



## Kentucky Law Journal

Volume 81 | Issue 2

Article 8


1992

# Rule of Men

John C. Roach

*United States Court of Appeals for the Sixth Circuit*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Constitutional Law Commons](#), and the [State and Local Government Law Commons](#)  
**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

### Recommended Citation

Roach, John C. (1992) "Rule of Men," *Kentucky Law Journal*: Vol. 81 : Iss. 2 , Article 8.

Available at: <https://uknowledge.uky.edu/klj/vol81/iss2/8>

This Special Feature is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

# Rule of Men

"Men often say that one cannot legislate morality. I should say that we legislate hardly anything else."<sup>1</sup>

## INTRODUCTION

The recent Kentucky Supreme Court decision, *Commonwealth v. Wasson*,<sup>2</sup> marks a new day in the role that the Kentucky Supreme Court plays in the development of the law. Our supreme court has abandoned the rule of law and now subscribes to a process of decision making based solely on the justices' whims and personal opinions.<sup>3</sup> *Wasson* stands for the proposition that no matter how little authority, how little precedent, and how little textual constitutional support exists, certain justices on the Kentucky Supreme Court are willing to usurp the rule of law, as enacted by Kentucky's duly elected legislators and as embodied by the framers in the Kentucky Constitution, in order to effect any result that seems correct to the justices despite rational and undeniable proof to the contrary.

State decisions such as *Wasson* will continue to take on great importance as the United States Supreme Court continues to, in this author's view, return legitimacy to the United States Constitution. As a result, the next battle over privacy and equal protection issues most likely will take place in the state legislatures and courts. One hopes that the state courts, including Kentucky's, will realize the gravity of their decisions and refuse to circumvent the will of the people and the framers of the respective state constitutions by inventing new constitutional rights such as the right to engage in homosexual sodomy.

In *Wasson*, the Kentucky Supreme Court found the Kentucky statute that prohibits homosexual sodomy unconstitutional under the Kentucky Constitution.<sup>4</sup> Specifically, the Kentucky Supreme Court found that the statute violated Kentucky's constitutional right to privacy and the state's guarantee of equal protection.<sup>5</sup> The sodomy statute found unconstitutional

---

<sup>1</sup> Eugene V Rostow, *The Enforcement of Morals*, 1960 CAMBRIDGE L.J. 174, 197.

<sup>2</sup> 842 S.W.2d 487 (Ky. 1992). *Wasson* has a somewhat confusing procedural history that is unrelated to the constitutional issues. This procedural history will not be discussed.

<sup>3</sup> The majority opinion in *Wasson* was written by Justice Leibson and joined by Chief Justice Stephens and Justices Spain and Combs. Justices Lambert, Wintersheimer, and Reynolds dissented.

<sup>4</sup> See KY. CONST. §§ 1, 2.

<sup>5</sup> *Wasson*, 842 S.W.2d at 491-92.

by the *Wasson* court, Kentucky Revised Statutes section 510.100, provided:

SODOMY in the fourth degree.

(1) A person is guilty of Sodomy in the fourth degree when he engages in deviate sexual intercourse with another person of the same sex.

(2) Notwithstanding the provisions of KRS 510.020, the consent of the other person shall not be a defense under this section, nor shall lack of consent of the other person be an element of this offense.

(3) Sodomy in the fourth degree is a Class A misdemeanor.<sup>6</sup>

Under Kentucky law, "[d]eviate sexual intercourse means any act of sexual gratification involving the sex organs of one (1) person and the mouth or anus of another."<sup>7</sup>

This Note argues that section 510.100 is constitutional and that the Kentucky Supreme Court incorrectly found that the right of happiness and the right to privacy under the Kentucky Constitution required the statute to be invalidated. First, this Note addresses the history of proscriptions on sodomy.<sup>8</sup> The focus then shifts to an analysis of the federal constitutional position on sodomy laws as discussed in *Bowers v. Hardwick*.<sup>9</sup> Other states' treatment of the issue since *Bowers* is then examined and compared and contrasted with Kentucky law.<sup>10</sup> Finally, this Note examines *Commonwealth v. Wasson*.<sup>11</sup>

## I. HISTORICAL BACKGROUND

Presently, twenty-four states and the District of Columbia have statutes criminalizing sodomy.<sup>12</sup> These provisions are in keeping with

---

<sup>6</sup> KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990).

<sup>7</sup> *Id.* § 510.010(1).

<sup>8</sup> See *infra* notes 12-22 and accompanying text.

<sup>9</sup> 478 U.S. 186 (1986); see *infra* notes 23-30 and accompanying text.

<sup>10</sup> See *infra* notes 31-77 and accompanying text.

<sup>11</sup> See *infra* notes 78-177 and accompanying text.

<sup>12</sup> Private, consensual sodomy is a criminal offense under the following statutes: ALA. CODE § 13A-6-65(a)(3) (1982) (class A misdemeanor); ARIZ. REV. STAT. ANN. §§ 13-1411, -1412 (1989) (class 3 misdemeanor); ARK. CODE ANN. § 5-14-122(b) (Michie 1987) (class A misdemeanor); D.C. CODE ANN. § 22-3502 (1981) (fine up to \$1000, sentence up to ten years); FLA. STAT. ANN. § 800.02 (West 1992); GA. CODE ANN. § 16-6-2 (Michie 1992) (imprisonment from one to twenty years); IDAHO CODE § 18-6605 (1987) (imprisonment not less than five years); KAN. STAT. ANN. § 21-3505 (1988) (class B misdemeanor); LA. REV. STAT. ANN. § 14:89 (West 1986) (\$2000 maximum fine, five year maximum sentence); MD. CODE ANN., CRIM. LAW §§ 553-54 (1989) (sentence "not more than ten years"); MASS. ANN. LAWS ch. 272 § 34 (Law. Co-op. 1992) (sentence "not more than twenty years"); MICH. COMP. LAWS ANN. §§ 750.158, .338, .338(a)-(b) (West 1991) (fine up to \$2500, sentence up to five years); MINN. STAT. ANN. § 609.293 (West 1987) (fine up to \$3000; imprisonment up to one year); MISS. CODE ANN. § 97-29-59 (1972) (sentence up to ten years); MO.

the states' long history of criminalizing sodomy. At the time of the ratification of the Fourteenth Amendment, all but five states in the Union had criminal sodomy laws,<sup>13</sup> and until 1961, every state outlawed sodomy.<sup>14</sup> Prohibitions against sodomy also have a long history throughout the world. The Bible condemns sodomy in both the Old and New Testaments.<sup>15</sup> Further, homosexual sodomy was a capital crime under Roman law and was secularly criminalized during the English reformation under Henry VIII.<sup>16</sup> Blackstone described sodomy as "the infamous crime against nature," an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named."<sup>17</sup> Lord

REV. STAT. § 566.090 (1991) (class A misdemeanor); MONT. CODE ANN. § 45-5-505 (1991) (fine up to \$50,000, imprisonment up to ten years); NEV. REV. STAT. § 201.190 (1991) (imprisonment for one to six years); N.C. GEN. STAT. § 14-177 (1991) (class H felony); OKLA. STAT. ANN. tit. 21, § 886 (West 1983) (imprisonment no more than ten years); R.I. GEN. LAWS § 11-10-1 (1981) (sentence between seven and twenty years); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985) (fine up to \$500; sentence up to five years); TENN. CODE ANN. § 39-13-510 (1991) (class C misdemeanor); TEX. PENAL CODE ANN. § 21.06 (West 1988) (class C misdemeanor); UTAH CODE ANN. § 76-5-403 (1990) (class B misdemeanor); VA. CODE ANN. § 18.2-361 (Michie 1992) (class B felony).

<sup>13</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986).

<sup>14</sup> *Id.*

<sup>15</sup> Among the pertinent Old Testament passages are: "Do not lie with a man as one lies with a woman; that is detestable." *Leviticus* 18:22 (New International Version); "If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death; their blood will be on their own heads." *Leviticus* 20:13 (New International Version). New Testament passages include: "Because of this, God gave them over to shameful lusts. Even their women exchanged natural relations for unnatural ones. In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion." *Romans* 1:26-27 (New International Version); "Do you not know that the wicked will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral nor idolaters nor adulterers nor male prostitutes nor homosexual offenders nor thieves nor the greedy nor drunkards nor slanderers nor swindlers will inherit the kingdom of God." 1 *Corinthians* 6:9-10 (New International Version). The cities of Sodom and Gomorrah were also condemned at least in part because of the prevalence of homosexual practices. *Genesis* 18:16-19:29 (New International Version).

<sup>16</sup> See *Bowers*, 478 U.S. at 196-97 (Burger, J., concurring) (citations omitted). The original English statute read:

For as much as there is not yet sufficient and condign punishment appointed and limited by the due course of the Laws of this realm, for the detestable and abominable vice of buggery committed with mankind or beast . . . it may therefore please the King's highness, with the assent of his lords spiritual and temporal, and the commons of this present parliament assembled . . . that the same offence be from henceforth adjudged felony And that the offenders being hereof convict . . . shall suffer such pains of death, and losses, and penalties of their hoods, chattels, debts, lands, tenements and hereditament, as felons be accustomed to do, according to the order of the common laws of this realm And that justices of Peace shall have power and authority, within the limits of their Commissions and Jurisdiction, to hear and determine the said offence, as they do use to do in cases of other felonies

25 Hen. 8, c. 6 (1533), quoted in Yao Apaso-Gbotso et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 n.18 (1986).

<sup>17</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*215, quoted in *Bowers*, 478 U.S. at 196 (Burger,

Coke, in discussing sodomy and buggery, noted that "ancient authors do conclude, that it deserveth death, ultimum supplicium, though they differ in the manner of the punishment." He also stated that sodomy was against the "ordinance of the Creator and order of nature."<sup>18</sup> This extensive history led to the enactment of Kentucky's original anti-sodomy statute, which read: "Whoever shall be convicted of the crime of sodomy or buggery with man or beast, he shall be confined in the penitentiary not less than two nor more than five years."<sup>19</sup> The modern statute, struck down by the court in *Wasson*, obviously reflects the Kentucky legislature's continuing concern for public morals and its deference to the traditional and historical abhorrence toward sodomy.

Although the Kentucky Supreme Court was not compelled to follow the U.S. Supreme Court's decision in *Bowers v. Hardwick*<sup>20</sup> in interpreting the Kentucky Constitution, Justice White's statement of the issue in *Bowers* is certainly pertinent to any state or federal court's analysis of the issue of homosexual sodomy:

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. *The issue presented is whether the U.S. Constitution confers a fundamental right upon homosexuals to engage in sodomy.*<sup>21</sup>

Justice White's framework is equally applicable in analyzing section 510.100 under the Kentucky Constitution. Does the Kentucky Constitution confer a fundamental right upon homosexuals to engage in sodomy? In other words, does the Kentucky Constitution prevent the legislature from criminalizing sodomy?<sup>22</sup>

## II. UNITED STATES CONSTITUTIONAL LAW

Although *Bowers* dealt with the interpretation of the federal right to privacy as it pertained to Georgia's law against sodomy,<sup>23</sup> it should be given

J., concurring).

<sup>18</sup> EDWARD COKE, THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 58 (1670) (emphasis added).

<sup>19</sup> 1 KY. REV. STAT., ch. 28, art. IV, § 11 (1860) (current version at KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990)).

<sup>20</sup> 478 U.S. 186 (1986).

<sup>21</sup> *Id.* at 190 (emphasis added).

<sup>22</sup> This Note argues that there is no basis for the Kentucky Supreme Court to invalidate this specific act of the legislature; whether this legislation is desirable in the legislative arena is irrelevant to the analysis of its constitutionality.

<sup>23</sup> See *Bowers*, 478 U.S. at 195-96.

great weight by any state court. It was, after all, the federal courts that began the development of so-called "right to privacy" protections.<sup>24</sup> *Bowers* has been widely discussed elsewhere,<sup>25</sup> and an in-depth discussion of the case is not warranted in this Note. It suffices to say that the U.S. Supreme Court held that the right to privacy does not extend to homosexual conduct and thus Georgia's sodomy statute does not violate the U.S. Constitution.<sup>26</sup> In delivering the opinion of the Court, Justice White listed the Court's previous right to privacy decisions,<sup>27</sup> and stated:

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.<sup>28</sup>

Justice White cited historical evidence of the criminalization of sodomy and concluded that there was no credible interpretation that would find sodomy to be either "implicit in the concept of ordered liberty" or a part of "those liberties that are 'deeply rooted in this Nation's history and tradition.'"<sup>29</sup> Justice Burger's concurrence reinforced this theme that homosexual conduct has been subject to state intervention throughout the history of Western Civilization.<sup>30</sup>

Despite the fact that *Bowers* was decided on federal grounds, the opinions of Justices White and Burger are still great resources to consider in analyzing whether there is a right to engage in homosexual sodomy. The justices' historical perspective is sound, and their discussion of the right to privacy provides a clear reminder that the development of that right has been in the context of traditional familial concerns.

### III. OTHER STATES

As mentioned above, twenty-four states and the District of Columbia outlaw sodomy.<sup>31</sup> Cases that have been decided in these states, especially

<sup>24</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>25</sup> See, e.g., Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); John R. Hamilton, Comment, *Sodomy Statutes, the Ninth Amendment and the Aftermath of Bowers v. Hardwick*, 76 KY. L.J. 301 (1987-88); Daniel J. Langin, Comment, *Bowers v. Hardwick: The Right to Privacy and the Question of Intimate Relations*, 72 IOWA L. REV. 1443 (1987); Serena L. Nowell, Case Note, *Constitutional Law: State Proscription of Private Consensual Homosexual Conduct—Bowers v. Hardwick*, 30 HOW. L.J. 551 (1987).

<sup>26</sup> *Bowers*, 478 U.S. at 190-91.

<sup>27</sup> *Id.* at 190 (citations omitted).

<sup>28</sup> *Id.* at 190-91.

<sup>29</sup> *Id.* at 191-92 (citations omitted).

<sup>30</sup> *Id.* at 196 (Burger, J., concurring).

<sup>31</sup> See *supra* note 12 and accompanying text.

those decided since *Bowers*, can be helpful in discerning the proper analysis of the purported right to engage in sodomy. In the end, a close examination of these cases reveals the faulty reasoning employed by the Kentucky Supreme Court in *Commonwealth v. Wasson*.<sup>32</sup> In his majority opinion, Justice Leibson placed great weight on the trend of states that have invalidated sodomy statutes, but he ignored many state cases that have upheld sodomy prohibitions. Furthermore, Leibson ignored the fact that most of these changes have come about through *legislative* and not *judicial* means. Instead of discussing state cases that have been decided since *Bowers*, Justice Leibson's majority opinion cited approvingly *People v. Onofre*,<sup>33</sup> a New York decision invalidating that state's anti-sodomy law on federal grounds. Obviously, the precedential value of this case is suspect in light of *Bowers*.<sup>34</sup>

In addition, Justice Leibson found "particularly noteworthy"<sup>35</sup> *Commonwealth v. Bonadio*,<sup>36</sup> a Pennsylvania Supreme Court decision that invalidated Pennsylvania's anti-sodomy law. The Pennsylvania high court relied primarily on the "appropriate region of liberty" as defined by John Stuart Mill.<sup>37</sup> The parameters of this "region" are liberty of conscience, thought and feeling, the liberty to do as one likes "without impediment from fellow creatures,"<sup>38</sup> and the liberty to associate with others.<sup>39</sup> The court held that this philosophy limits the authority of the state to circumscribe the sexual activities of an individual.<sup>40</sup> The court also relied on the equal protection guarantees of both the U.S. and Pennsylvania Constitutions in holding that the imposition of different treatment based on marital status is wholly unrelated to the state's interest in prohibiting deviate sexual acts.<sup>41</sup>

Despite the common heritage the Kentucky Constitution and the Pennsylvania Constitution share,<sup>42</sup> it seems odd to rely on an opinion that purports to analyze the state and federal equal protection guarantees but in fact simply concludes, without citing a constitutional provision, that the state's police powers are defined by John Stuart Mill.<sup>43</sup> Further-

---

<sup>32</sup> 842 S.W.2d 487 (Ky. 1992).

<sup>33</sup> 415 N.E.2d 937 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981).

<sup>34</sup> The New York Court of Appeals specifically held that the statute violated both the "right of privacy" and the right to equal protection of the laws as guaranteed to the plaintiffs by the United States Constitution. *Id.* at 938-39.

<sup>35</sup> *Wasson*, 842 S.W.2d at 498.

<sup>36</sup> 415 A.2d 47 (Pa. 1980).

<sup>37</sup> *Id.* at 50.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 51.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See *Commonwealth v. Wasson*, 842 S.W.2d 487, 498 (Ky. 1992).

<sup>43</sup> See *Bonadio*, 415 A.2d at 50.

more, the equal protection analysis of the court in *Bonadio* relies primarily on federal grounds and is thus entitled to little weight in the wake of *Bowers*.<sup>44</sup> Thus the only state high court decision invalidating a sodomy statute on state constitutional grounds prior to *Wasson-Bonadio*—is itself of marginal value. The following cases are far more persuasive, and one must wonder why they were so completely overlooked by the *Wasson* majority.

One case in particular that the majority chose not to follow might have provided valuable guidance. The Missouri Supreme Court, in *State v. Walsh*,<sup>45</sup> rejected a constitutional challenge to a statute similar to the Kentucky sodomy statute. The *Wasson* majority, however, found the *Walsh* opinion unpersuasive because “[n]o state constitutional law issues were raised in the *Walsh* case. The Court addressed federal law only and simply followed in lock step the decision in *Bowers v. Hardwick*.”<sup>46</sup> This is simply not true. In fact, when Justice Leibson quoted from *Walsh* that the issue in that case was “whether the Fourteenth Amendment to the United States Constitution prohibits the state from proscribing homosexual conduct,”<sup>47</sup> he conspicuously failed to note that this statement was the statement of the issue for the *federal* claim. The Missouri Supreme Court acknowledged in addition the presence of a state constitutional challenge, stating that “[f]inally, respondent has raised a challenge under the Missouri Constitution.”<sup>48</sup> Although the Missouri court declined to rule specifically on the state constitutional issue, clearly the issue was raised. Moreover, the Missouri court did state that “whatever justification there may be for a nonoriginalist interpretation of the older United States Constitution, we must believe that our Constitution of 1945 must be interpreted according to its plain language and original intent.”<sup>49</sup> Thus, clearly the state constitutional issue was raised and discussed in *Walsh*, and the Missouri court’s reasoning could have served as an alternative to the *Wasson* majority’s more inventive approach toward interpreting Kentucky’s constitution. A number of other cases on which the Kentucky Supreme Court could have relied would also have led to a different result.<sup>50</sup>

---

<sup>44</sup> See *supra* notes 20-30.

<sup>45</sup> 713 S.W.2d 508 (Mo. 1986).

<sup>46</sup> *Wasson*, 842 S.W.2d at 498-99.

<sup>47</sup> *Id.* at 498 (quoting *Walsh*, 713 S.W.2d at 509).

<sup>48</sup> *Walsh*, 713 S.W.2d at 513.

<sup>49</sup> *Id.* (citation omitted).

<sup>50</sup> The majority opinion in *Wasson* also cites two other cases decided since *Bowers*, neither of which is from a state’s highest court. See *Wasson*, 842 S.W.2d at 498 (citing *State v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992) and *Michigan Org. for Human Rights v. Kelly*, No. 88-815820 (CZ) (Wayne Co. Cir. Ct., July 9, 1990)). As for *Morales*, the Texas Supreme Court has granted discretionary review. *State v. Morales*, 35 Tex. Sup. Ct. J. 1117 (Tex. 1992). *Kelly*, on the other hand, is the ruling of one local judge; Michigan’s anti-sodomy provisions remain on the books and, one



In *State v. Poe*,<sup>51</sup> a pre-*Bowers* case, the defendant was convicted under a North Carolina law forbidding consensual fellatio. Under North Carolina's anti-sodomy statute: "If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class H felon."<sup>52</sup> The North Carolina Constitution provides:

The equality and rights of persons.

We hold it to be self-evident that all persons are created equal; that they are endowed by their *Creator* with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and *pursuit of happiness*.<sup>53</sup>

The defendant in *Poe* argued that the statute did not apply to heterosexual conduct, and, alternatively, that the statute was in violation of his constitutional right to privacy and was unconstitutionally vague.<sup>54</sup>

The court quickly dismissed the first claim on the ground that the statute had historically been interpreted to cover heterosexual and homosexual conduct.<sup>55</sup> In discussing the right to privacy, the court reviewed the federal line of cases and concluded that the right to privacy did not protect the defendant. The court determined that the law was not vague, because people of ordinary intelligence know what crimes against nature are.<sup>56</sup> The court made no mention of North Carolina's constitutional right to the pursuit of happiness.

Some may argue that because *Poe* was decided before *Bowers* and the perceived "retreat" of the Supreme Court from protecting individual rights, the state court overemphasized the federal constitutional protections, thus failing to concentrate on the state constitution. The North Carolina courts, however, have had the opportunity to apply the statute since *Bowers*, and in 1987 stated: "The appellate courts of this state have held repeatedly that G.S. 14-177 is not unconstitutional."<sup>57</sup> This holding, in light of the North Carolina Constitution's "pursuit of happiness" provision, is particularly relevant to an analysis of Kentucky's sodomy statute under the Kentucky Constitution.

In *Schochet v. State*,<sup>58</sup> Maryland's highest court was faced with the issue of whether a Maryland statute that provided criminal penalties for

---

would presume, in force, until a higher court rules otherwise. See MICH. COMP. LAWS §§ 750.158, .338, .338(a)-(b) (1991).

<sup>51</sup> 252 S.E.2d 843 (N.C. Ct. App. 1979).

<sup>52</sup> N.C. GEN. STAT. § 14-177 (1986).

<sup>53</sup> N.C. CONST. art. I, § 1 (emphasis added).

<sup>54</sup> See *Poe*, 252 S.E.2d at 844.

<sup>55</sup> See *id.* at 845.

<sup>56</sup> *Id.*

<sup>57</sup> *State v. Woodrow*, 354 S.E.2d 259, 264 (N.C. Ct. App. 1987) (citations omitted).

<sup>58</sup> 580 A.2d 176 (Md. 1990).

"unnatural or perverted sexual practices"<sup>59</sup> applied to consensual, noncommercial heterosexual activity in the home.<sup>60</sup> The court stated: "In light of the rule that statutes should be construed so as to avoid casting doubt upon their constitutionality, statutory provisions like § 554 have elsewhere been interpreted to exclude consensual, noncommercial, heterosexual activity between adults in private."<sup>61</sup> However, the court did go out of its way to discuss and endorse prior cases that upheld the statute as applied to homosexual activity.<sup>62</sup>

In denying a lesbian mother custody of her children, the Arkansas Court of Appeals, in *Thugpen v. Carpenter*,<sup>63</sup> noted that the mother's homosexuality could be a factor in the decision to grant custody. Indeed, a concurring opinion noted that an Arkansas statute imposes criminal penalties for sodomy and that "[t]he people of this state have declared, through legislative action, that sodomy is immoral, unacceptable, and criminal conduct. This clear declaration of public policy is certainly one that a chancellor may note and consider in child custody cases."<sup>64</sup>

In a previous decision, the Arkansas Supreme Court stated that "[i]n any event, we consider the sodomy statute to be a legitimate exercise of the police power by the General Assembly to promote the public health, safety, morals, and welfare."<sup>65</sup> As in North Carolina,<sup>66</sup> the Constitution of Arkansas contains a provision similar to section 1 of Kentucky's Bill of Rights.<sup>67</sup> The Arkansas provision states: "All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring and possessing and protecting property and reputation, and of pursuing their own happiness."<sup>68</sup>

In *In re Opinion of the Justices*,<sup>69</sup> the New Hampshire House of Representatives presented a bill to the New Hampshire Supreme Court that excluded homosexuals from being foster parents, adoptive parents or day care operators. The House asked the court to decide whether the bill violated either the U.S. Constitution or the New Hampshire Constitution. The court first held that homosexuals did not constitute a suspect class under equal protection analysis.<sup>70</sup> The court then applied a rational level

<sup>59</sup> MD. CRIM. LAW CODE ANN. § 554 (1989).

<sup>60</sup> *Schochet*, 580 A.2d at 177.

<sup>61</sup> *Id.* at 184.

<sup>62</sup> *See id.* at 184-85.

<sup>63</sup> 730 S.W.2d 510 (Ark. Ct. App. 1987).

<sup>64</sup> *Id.* at 514 (Cracraft, J., concurring).

<sup>65</sup> *Carter v. State*, 500 S.W.2d 368, 372 (Ark. 1973), cert. denied, 416 U.S. 905 (1974).

<sup>66</sup> *See* N.C. CONST. art I, § 1; *see also supra* notes 51-57 and accompanying text.

<sup>67</sup> *See* KY. CONST. § 1.

<sup>68</sup> ARK. CONST. art. II, § 2 (emphasis added).

<sup>69</sup> 530 A.2d 21 (N.H. 1987).

<sup>70</sup> *Id.* at 24.

scrutiny test and found that the exclusion of homosexuals from being foster parents or adoptive parents was rationally related to the bill's goals of providing positive role models and a positive nurturing environment for children.<sup>71</sup> The court did not uphold the exclusion as to child care, because it found that the exclusion was not narrowly tailored to the familial concerns upon which the statute was enacted.<sup>72</sup> The court did not find any due process violations or right to privacy violations under either constitution.<sup>73</sup> Although this case does not address sodomy in particular, it does illustrate a state court's analysis of anti-homosexual legislation and its tolerance of such laws.

There are numerous pre-*Bowers* state and federal cases upholding anti-sodomy laws against constitutional attack.<sup>74</sup> One case that is particularly noteworthy is *State v. Bateman*,<sup>75</sup> in which Arizona statutes proscribing sodomy and lewd and lascivious behavior were challenged. The *Bateman* court stated:

The state may also regulate other sexual misconduct in its rightful concern for the moral welfare of its people. *The right of privacy is not unqualified and absolute and must be considered in the light of important state interests.*

Sodomy has been considered wrong since early times in our civilization. The lewd and lascivious acts prohibited in this state have also been traditionally prohibited. The legislature has thus made certain sexual behavior criminal by its power to regulate the health, morals and welfare of its people. This type of activity has not been discussed by the United States Supreme Court. We therefore hold that sexual activity between two consenting adults in private is not a matter of concern for the State except insofar as the legislature has acted to properly regulate the moral welfare of its people, and has specifically prohibited sodomy and other specified lewd and lascivious acts. While we are very well aware that some of the acts complained of are not universally condemned, *we are equally cognizant of our role as the judicial branch of government and not the legislative.*

<sup>71</sup> *Id.* at 24-25.

<sup>72</sup> *Id.* at 25.

<sup>73</sup> *Id.*

<sup>74</sup> See, e.g., *Carter v. State*, 500 S.W.2d 368 (Ark. 1973), *cert. denied*, 416 U.S. 905 (1976); *Conner v. State*, 490 S.W.2d 114 (Ark. 1973); *Wanzer v. State*, 207 S.E.2d 466 (Ga. 1974); *State v. Carringer*, 523 P.2d 532 (Id. 1974); *State v. McCoy*, 337 So. 2d 192 (La. 1976); *Cherry v. State*, 306 A.2d 634 (Md. 1973); *Blake v. State*, 124 A.2d 273 (Md. 1956); *People v. Coulter*, 288 N.W.2d 448 (Mich. Ct. App. 1980); *Davis v. State*, 367 So. 2d 445 (Miss. 1979); *State v. Mays*, 329 So. 2d 65 (Miss.), *cert. denied*, 429 U.S. 864 (1976); *State v. Elliot*, 551 P.2d 1352 (N.M. 1976); *Canfield v. State*, 506 P.2d 987 (Okla. Crim. App.), *appeal dismissed*, 414 U.S. 991 (1973); *State v. Santos*, 413 A.2d 58 (R.I. 1980); *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976). *But see* *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980).

<sup>75</sup> 547 P.2d 6 (Ariz.), *cert. denied*, 429 U.S. 864 (1976).

Whatever our personal predilections in the area of sex may be, this is not the time to voice them, *for the public policy of the State in this and other areas of concern is articulated by the legislature.*<sup>76</sup>

This lengthy passage is even more noteworthy when analyzed in light of Arizona's Constitution, which explicitly protects a person's private affairs from government intrusion. Article II, section 8 of the Arizona Constitution states: "No person shall be disturbed in his private affairs, or his home invaded without authority of law."<sup>77</sup>

#### IV. KENTUCKY CONSTITUTIONAL LAW

##### A. Constitutional Construction

There is no explicit mention of a right to privacy in the Kentucky Constitution, and the Kentucky Supreme Court had not recognized a state constitutional right of privacy until *Wasson*, where the court declared that such a right has always existed.<sup>78</sup> Kentucky's prohibitions on homosexual sodomy have been codified for more than 100 years, and yet the *Wasson* case is the first to challenge Kentucky Revised Statutes section 510.100<sup>79</sup> as violative of the Kentucky Constitution. The only possible source for a right to engage in homosexual sodomy would be in the Bill of Rights section of the constitution. The preamble and the pertinent parts of the Bill of Rights of the Kentucky Constitution provide:

##### PREAMBLE:

We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political, and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution.<sup>80</sup>

##### BILL OF RIGHTS:

That the great and essential principles of liberty and free government may be recognized and established, we declare that:

§ 1. Rights of life, liberty, worship, pursuit of safety and happiness, free speech, acquiring and protecting property, peaceable assembly, redress of grievances, bearing arms.—All men are equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties.

Second: The right of worshipping Almighty God according to the dictates of their consciences.

<sup>76</sup> *Id.* at 9-10 (emphasis added) (citations omitted).

<sup>77</sup> ARIZ. CONST. art. II, § 8.

<sup>78</sup> See *Commonwealth v. Wasson*, 842 S.W.2d 487, 491-92, 495 (Ky. 1992).

<sup>79</sup> KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990).

<sup>80</sup> KY. CONST. pmbl.

Third: The right of seeking and pursuing their safety and happiness.

§ 2. Absolute and arbitrary power denied.—Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.<sup>81</sup>

Obviously, deriving from these provisions a right to privacy, let alone a right to engage in sodomy, requires a significant inferential step. It was in making this step that the Supreme Court of Kentucky failed to apply the proper rule of construction.

In the past fifty years, there has been a great debate at the federal level concerning what role original understanding should play in the interpretation of the U.S. Constitution and what type of deference should be accorded to legislative bodies.<sup>82</sup> The appellate courts of Kentucky have addressed these issues explicitly and at length. In *Shamburger v. Duncan*,<sup>83</sup> Kentucky's highest court, construing section 246 of the Kentucky Constitution, stated:

“courts in construing constitutional provisions will look to the history of the times and the state of existing things to ascertain the *intention of the framers of the Constitution and the people adopting it*, and a practical interpretation will be given to the end that the plainly manifested purpose of those who created the Constitution, or its amendments, may be carried out.”<sup>84</sup>

This point is reinforced by the case of *Games v. O'Connell*,<sup>85</sup> in which the court stated: “It is a cardinal rule of construction that no part of the Constitution should be construed so as to defeat its substantial purpose or the reasonable intent of the people in adopting it.”<sup>86</sup>

This rule of construction has not since been abrogated by the Kentucky Supreme Court. Perhaps the best example of the court's continued deference to the framers' intentions is found in the recent landmark case of *Legislative Research Commission v. Brown*.<sup>87</sup> The *Brown* court based most of its conclusions regarding the separation of powers clauses on its analysis of the times surrounding the adoption of the Kentucky Constitution, particularly as evidenced by the debates at the

<sup>81</sup> *Id.* §§ 1, 2.

<sup>82</sup> See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA* 133-269 (1990).

<sup>83</sup> 253 S.W.2d 388 (Ky. 1952).

<sup>84</sup> *Id.* at 390-91 (emphasis added) (quoting *Keck v. Manning*, 231 S.W.2d 604, 607 (Ky. 1950)).

<sup>85</sup> 204 S.W.2d 425 (Ky. 1947).

<sup>86</sup> *Id.* at 427 (citations omitted); see also *Runyon v. Smith*, 212 S.W.2d 521, 523 (Ky. 1948) (“In arriving at the proper construction of any specific section we must consider the reason for the provision and the purpose of a convention in adopting it.”).

<sup>87</sup> 664 S.W.2d 907 (Ky. 1984).

Constitutional Convention of 1891.<sup>88</sup> A cursory reading of Kentucky decisions that deal with constitutional construction will show recurring reference to the debates at the convention, as well as a tendency to explore the context of the times surrounding Kentucky's adoption of its Constitution.<sup>89</sup> This tendency, for example, has led the court many times to acknowledge the hostility toward the legislature in 1891 as a backdrop to particular problems. In the celebrated school reform case, *Rose v. Council For Better Education, Inc.*,<sup>90</sup> Chief Justice Stephens, in his analysis of section 183 of the Kentucky Constitution,<sup>91</sup> based much of his interpretation on the constitutional debates, stating that "[a] brief sojourn into the Constitutional debates will give some idea—a contemporaneous view—of the depth of the delegates' intention when Section 183 was drafted and eventually made its way into the organic law of this state."<sup>92</sup>

The specific conclusions in *Brown* and *Rose* are not particularly important for the purposes of discussing Kentucky's sodomy law; what is significant is that the court in those cases interpreted the Kentucky Constitution by attempting to discern the framers' intent and by looking at the surrounding circumstances at the time of the constitution's adoption. Apparently, as evidenced by its decision in *Commonwealth v. Wasson*,<sup>93</sup> the Kentucky Supreme Court has abrogated this rule of construction and now has adopted an approach of constitutional construction based simply on the justices' personal opinions. It is absurd to argue, as the court in *Wasson* does, that the framers of the Kentucky Constitution, the ratifiers, or the people of the state believed that homosexual sodomy was a fundamental, constitutionally protected right.

In light of two other lines of cases, each addressing the role of the legislature and its enactments, the original intent approach to constitutional construction purportedly used by the *Wasson* court should have led the court to conclude that Kentucky's sodomy statute is constitutional. The first line of cases is premised on the presumption of constitutionality of statutes, and the requirement that a clear constitutional mandate prohibiting a given law be recognized before overturning duly enacted legislation. In *Harrod v. Meigs*,<sup>94</sup> the court explained:

"The general rule, where the constitutionality of legislation is to be ascertained by the courts, is that any reasonable *doubt must be resolved*

---

<sup>88</sup> *Id.* at 912.

<sup>89</sup> See *supra* notes 83-88, *infra* notes 90-94 and accompanying text.

<sup>90</sup> 790 S.W.2d 186 (Ky. 1989).

<sup>91</sup> KY. CONST. § 183.

<sup>92</sup> *Rose*, 790 S.W.2d at 205.

<sup>93</sup> 842 S.W.2d 487 (Ky. 1992).

<sup>94</sup> 340 S.W.2d 601 (Ky. 1960).

*in favor of the legislative action, and the act sustained. And where it is not clear that the Constitution had been invaded, the courts will rarely, if ever, interfere to arrest the operation of legislative enactments. A court must start with the fundamental principle that the statute is constitutional; and it is not permitted by any decree of ours to nullify a statute, unless it is clearly against the Constitution.*"<sup>95</sup>

The other line of cases stands for the proposition that the legislature, not the Kentucky Supreme Court, is the commonwealth's policy-making body. The Kentucky Court of Appeals made this point forcefully in *Blue Cross & Blue Shield of Kentucky v. Baxter*,<sup>96</sup> where it stated:

"The public policy of a state is to be found: first, in the Constitution; second, in the Acts of the Legislature; and third, in its Judicial Decisions. Where the Constitution is silent, the public policy of the State is to be determined by the Legislature on subjects which it has seen fit to speak. It is only where the Constitution and the Statutes are silent on the subject that the Courts have an independent right to declare the public policy."<sup>97</sup>

Applying the rationale propounded by these courts to Kentucky's sodomy statute, the constitution is silent on this issue, but the statutes obviously are not. It follows that the court should have deferred to the legislature's public policy role and should have found Kentucky Revised Statutes section 510.100<sup>98</sup> constitutional.

The cases cited above show that the Kentucky Supreme Court has consistently attempted to ascertain the intent of the drafters of the Kentucky Constitution to determine the meaning of clauses in the document. Sections 1 and 2 of the constitution are the pertinent provisions with respect to the sodomy statute. Specifically, section 1 states that individuals have "[t]he right of seeking and pursuing their safety and happiness."<sup>99</sup> Section 2's denial to the majority of arbitrary and absolute power over the lives and liberty of "freemen"<sup>100</sup> was also

<sup>95</sup> *Harrod v. Meigs*, 340 S.W.2d at 606 (emphasis added) (quoting *Scott v. McCreary*, 147 S.W. 903, 909 (Ky. 1912) (Winn, J., dissenting)); see also *Barker v. Lannert*, 222 S.W.2d 659, 663 (Ky. 1949) (unsuccessful challenge to a land condemnation statute on due process grounds); *Reeves v. Wright & Taylor*, 220 S.W.2d 1007, 1009 (Ky. 1949) (unsuccessful challenge to a statutory classification that only allowed a person to qualify as "self-insured" when the person owned more than twenty-five vehicles; any other person had to acquire insurance).

<sup>96</sup> 713 S.W.2d 478 (Ky. Ct. App. 1986).

<sup>97</sup> *Id.* at 480 (quoting *Kentucky State Fair Board v. Fowler*, 221 S.W.2d 435, 439 (Ky. 1949) (citations omitted)); see also *Int'l Brotherhood of Boilermakers v. Holt*, 418 S.W.2d 758, 760 (Ky. 1967) (declaring labor contract void as against public policy only because the statute and constitution are silent on the issue).

<sup>98</sup> KY. REV. STAT. ANN. § 510.100 (Miche/Bobbs-Merrill 1990).

<sup>99</sup> KY. CONST. § 1.

<sup>100</sup> *Id.* § 2.

used by the *Wasson* court as a basis for the right of privacy.<sup>101</sup> These two sections, however, should not have led to the invalidation of section 510.100. As the court stated in *Shamburger*, courts should look to the “*history of the times and the state of existing things*” to help ascertain the meaning of constitutional provisions.<sup>102</sup> Such an approach would foreclose the possibility that sections 1 and 2 of the constitution guarantee a right to engage in homosexual sodomy. In light of the duration of the statute and the history of hostility in Western law toward homosexual sodomy, it is ludicrous to conclude that these constitutional provisions were intended to foreclose the statutory prohibition of homosexual sodomy. The silence of the Kentucky Constitution with regard to a right to engage in homosexual sodomy, the two lines of cases recognizing a presumption of constitutionality with regard to legislative enactments, and the fact that the legislature is the primary policy-making body, clearly indicate that Kentucky’s sodomy statute is not violative of the Kentucky Constitution.

### B. *The Right of Happiness*

The framers had no intention, through the use of the word “happiness” in the constitution,<sup>103</sup> to grant an absolute right to do any act.<sup>104</sup> The state cases discussed above show that other state courts have refused to find in similar state constitutional provisions any protection of the right to engage in sodomy.<sup>105</sup> The consequences of using the right of happiness as a guarantee of a right to engage in sodomy are frightening. Under this reasoning, Kentucky Revised Statutes section 530.020,<sup>106</sup> which makes it a crime to engage in incest, would also be unconstitutional. Obviously, the framers no more intended to preclude the

---

<sup>101</sup> *Commonwealth v. Wasson*, 842 S.W.2d 487, 494 (Ky. 1992).

<sup>102</sup> *Shamburger v. Duncan*, 253 S.W.2d 388, 390-91 (Ky. 1952) (emphasis added).

<sup>103</sup> KY. CONST. § 1. See *supra* text accompanying notes 80-81.

<sup>104</sup> See *Moore v. Northern Kentucky Independent Food Dealers Ass’n*, 149 S.W.2d 755, 756-57 (Ky. 1942). The court stated:

[A]ll of the argument of defendant’s counsel clusters around their contention that the statute under consideration impairs the rights guaranteed to their client by subsections 3 and 5 of section 1 of *our* Constitution, which is a part of its “Bill of Rights,” the first of which, subsection 3, guarantees to the citizens of the commonwealth “the right of seeking and pursuing their safety and happiness.” It is admitted that the constitutional guaranties referred to may—when occasions and conditions require it—be regulated by the legislature under its police power, but with the qualification that such regulation shall be based upon some reasonable grounds for the promotion of the interest or welfare of the general public, but not to be exercised arbitrarily so as to destroy the constitutional rights so guaranteed.

*Id.*

<sup>105</sup> See *supra* notes 31-77 and accompanying text.

<sup>106</sup> KY. REV. STAT. ANN. § 530.020 (Miche/Bobbs-Merrill 1990).



state's ability to prohibit incest than they intended to create a right to engage in sodomy. However, if the two participants in an incestuous relationship were consenting adults, there would be no difference between their belief that such conduct is essential to happiness and the belief that homosexual sodomy is essential to the happiness of its participants. Similar consequences might arise for many other statutory enactments, such as prohibitions of consensual murder, drug use in the home, and bestiality. Each of these acts could involve consenting adults who, theoretically, hurt no person but themselves. These individuals could argue that it is essential for them to take part in these activities in order to attain happiness. In the case of drug use, for example, such usage is assumed to have consequences for others beside the user. However, many single individuals have the financial resources to support their individual drug use and could confine their use to the privacy of their individual homes. If homosexual sodomy cannot be constitutionally restricted, then much of this behavior surely would be protected as well. These are just a few examples of the possible ramifications of constitutionally protecting sodomy. The list of examples could go on and on.

The right of happiness provision must be analyzed in light of the whole of section 1. Section 1 introduces the parts of the provision by stating that there are "certain inherent and inalienable rights . . ."<sup>107</sup> Because neither the framers nor Western Civilization generally considered sodomy to be an *inalienable* right,<sup>108</sup> the context of section 1 stands against the assertion that the right of happiness protects homosexual sodomy. Quite the contrary, sodomy was universally considered a heinous crime at the time of ratification.<sup>109</sup> The language of section 1 instead refers to a package of rights that are called the "rights of Englishmen."<sup>110</sup> It would be anomalous to conclude that homosexual sodomy is a basic right when, in fact, it was a capital crime in England and colonial America.<sup>111</sup> If section 1's "right of happiness" and section 2's prohibition on arbitrary power<sup>112</sup> afford any type of privacy, it must

<sup>107</sup> KY. CONST. § 1.

<sup>108</sup> See *supra* notes 12-22 and accompanying text.

<sup>109</sup> See *supra* notes 12-30 and accompanying text.

<sup>110</sup> See Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 KY. L.J. 1, 5 (1991-92). In referring to the Kentucky Bill of Rights, the authors state: "These documents protected what were considered basic rights of Englishmen, which existed in England long before the colonies' independence. Specifically, an examination of the Kentucky Bill of Rights of 1792 shows that it may be traced ultimately to the Magna Charta and the English Bill of Rights." The authors further state: "A central theme of [Edmund] Burke's is that the rights of Englishmen, reflected in the Petition of Right, Magna Charta and the Declaration of Right, are derived from tradition and are to be transmitted to posterity." *Id.* at 5 n.23 (discussing EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (J.G.A. Pocock ed., 1987)).

<sup>111</sup> See *supra* notes 12-22 and accompanying text.

<sup>112</sup> KY. CONST. §§ 1, 2.

be determined in the context of these core inalienable rights, which must be discerned from the historical notions of inalienable rights and the rights of Englishmen.<sup>113</sup>

The principle of inalienable rights is discussed by Justice Combs in his concurring opinion, but he cites no cases or other authorities to bolster his position. Justice Combs states that the majority's opinion is a "historic monument to freedom, liberty, and equality—the birthright of every citizen of Kentucky."<sup>114</sup> In discussing the right of happiness, Combs concludes that "[w]here one seeks happiness in private, removed from others (indeed unknown to others, absent prying), and where the conduct is not relational to the rights of another, state interference is per se overweening, arbitrary, and unconstitutional."<sup>115</sup> It is hard to take this statement seriously, and perhaps the best treatment of the court's opinion would be to ignore it. However, the statement had enough appeal to cause Chief Justice Stephens to join the opinion, and thus it must be addressed out of fear that more justices will buy into this philosophy of judicial fiat.

Where does the birthright that Justice Combs speaks of come from? His source must be the inalienable rights that are mentioned in Kentucky's Bill of Rights. Justice Combs pays lip service to the inalienable rights, but then goes on to declare that the right of privacy is essential to natural freedom. This natural freedom must derive from a constitutional source, but instead of indicating that source, Justice Combs simply begs the question by concluding that the appropriate inquiry "is not 'Whence comes the right to privacy?' but rather, 'Whence comes the right to deny it?'"<sup>116</sup> It is obvious that Justice Combs' personal predilections provide the real source of his opinion.

### C. *The Right to Privacy*

The Kentucky Supreme Court has not had many opportunities to consider the right to privacy outside the context of torts<sup>117</sup> and search and seizures cases.<sup>118</sup> The debate has taken place primarily in the

<sup>113</sup> For an interesting approach to due process analysis at the federal level, see Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989), where Justice Scalia proposed a new test for substantive due process under which courts would look at the most specific level of tradition that can be identified to determine whether a particular right is fundamental. See also Gregory C. Cook, Note, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853 (1991).

<sup>114</sup> *Commonwealth v. Wasson*, 842 S.W.2d 487, 502 (Ky. 1992) (Combs, J., concurring).

<sup>115</sup> *Id.* (Combs, J., concurring).

<sup>116</sup> *Id.* at 503 (Combs, J., concurring).

<sup>117</sup> See, e.g., *Helm v. Commonwealth*, 813 S.W.2d 816 (Ky. 1991); *Raglin v. Commonwealth*, 812 S.W.2d 494 (Ky. 1991); *Crececius v. Commonwealth*, 502 S.W.2d 89 (Ky. 1973).

<sup>118</sup> See, e.g., *Brents v. Morgan*, 229 S.W. 967 (Ky. 1929); *Douglas v. Stokes*, 149 S.W. 849 (Ky. 1912); *Foster-Milburn Co. v. Chunn*, 120 S.W. 364 (Ky. 1909).

federal courts; however, the court has had several opportunities to discuss the privacy issue. One year before *Roe v. Wade*<sup>119</sup> was decided, Kentucky's highest court addressed the constitutionality of Kentucky's pro-life legislation in *Sasaki v. Commonwealth*.<sup>120</sup> In quoting from and substantially adopting language from *Crossen v. Commonwealth*,<sup>121</sup> the *Sasaki* court stated:

"It should serve as a reminder to the federal judiciary of the obligation to exercise judicial restraint in nullifying the will and desires expressed by a duly enacted statute of long standing on a matter of deep significance to the way of life, attitude of mind and individual personal faith of the whole people of a sovereign state.

It is an axiom of the judiciary that there exists a presumption in favor of the constitutionality of a duly enacted statute. The courts, in deference to legislative bodies, which must be presumed to have acted within the scope of their powers, will not strike down a statute *unless its violation of the Constitution is clear, complete and unequivocal.*

By the stronger reason, its constitutionality, and the presumption in favor of its constitutionality, is supported by more than a half of a century of unchallenged existence and application."<sup>122</sup>

There was no indication in *Sasaki* that the Kentucky statute proscribing abortion rights violated the Kentucky Constitution. In fact, when the U.S. Supreme Court vacated the case, the Kentucky high court responded by reluctantly obeying the directive of *Roe*.<sup>123</sup> In doing so, Justices Osborne and Reed made their views clear. Justice Osborne stated that "[i]f the court's decision in *Roe v. Wade* is a barometer of what is about to befall we should all turn our heads to heaven for mercy for there is nothing left."<sup>124</sup> Justice Reed found fault with the legal theories of *Roe* and stated his belief that the courts must respect the legislature's role in policy formulations. He concluded by stating that this deference and respect for separation of powers would, "[i]n the long run, however, . . . [prove] to be a far superior course insofar as the *happiness and freedom of the individual are concerned* than the more authoritarian methods employed in other places in the world and advocated by some for adoption in this country."<sup>125</sup> This same argument could be made in

<sup>119</sup> 410 U.S. 113 (1973).

<sup>120</sup> 485 S.W.2d 897 (Ky. 1972), *vacated*, 410 U.S. 951 (1973) (*vacated* in light of the *Roe* decision).

<sup>121</sup> 344 F. Supp. 587 (E.D. Ky. 1972).

<sup>122</sup> *Sasaki*, 485 S.W.2d at 902-04 (emphasis added) (quoting *Crossen*, 344 F. Supp. at 591-93) (other citations omitted).

<sup>123</sup> See *Sasaki v. Commonwealth*, 497 S.W.2d 713 (Ky. 1973).

<sup>124</sup> *Id.* at 714 (Osborne, J., concurring).

<sup>125</sup> *Id.* at 715 (Reed, J., concurring) (emphasis added).

support of the constitutionality of Kentucky Revised Statutes section 510.100.<sup>126</sup> If deference is appropriate with respect to a statute that remained unchallenged for fifty years,<sup>127</sup> then such deference is even more compelling when addressing section 510.100 and its predecessor statute,<sup>128</sup> which together banned sodomy in Kentucky without challenge for more than 130 years.

It seems odd that the Kentucky Constitution protects homosexual sodomy while it does not protect the right to have an abortion.<sup>129</sup> On the other hand, the U.S. Constitution's right to privacy protections guarantee the right to have an abortion but afford no protection for homosexual sodomy.<sup>130</sup> *Sasaki* is another example of why section 1's right to happiness clause and section 2's prohibition on arbitrary power are certainly not absolute and do not extend to rights that were not viewed as rights by the framers. An abortion could be seen as necessary to one's happiness. However, the court in *Sasaki* was never even asked to rule upon the validity of Kentucky's anti-abortion statute<sup>131</sup> under the Kentucky Constitution; the sole challenge to the statute was under the U.S. Constitution.<sup>132</sup> Nonetheless, *Sasaki* was neither explained nor distinguished in the *Wasson* case.

Kentucky's high court has not mentioned section 1's right to happiness provision often. However, the leading case, and the one on which the majority in *Wasson* most heavily relied, is *Commonwealth v. Campbell*.<sup>133</sup> In *Campbell*, the question before the court was whether the legislature could prohibit the possession of liquor intended solely for an individual's personal use. The court answered the question quite plainly in its analysis of the Kentucky Constitution's provisions on liquor. The court felt that the constitutional sections that dealt with this topic left the power to regulate the sale of liquor to local options. Based on this conclusion, the court stated:

We cannot believe that the framers of the Constitution intended to thus carefully take from the Legislature the power to regulate the sale of

<sup>126</sup> KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990).

<sup>127</sup> See *id.* § 436.020 (repealed 1975) (proscribing abortion).

<sup>128</sup> 1 KY. REV. STAT., ch. 28, art. IV, § II (1860).

<sup>129</sup> See *supra* notes 119-27 and accompanying text.

<sup>130</sup> See *Roe v. Wade*, 410 U.S. 113 (1973); *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Kentucky Supreme Court has shown in *Wasson* that precedent and the rule of law are things to be ignored if they do not seem to fit with the individual justices' personal opinions of the law. See also Thomas P. Lewis, *Jural Rights under Kentucky's Constitution: Realities Grounded in Myth*, 80 KY. L.J. 953 (1991-92) (providing an excellent illustration of how the Kentucky Supreme Court has developed entire areas of law contrary to precedent and contrary to the Kentucky Constitution).

<sup>131</sup> See *supra* note 127.

<sup>132</sup> See *Sasaki v. Commonwealth*, 497 S.W.2d 713 (Ky. 1973).

<sup>133</sup> 117 S.W. 383 (Ky. 1909).

liquor, and at the same time leave with that department of the state government the greater power of prohibiting the possession or ownership of liquor.<sup>134</sup>

This constitutional construction answered the question before the court, but the court chose to go further:

The Bill of Rights, which declares that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness, and that the absolute and arbitrary power over the lives, liberty, and property of freeman exists nowhere in a republic, not even in the largest majority, would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not *offend the laws of decency* by being intoxicated in public.<sup>135</sup>

This statement was cited by the *Wasson* court as authority for finding a right to homosexual sodomy in the Kentucky Bill of Rights. However, there is no support for this conclusion if the entire opinion in *Campbell* is analyzed. Before the court made this statement, it stated that “[t]he history of our state from its beginnings shows that there was never even the claim of a right on the part of the Legislature to interfere with the citizen using liquor for his own comfort.”<sup>136</sup> This is a key distinction that the majority in *Wasson* misses. Drinking and smoking are treasured Kentucky traditions that predate the anti-liquor laws. In contrast, sodomy is not, and the Kentucky legislature has claimed the right to prohibit homosexual sodomy since 1860.<sup>137</sup>

The court in *Campbell* also analyzed the role of natural law in constitutional analysis. The court stated that “[m]an in his natural state has a right to do whatever he chooses and has the power to do. Therefore the question of what a man will drink, or eat, or own, provided the rights of others are not invaded,” is one that the individual is to decide.<sup>138</sup> The easiest way to distinguish this case is to emphasize its limited reference to drinking, eating and owning, but an additional statement from the court provides further guidance. The court stated: “It is not within the competency of government to invade the privacy of a citizen’s life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society.”<sup>139</sup> First, the Kentucky legislature and most of Western Civilization have determined that

<sup>134</sup> *Id.* at 385.

<sup>135</sup> *Id.* (emphasis added).

<sup>136</sup> *Id.*

<sup>137</sup> 1 KY. REV. STAT., ch. 28, art. IV, § 11 (1860) (current version at KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990)).

<sup>138</sup> *Campbell*, 117 S.W. at 385.

<sup>139</sup> *Id.*

homosexual sodomy does injure society, for many reasons.<sup>140</sup> Second, the individual does not act alone. These distinctions are obvious. There is, however, a more compelling distinction.

One cannot have his cake and eat it too. The *Campbell* opinion refers to Blackstone's theories on basic rights and natural law.<sup>141</sup> This "natural law" does not protect actions that Blackstone himself deemed so heinous they were not fit to be named.<sup>142</sup> Man in his natural state is afforded certain rights. The flaw in this approach, however, is that no theory of the natural state regards sodomy as

<sup>140</sup> Many rationales have been offered throughout history. These range from health reasons to the role the legislature plays in preserving the integral role of the family. At the core of these rationales is the need to protect society's basic morals and the sanctity of the family. Marriage plays an integral role in the family, and gay promiscuity does not fit into the traditional family model. Even assuming that AIDS has generally decreased promiscuity in society, the pre-AIDS statistics are still quite telling. One study found the incidence of different sexual partners to be at least ten times greater among homosexual men compared to heterosexual men over a lifetime. MORTON M. HUNT, *GAY: WHAT YOU SHOULD KNOW ABOUT HOMOSEXUALITY* 157 (1977). The Missouri Supreme Court has stated that in addition to health reasons, the General Assembly "could have reasonably concluded that the general promiscuity characteristic of the homosexual lifestyle made such acts among homosexuals particularly deserving of regulation, thus rationally distinguishing such acts within a heterosexual context." *State v. Walsh*, 713 S.W.2d 508, 512-13 (Mo. 1986) (citing ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 85 (1978)).

The impact of homosexual behavior on public health is clear. It is well established that the majority of AIDS cases in the United States occur among the homosexual population. *See, e.g.,* Sevgi O. Aral & King K. Holmes, *Sexually Transmitted Diseases in the AIDS Era*, 264 *SCI. AM.* 62, 66 (1991) ("Of the sexually transmitted HIV infections, most of those occurring in North America have been transmitted homosexually to men who practiced receptive anorectal intercourse"); Marc J. Sicklick & Arye Rubenstein, *A Medical Review of AIDS*, 14 *HOFSTRA L. REV.* 5, 7 n.18 (1985) (stating that "homosexual and bisexual males and intravenous drug abusers account for 90% of the reported adult cases").

AIDS is just the tip of the iceberg. There is a greater prevalence of syphilis and gonorrhea among homosexual men than among heterosexuals. *See* Franklin N. Judson, *Comparative Prevalence Rates of Sexually Transmitted Diseases in Heterosexual and Homosexual Men*, 112 *AM. J. EPIDEM.* 836, 836 (1980); William F. Owen, *Sexually Transmitted Diseases and Traumatic Problems in Homosexual Men*, 92 *ANNALS INTERN. MED.* 805, 805 (1980). Medical evidence also shows that male homosexual behavior "predisposes not only to the 'traditional' venereal diseases, but to hepatitis A, hepatitis B, venereal herpes, and some enteric pathogens as well." Janet R. Daling et al., *Correlates of Homosexual Behavior and the Incidence of Anal Cancer*, 247 *JAMA* 1988, 1988 (1982). *See also* Richard R. Babb, *Sexually Transmitted Infections in Homosexual Men*, 65 *POSTGRAD. MED. J.* 215, 217 (1979); Lawrence Corey & King K. Holmes, *Sexual Transmission of Hepatitis A in Homosexual Men*, 302 *NEW ENG. J. MED.* 435, 437-38 (1980); William W. Darrow, *The Gay Report on Sexually Transmitted Diseases*, 71 *AM. J. PUB. HEALTH* 1004, 1009 (1981); H. Hunter Handsfield, *Sexually Transmitted Diseases in Homosexual Men*, 71 *AM. J. PUB. HEALTH* 989, 989-90 (1981); A.W. Martin Marino, Jr. & Hugo W.N. Mancini, *Anal Eroticism*, 58 *SURG. CLIN. NORTH AM.* 513, 514-15 (1978).

Finally, homosexual men are also subject to a high incidence of anal pathology. *See* Henry L. Kazal et al., *The Gay Bowel Syndrome: Clinicopathologic Correlation in 260 Cases*, 6 *ANNALS CLIN. LAB. SCI.* 184, 187 (1976); Norman Sohn et al., *Social Injuries of the Rectum*, 134 *AM. J. SURG.* 611, 612 (1977). Besides finding that "male homosexuals are at increased risk of anal cancer," Daling et al., *supra*, also found that anal pathology consists of "nonspecific proctitis, anal tears and fissures, perirectal abscesses and anal fistulae." Daling, *supra*, at 1990.

<sup>141</sup> *See Campbell*, 117 S.W. at 385 (citing 1 BLACKSTONE, *supra* note 17, at 123, 124).

<sup>142</sup> *See supra* note 17 and accompanying text.

“natural.” The dictum on natural law in *Campbell* must not be taken out of context and selectively quoted. It must be analyzed in its totality, in the context of the theory it was expounding. Seen this way, it is unimaginable that homosexual sodomy could find shelter in natural law. In this sense, the theory underlying *Campbell* refutes *Wasson* instead of supporting it.

In another liquor case, *Commonwealth v. Smith*,<sup>143</sup> the court quoted extensively from *Campbell* and discussed the police power in general. It explained:

The power of a state to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others. With his faults or weaknesses, which he keeps to himself, and which do not operate to the detriment of others, the state as such has no concern. In other words, the police power may be called into play when it is reasonably necessary to protect the public health, or *public morals* or public safety. When, therefore, the statute purporting to have been enacted to protect the public health or public morals or public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge, and thereby give effect to the Constitution.<sup>144</sup>

Thus, the language in *Smith* itself distinguishes the liquor cases from the case of homosexual sodomy. The legislature has determined that homosexual sodomy injuriously affects others and is a detriment to the public morals and health.<sup>145</sup> It also must be noted that the Kentucky Supreme Court, throughout these liquor cases, placed great weight on the fact that the individual acted alone. The act of sodomy is not one of those cases in which the individual is keeping his “faults or weaknesses . . . to himself.”<sup>146</sup> This factor was ignored by the majority in *Wasson*.

Yet another liquor case provides further guidance. In *Commonwealth v. Wells*,<sup>147</sup> the issue was the legality of a law prohibiting the giving away of liquor. In speaking of the police power and the “inherent power to legislate on any subject affecting the morals of its citizens,” the court stated that “[t]his power inherent in the state is not

<sup>143</sup> 173 S.W. 340 (Ky. 1915).

<sup>144</sup> *Id.* at 343 (emphasis added) (citations omitted). This justification for the police power under the preservation of morals has tremendous case support. See, e.g., *Bosworth v. Lexington*, 125 S.W.2d 995, 1000 (Ky. 1939) (“Generally speaking, the courts uphold such regulatory measures if they are related to health, safety, morals, and the general welfare of the community.”).

<sup>145</sup> See KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990).

<sup>146</sup> *Smith*, 173 S.W. at 343.

<sup>147</sup> 244 S.W. 675 (Ky. 1922).

surrendered or abridged by the mere adoption of a constitutional provision relating to the subject, unless the terms of the provision plainly express or imply a limitation or restriction on the power."<sup>148</sup> There is no such term in the present context.

The theme throughout these liquor cases is that the state does have a right to protect community and societal morals. This right is not absolute when viewed in the light of the *Campbell* court's discourse on natural law that it read into section 1, the court did find a core value of liberty in the alcohol cases. However, this liberty value was not found in a vacuum, but was found through tracing the meaning and consequences of the natural rights that are incorporated into section 1.

This core value of liberty is not implicated in analyzing homosexual sodomy. The North Carolina and Arkansas courts recognized this distinction,<sup>149</sup> and the Kentucky Supreme Court should not have read more into sections 1 and 2 than the bundle of rights—the rights of Englishmen.<sup>150</sup> Despite these distinctions, it is this line of cases that the majority contends created the right of privacy, and the right to engage in homosexual sodomy, now found in the Kentucky Constitution. But by looking deeper into the underlying rationale of the liquor cases, it is clear that sodomy is not analogous.

One final point should be discussed. Although the court in *Wasson* purports to examine the framers' intent and the plain language of the constitution, in reality the court is analyzing the document under some sort of "living constitution" approach. Many view the constitution as a "living document" and are not satisfied with an approach that looks only to the language of the document and the original intent of its framers. But, if original intent is to be gauged in light of contemporaneous knowledge and understanding, what new and relevant discourses are there regarding human nature? What new authority is there? The majority of Kentuckians surely would not agree that homosexual sodomy is something different from what it was 100 or 1000 years ago. The legislature as recently as 1974 expressed the will of the people by enacting the present statute. If a fundamental right has been discovered in the midst of such overwhelming majoritarian opposition, then what is its source? This issue is properly left to the province of the legislature. The court does have a role in preventing the legislature from enacting unconstitutional legislation, but in the final analysis, there is absolutely no support in the Kentucky Constitu-

---

<sup>148</sup> *Id.* at 677.

<sup>149</sup> See *supra* notes 51-57, 63-68 and accompanying text.

<sup>150</sup> See *supra* note 110.



tion for the repeal of this law and for the decision of the Kentucky Supreme Court.

#### V AN ANALYSIS OF *COMMONWEALTH V WASSON*

This Note does not engage in a line-by-line analysis of the *Wasson* majority's opinion. The dissenting opinions by Justices Lambert and Wintersheimer are not discussed in depth either, although both justices do an excellent job of refuting the majority's conclusions.<sup>151</sup> However, some of the more glaring deficiencies in the opinion warrant discussion. Further, this Note maintains that the court's conclusions regarding equal protection are also without basis.

The court began its faulty substantive analysis by concluding that, since Kentucky's highest court declared that the law as it stood in 1909 prohibited anal but not oral sodomy, any argument that the present anti-sodomy law had a basis in the law and tradition had no force.<sup>152</sup> Justice Lambert noted in his dissent that although the majority cited the 1909 case as supportive of its view, the case actually makes unmistakably clear that the majority is wrong.<sup>153</sup> In *Commonwealth v. Poindexter*,<sup>154</sup> the court did affirm the dismissal of an indictment against two men charged with oral sodomy, but the court went out of its way to state:

We must confess that we are unable to see why the act with which appellees stand charged is not as much a crime against nature as if done in the manner sodomy is usually committed; but as the only authorities we have been able to discover decide otherwise, we regard it our duty to follow precedent, and for this reason alone we hold that the circuit court properly held the indictment bad, and dismissed it. *It is to be hoped, however, that the Legislature will by proper enactment make such an infamous act as that of which appellees confess themselves guilty a felony and punishable as such.*<sup>155</sup>

This statement refutes much of the majority's rationale. Kentucky's highest court found no constitutional defect with the anti-sodomy law, and, in fact, urged its extension in the form that section 510.100<sup>156</sup> eventually

---

<sup>151</sup> Especially noteworthy are both justices' opinions on the equal protection issue. See *Commonwealth v. Wasson*, 842 S.W.2d 487, 507-09, 516-17 (Ky. 1992). Also worth noting is Justice Wintersheimer's discussion on the misguided adoption of the philosophy of John Stuart Mill as a part of the Kentucky Constitution. *Id.* at 512-13.

<sup>152</sup> *Id.* at 491 ("Concededly, by virtue of *Commonwealth v. Poindexter*, 133 Ky. 720, 118 S.W. 943 (1909), in order for the act of sodomy to be committed by one person on another, under Kentucky law, it is necessary that there be anal penetration.") (quoting *United States v. Milby*, 400 F.2d 702, 704 (6th Cir. 1968)).

<sup>153</sup> See *id.* at 506-07 (Lambert, J., dissenting).

<sup>154</sup> 118 S.W. 943 (Ky. 1909).

<sup>155</sup> *Id.* at 944 (emphasis added).

<sup>156</sup> KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990).

took. The clear precedent is that the Kentucky Supreme Court should affirm the Kentucky legislature since the court, in effect, invited the sodomy legislation. How could anyone contend that the Kentucky Constitution has always recognized a constitutional right of privacy that protects the right of sodomy? Perhaps the most interesting point is that any reliance the majority places on *Commonwealth v. Campbell*<sup>157</sup> is equally tenuous. *Campbell* was decided by the same court only six weeks before *Poindexter*. The majority placed great reliance on *Campbell* and its defense of the "right to privacy against the intrusive police power of the state,"<sup>158</sup> but the majority ignored the fact that this same court had no intention of applying this right outside of the context of inalienable rights.<sup>159</sup> Thus, the majority opinion, which relied on *Campbell* as a window to the original meaning of the constitution, is either poorly written or disingenuous.

*Poindexter*, a decision based not on the writings of John Stuart Mill<sup>160</sup> but instead on sound constitutional interpretation, precludes any attempt to use the liquor cases as support for a right to homosexual sodomy. In fact, *Poindexter* illustrates exactly what the majority did do in *Wasson*—simply discover a right to their own liking that had no basis in the constitution or any precedents of Kentucky. There is no tradition in "ringing terms" of a right to privacy under the Kentucky Constitution.<sup>161</sup> In fact, *Wasson* is the first case that even acknowledges a state constitutional right to privacy under the Kentucky Constitution.

The majority also cites the comments that Delegate J.A. Brents made at the debates of the constitutional convention as supporting its view of personal liberty.<sup>162</sup> The majority did not explain the context in which Brents stated

<sup>157</sup> 117 S.W. 383 (Ky. 1909).

<sup>158</sup> See *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992).

<sup>159</sup> See *Campbell*, 117 S.W. at 386-87.

<sup>160</sup> Justice Leibson indicates that John Stuart Mill's beliefs were essentially codified in the Kentucky Constitution. He bases this on the fact that the *Campbell* court quoted from Mill, and he states that based on this opinion, "and on the Comments of the 1891 Convention Delegates, there is little doubt but that the views of John Stuart Mill, which were then held in high esteem, provided the philosophical underpinnings for the reworking and broadening of protection of individual rights that occurs throughout the 1891 Constitution." *Wasson*, 842 S.W.2d at 497. It should be noted that Justice Leibson does not cite to any reference in the debates to John Stuart Mill specifically. Despite this fact, he places great weight on *Campbell*, even though this same court six weeks later made it clear that there was no intention to put the gloss on *Campbell* that Justice Leibson has placed upon it. *Id.* at 494-95. It should also be noted that the United States Supreme Court has explicitly rejected the incorporation of Mill's philosophy into the United States Constitution. See *Pans Adult Theatre I v. Slaton*, 413 U.S. 49, 68 (1973). Chief Justice Burger cited to many state laws that would violate Mill's view, noting that the "state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels although these crimes may only directly involve 'consenting adults.'" *Id.* at 68 n.15. The Kentucky Supreme Court, by incorporating Mill into the Kentucky Constitution, may be overruling these types of laws as well.

<sup>161</sup> *Wasson*, 842 S.W.2d at 492-93.

<sup>162</sup> *Id.* at 494.

that "majorities cannot and ought not to exercise arbitrary power over the minority."<sup>163</sup> This context is important because Brents had made clear that he did not view the rights that he spoke of in a vacuum. He stated that the rights of man "are rights given to man by God, and are inherent and existed before Government had an existence."<sup>164</sup> Certainly, most would contend that the Judeo-Christian God to which Brents referred had no intention to give the people the right to engage in sodomy.<sup>165</sup>

The above discussion points to the absurdity of the *Wasson* opinion. The majority has proclaimed that the right to sodomy, as protected by the right of privacy under the Kentucky Constitution, has existed since its ratification.<sup>166</sup> The court made no attempt to adopt an explicit "living constitutionalist" approach. They reached their holding under original understanding and maintain that this right was protected by the framers of the Kentucky Constitution.<sup>167</sup> It is hard to believe that anyone would accept this conclusion as being intellectually honest. There may yet be an honest and a sincere debate on how constitutions ought to be interpreted, but in the present case that was not the subject of the debate. The Kentucky Supreme Court's purported reliance on original understanding is fatally flawed.

Besides using the liquor cases to create a right of privacy in the Kentucky Constitution, the *Wasson* court found that the statute violated the constitution's guarantees of equal protection.<sup>168</sup> Justice Leibson began by noting that the Georgia law at issue in *Bowers* applied to both heterosexual and homosexual sodomy.<sup>169</sup> Thus, the Equal Protection Clause was not implicated. Justice Leibson then cited both a concurring opinion in a Ninth Circuit case and Laurence Tribe for the proposition that homosexuals are a separate and identifiable class for Kentucky constitutional law purposes.<sup>170</sup> The opinion then held "that it is 'arbitrary' for the majority to criminalize sexual activity solely on the basis of majoritarian sexual preference, and that it denied 'equal' treatment under the law when there is no rational basis, as this term is used and applied in our Kentucky cases."<sup>171</sup> The opinion concluded that there is no rational basis for the statute, because the legislature no longer

---

<sup>163</sup> 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE 1890 CONVENTION 618 (E. Polk Johnson ed., n.d.).

<sup>164</sup> *Id.* at 615. My point is not to evoke a theological debate or discuss the role of religion in the law. It is simply to show that any reliance on this portion of the debates by the majority is taking the statements out of their proper context.

<sup>165</sup> See *supra* note 15.

<sup>166</sup> See *Wasson*, 842 S.W.2d at 495.

<sup>167</sup> See *id.* at 492-97.

<sup>168</sup> See *id.* at 499-502.

<sup>169</sup> *Id.* at 499.

<sup>170</sup> *Id.* at 499-500 (citations omitted).

<sup>171</sup> *Id.* at 500.

criminalizes traditionally immoral heterosexual activity. This singling out of homosexuals was held to have no rational relation to the legislature's objectives.<sup>172</sup>

Justice Lambert's dissent noted the obvious; the sodomy law is not aimed at homosexuals, but at conduct, and anyone, irrespective of his or her sexual preference, can violate this statute at a given time.<sup>173</sup> Indeed, neither gender nor sexual preference is mentioned in the statute. The statute prevents all people from engaging in this conduct, and therefore has no implication under equal protection analysis. Justice Lambert noted that this was the conclusion reached by the United States Court of Appeals for the Fifth Circuit in *Baker v. Wade*.<sup>174</sup> In discussing a similar Texas statute, the Fifth Circuit stated that "[t]he statute affects only those who choose to act in the manner proscribed" and is not directed at a class of people.<sup>175</sup>

Even assuming that there is a classification and the statute is subject to equal protection analysis, Justice Leibson admitted that it is subject only to rational level scrutiny.<sup>176</sup> This deferential standard was certainly met, because it is rational for the legislature to distinguish acts of sodomy between homosexuals and heterosexuals. Justice Lambert was correct in concluding that the distinction is manifest because of the United States Supreme Court's own "heightened protection of the right of persons with respect to conduct in the context of marriage, procreation, contraception, family relationships, and child rearing and education."<sup>177</sup> These concerns are lessened, if not rendered altogether irrelevant, with regard to the homosexual, and thus the classification would survive rational basis scrutiny.

### CONCLUSION

The combination of the weight of history, the *Bowers* decision, other states' treatment of the subject, and Kentucky constitutional jurisprudence leads to one conclusion concerning the constitutionality of Kentucky Revised Statutes section 510.100<sup>178</sup>—it is constitutional. The Kentucky Supreme Court's conclusion to the contrary is a wide divergence from precedent and will have consequences for the state's police power that will pose a great danger to the state. Justice Osborne's statement in *Sasaki*

---

<sup>172</sup> *Id.* at 501-02.

<sup>173</sup> *Id.* at 507-08.

<sup>174</sup> *Id.* at 508 (citing *Baker v. Wade*, 774 F.2d 1285 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986)).

<sup>175</sup> *Baker*, 774 F.2d at 1287.

<sup>176</sup> *Wasson*, 842 S.W.2d at 500.

<sup>177</sup> *Id.* at 509 (Lambert, J., dissenting).

<sup>178</sup> KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990).

v. *Commonwealth*<sup>179</sup> is appropriate in the present context. If the Kentucky Supreme Court's decision in *Wasson* "is a barometer of what is about to befall we should all turn our heads to heaven for mercy for there is nothing left."<sup>180</sup> The *Wasson* decision makes clear that there is not much left of the Kentucky Constitution and honest judicial interpretation in Kentucky. Four men have decided to usurp the rule of law and have substituted for it their "reasoned judgment" despite overwhelming evidence against their conclusion. One can only wonder what the reign of this "rule of men" has in store.

*John C. Roach\**

---

<sup>179</sup> 497 S.W.2d 713 (Ky. 1973).

<sup>180</sup> *Id.* at 714 (Osborne, J., concurring).

\* John C. Roach received his J.D. from the University of Kentucky in 1992 and is currently serving as a judicial clerk for Judge Pierce Lively of the United States Court of Appeals for the Sixth Circuit.