence in this examination may reasonably be assumed.