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Decisions Between Consenting Adults Made in Private— No Place for the Government to Tread

INTRODUCTION

Many citizens would probably agree that sexual intimacies between consenting adults should be free from governmental interference. While several states have provided their citizens with increased protection from governmental interference for private, personal behavior and struck down sodomy statutes under their state constitutions,¹ the Louisiana Supreme Court has not yet considered the constitutionality of the state's sodomy law, Louisiana Revised Statutes 14:89.² However, in *State v. Smith*,³ the Louisiana Fourth Circuit Court of Appeal struck down the statute as an unconstitutional invasion of privacy under the Louisiana Constitution.⁴ The fourth circuit's decision has placed the issue of the state sodomy law's constitutionality squarely before the Louisiana Supreme Court. As this comment will explain, the current sodomy law is a violation of privacy under Article I, § 5 of the Louisiana Constitution, and the *Smith* case offers the court the opportunity to ensure the privacy of Louisiana's citizens.

Part I of this comment discusses some United States Supreme Court cases that have addressed the issue of individual privacy and the efforts of state courts to distinguish these decisions. In order to evaluate the arguments asserted against the statutes, to isolate the states' justifications for upholding the statutes, and to understand the courts' varying justifications for striking down the statutes under state law, Part II focuses on decisions of state courts that have overturned their

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1. Those states whose sodomy laws have been struck down on state law grounds include: Tennessee, *see* *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996); Pennsylvania, *see* *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980); Kentucky, *see* *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); New York, *see* *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980); Alabama, *see* *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); Texas, *see* *State v. Morales*, 826 S.W. 2d 201 (Tex. Ct. App. 1992); and Iowa, *see* *State v. Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976).

2. La. R.S.14:89 (1986) defines a crime against nature as:

(1) The unnatural carnal copulation by a human being with another of the same sex or opposite sex or an animal, except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in R.S. 14:41, 14:42, 14:42.1 or 14:43. Emission is not necessary; and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.

(2) The solicitation by a human being of another with the intent to engage in any unnatural carnal copulation for compensation.

B. Whoever violates the provisions of this Section shall be fined not more than two thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.

3. 729 So. 2d 648 (La. App. 4th Cir. 1999).

4. La. Const. art. I, § 5 provides: "Right to Privacy: Section 5. Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."

sodomy statutes. It also notes several cases in which state sodomy statutes have been upheld under state or federal law. Part III first describes the right of privacy in Article I, § 5 of the Louisiana Constitution as interpreted by the Louisiana Supreme Court. It then presents an analysis of the judicial history of Louisiana Revised Statutes 14:89 and the facts and issues of the *Smith* case currently before the court. The arguments of the state and the defendant are analyzed with a comparison to the decisions from other state courts. This comment concludes that the reasoning used by other state courts to strike down state statutes and the prior interpretations of the "privacy protections" in the Louisiana Constitution support a decision that Louisiana's sodomy statute is an unconstitutional invasion of privacy under Louisiana law.⁵

I. FEDERAL LAW BACKGROUND AND STATE COURT RESPONSE

A. *Background and History*

The recent history of the right of privacy as applied to personal autonomy is well established. Although not an enumerated right under the United States Constitution, the right of privacy is a guarantee upon which American citizens have come to expect and rely. The common law right of privacy was described by Justice Brandeis as "the most comprehensive of rights."⁶ While the right to privacy has since been interpreted to expand areas of personal autonomy, the Supreme Court has also defined limits to the right to privacy.⁷

In the 1960s, the Supreme Court began to expand the protections of the right of privacy in areas affecting the personal autonomy of the individual. In *Griswold v. Connecticut*,⁸ the United States Supreme Court took one of its first steps in recognizing a fundamental right to privacy and held that the government could not prohibit the use of contraceptives by married persons.⁹ Later, in *Eisenstadt v.*

5. This comment does not purport to delve into the numerous intricacies of the federal or state right to privacy but rather focuses on those issues that are pertinent to the evaluation of La. R.S. 14:89 (1986) under the state constitution. Additionally, the subject matter deals only with the private consensual acts between adults. It does not advocate any repeal of laws prohibiting forced sexual acts, acts in public, or acts with children or animals.

6. *Olmstead v. U.S.*, 277 U.S. 438, 478, 48 S. Ct. 564, 604 (1928) (Brandeis, J., dissenting).

7. Please note that the cases discussed in the ensuing section are only intended to serve as a representative sample. The section does not begin to attempt to discuss the mass of jurisprudence surrounding the federal right to privacy.

8. 381 U.S. 479, 85 S. Ct. 1678 (1965).

9. In the majority opinion, Justice Douglas explained that several of the guarantees in the Bill of Rights created a "penumbra" or "zone of privacy" that the government could not infringe. The Court held that the First, Third, Fourth, Fifth and Ninth Amendments established a zone of privacy protected from government intrusion. *Id.* at 483-85, 85 S. Ct. at 1681. The three concurrences reached the same conclusion as the majority, but in different ways. Justice Goldberg explained that just as the Ninth Amendment protected rights that were not enumerated in the first eight amendments, the Fourteenth Amendment should protect against government actions that infringe rights not detailed in the Bill of Rights. *Id.* at 488-89, 85 S. Ct. at 1684. Justice Harlan argued that the Fourteenth Amendment protects those values that are "implicit in the concept of ordered liberty." *Id.* at 500, 85 S. Ct. at 1690 (citing

Baird,¹⁰ the Supreme Court held that the government could not prohibit the use of contraceptives by non-married persons.¹¹ In *Roe v. Wade*,¹² the Court held, *inter alia*, that the right of privacy limits a legislature's freedom to proscribe or regulate a woman's right to an abortion.¹³ While the Court has been somewhat willing to extend the right of privacy in areas such as parenting and education,¹⁴ family relationships,¹⁵ marriage,¹⁶ contraception,¹⁷ and abortion,¹⁸ it has been more reluctant to establish any general protection for adult consensual sexual behavior. In *Bowers v. Hardwick*,¹⁹ the Supreme Court held that the Georgia state law proscribing homosexual sodomy was constitutional because the United States Constitution did not provide a fundamental right to engage in such acts. The Court reasoned that "[n]one of the fundamental rights announced in this Court's prior cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case."²⁰ The dissent in *Bowers* argued that

Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 152 (1937)) Finally, Justice White opined that an ends/means analysis should be used to evaluate the state interest in the protection of privacy interests. *Id.* at 502, 85 S. Ct. at 1691-94.

10. 405 U.S. 438, 92 S. Ct. 1029 (1972).

11. The Court explained that, "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453, 92 S. Ct. at 1038.

12. 410 U.S. 113, 93 S. Ct. 705 (1973).

13. The holding in *Roe* has been admittedly limited by the Court's subsequent decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992). In *Casey*, the Court held that legislatures were allowed to regulate the right of a woman to have an abortion as long as the restrictions did not impose an undue burden.

14. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925) (striking down a statute requiring children to attend public schools because it infringed on the "liberty" of parents "to direct the upbringing" and education of their children); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625 (1923) (striking down a state law that prohibited teachers from teaching foreign languages to young children.).

15. See *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438 (1944).

16. See *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967) (holding that the state could not prohibit marriage between whites and non-whites.).

17. See *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965) (holding married couples have the right to obtain contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1972) (holding non-married individuals had a fundamental right to obtain contraceptives).

18. See *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973); and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992) (allowing states to regulate abortions only as long as there is no undue burden imposed on the mother).

19. 478 U.S. 186, 106 S. Ct. 2841 (1986). However, *Bowers* has been questioned and criticized by a number of scholars. See *Developments in the Law: Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1523 n.30 (1989). Also, Justice Powell, the "swing vote" in *Bowers*, has commented that his decision was "probably a mistake." See Anand Agneshwar, *Powell Concedes Error in Key Privacy Ruling: Vote to Sustain Sodomy Law at High Court Called "Mistake,"* N.Y.L.J. Oct. 26, 1990.

20. *Id.* The Court was equally unaffected by the assertion of the defendant that the homosexual conduct should be protected when carried out in the privacy of one's home. It weakly distinguished *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243 (1969), in which the Court had extended the right of privacy to protect the viewing of pornographic materials in the privacy of one's home. The Court reasoned that if *Stanley* was extended to protect the behavior in *Bowers*, it would be hard to limit

interpretations in prior cases allowed an extension of the right to privacy to the facts in *Bowers*. The dissent explained,

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. . . . Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment.²¹

In the opinion of the dissenters, homosexual conduct should be protected under the same analysis that extended the right to privacy to parenting, contraception, abortion, and possession of pornography in the home.²²

B. State Constitutionalism

As the United States Supreme Court has limited the growth of individual rights under the federal Constitution, the concept of state constitutionalism has enabled state courts to provide increased protection and broader individual rights to their citizens under state law.²³ State courts often interpret their state Declarations of Rights to afford increased protection as long as federally protected rights are not infringed. The United States Supreme Court, therefore, has been said to provide a "legal floor" for individual rights, but has no role in the interpretation given to

protection of future activities because they would be carried out in the privacy of one's home. For example, the Court stated, "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road." *Bowers*, at 195-96, 106 S. Ct. at 2846.

21. *Id.* at 216, 106 S. Ct. at 2857 (quoting *Criswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965)).

22. See discussion *infra* surrounding *Powell v. State*, 510 S.E.2d 18 (Ga. 1998). It is interesting to note that the very statute that the United States Supreme Court upheld as constitutional under federal law in *Bowers* was struck down in 1999 as unconstitutional by the Georgia Supreme Court on state constitutional law grounds in *Powell*.

23. William J. Brennan Jr., *The Bill of Rights and the States: The Rival of State Constitutions as Guardians of Individual Rights*, 61 N.Y. U. L. Rev. 535 (1986); See also Paula A. Brantner, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 Hastings Const. L.Q. 495, 509-10 (1992) (noting that state constitutions are generally more comprehensive, provide more explicit guarantees of rights, and even grant affirmative rights to their citizens); *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324 (1982); Ronald L. Collins, *Reliance on State Constitutions Away From a Reactionary Approach*, 9 Hastings Const. L. Q. 1 (1981); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379 (1980); and William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 484, 501 (1977), in which Brennan makes a stinging plea to state courts to move beyond the protections given by the United States Supreme Court. Justice Brennan said, "[s]tate courts cannot rest when they have afforded their citizens the full protection of the Federal Constitution. State Constitutions, too, are a font of individual liberties. Their protections often expand beyond those required by the Supreme Court's interpretation of federal law."

state law by state courts.²⁴ In accordance with this principle, state courts have often diverged from federal interpretations of law by relying on their respective constitutions.²⁵

The Louisiana Supreme Court has frequently followed the precepts of state constitutionalism and provided greater protection for individual rights than is afforded under the federal Constitution. The court has offered increased protection for privacy guarantees under the state constitution as it has done with other constitutional guarantees, some of which are stated more broadly than in federal law and some of which have no corresponding federal guarantee.²⁶ In *State v. Perry*, the Louisiana Supreme Court clearly articulated its adherence to the principles of state constitutionalism. As Justice Dennis explained,

[B]ecause our state Declaration of Rights incorporates or expands most of the federal Bill of Rights standards, a decision by this court upholding an individual's state constitutional right rarely will call for further review by the Supreme Court. As long as one party's state rights are expanded without infringement on another individual's federal right, our state constitution may be used to supplement or expand federally guaranteed constitutional rights.²⁷

The court in *Perry* cited state constitutional grounds in concluding that the state was not permitted to medicate an insane prisoner on death row in order to

24. Paul W. Kahn, Comment, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147, 1148 (1993). See also Nan Feyler, *The Use of The State Constitutional Right to Privacy to Defeat State Sodomy Laws*, 14 N.Y.U. Rev. L. & Soc. Change 973, 984 (1986).

25. See, e.g., *People v. Mitchell*, 650 N.E.2d 1014 (Ill. 1995) (holding that the Illinois Supreme Court may construe provisions of the Illinois Constitution to provide more expansive protections than comparable federal constitutional provisions); *Baker v. City of Fairbanks*, 471 P. 2d 386 (Alaska 1970) (expanding the rights of criminal defendants beyond the protections of the federal government when it held that defendants were entitled to a jury trial in any criminal prosecution); *People v. Fields*, 914 P.2d 832 (Cal. 1996) (stating that the California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of a defendant's rights than extended by the federal Constitution); *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 100 S. Ct. 2035 (1980) (holding that the California courts could provide citizens greater freedom than the federal Constitution. Specifically, the California Supreme Court could permit its citizens to solicit signatures at the private mall and the exercise of that right did not infringe on the property rights of the mall owners.); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (Kentucky court not bound on state law grounds by the decision in *Bowers*); *Cooper v. California*, 386 U.S. 58, 87 S. Ct. 788 (1967) (reasoning that "a state court is free as a matter of its own law to impose greater restrictions on police activity than those this court holds to be necessary upon federal standards.").

26. John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade be Alive and Well in the Bayou State?*, 51 La. L. Rev. 685, 688-89 (comment details rights expanded by the Louisiana Supreme Court).

27. *State v. Perry*, 610 So. 2d 746 (La. 1992) (citing *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 100 S. Ct. 2035 (1980)); see also Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 179 (1984); *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1334 (1982).

carry out an execution.²⁸ The court reasoned that such an act would be a violation of the prisoner's right to personal autonomy in the sense of a right to control one's own medical treatment, as found in Article I, § 5 of the Louisiana Constitution.²⁹ The majority opinion further explained that the Louisiana Supreme Court should not rule on a parallel, federal constitutional question if there is also a state ground on which the case could be decided. The Court noted that when state issues are addressed first, there is "[g]reater judicial efficiency and coherence."³⁰

II. PRIVACY AND SODOMY UNDER STATE CONSTITUTIONS: SISTER STATE EXPERIENCES

The United States Supreme Court has not overruled its decision in *Bowers v. Hardwick* and has continued to maintain that homosexual sodomy is not protected by the federal Constitution.³¹ Therefore, state legislatures and judicial bodies have had to determine whether acts of sodomy are protected by their state constitutions.³²

28. 601 So. 2d 746 (La. 1992).

29. *Id.*

30. *Id.* at 750. *Cf.* *Large v. Superior Court*, 714 P.2d 399, 405 (Ariz. 1986); *City of Portland v. Jacobsy*, 496 A.2d 646, 648 (Me. 1985); *State v. Chaisson*, 486 A.2d 297, 301 (N.H. 1984); *Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1983); *State v. Coe*, 679 P.2d 353, 359 (Wash. 1984).

31. It has been argued, however, that the holding in *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620 (1996), "chips away" at the thrust of the decision in *Bowers*. In *Romer*, the Supreme Court held that Colorado's proposed amendment to its state constitution that prohibited laws that would make sexual orientation an impermissible ground on which to discriminate violated the Fourteenth Amendment under a rational basis analysis. *See, e.g.*, Katherine M. Hamill, *Romer v. Evans: Dulling the Equal Protection Gloss on Bowers v. Hardwick*, 77 B.U. L. Rev. 655 (1997) (concluding that *Bowers* can no longer be used by lower courts to validate laws that discriminate on the basis of sexual orientation); Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights*, 1996 Wis. L. Rev. 893, 917 (noting that *Romer's* most noteworthy achievement was its "failure to cite anything to which the continued validity of *Bowers* could be moored").

32. Act of July 17, 1978 ch. 166, 1978 Alaska Sess. Laws 219; Act of May 12, 1975, ch. 71, sec. 4-12, 1975, Cal. Stat. 131, 133-136; Colorado Criminal Code, chs. 40-1-403, 40-3-40, 1971 Colo. Sess. Laws 388, 423; Conn. Penal Code, Pub. Act No. 828, sec. 66-91, 1969, Conn. Pub. Acts 1554, 1579-85; Delaware Criminal Code, ch. 497 sec. 766, 767, 58 Del. Laws 1611, 1665-66 (1972); Haw. Penal Code Act 9 sec. 733-735, 1972, Hawaii Sess. Laws 32, 90-01; Act of Feb. 25, 1976, Pub. Law No. 148 ch. 4 sec. 2, 1976 Ind. Acts 718, 733-34; Iowa Criminal Code, ch. 1245, sec. 901-906, 1976 Iowa Acts 549, 558-559; Maine Criminal Code, ch. 499 sec. 251-255, 1975 Me. Laws 1273, 1297-1300; Nebraska Criminal Code, L.B. 38 sec. 32-38, 1977 Neb. Laws 88, 100-102; Act of July 2, 1973, ch. 532:26, 1973 N.H. Laws 999, 1011; New Jersey Code of Criminal Justice, ch. 95, sec. 14:0 to 14:3, 1978 N.J. Laws 482, 547-550; Act of Apr. 3, 1975, ch. 109, 1975 Laws 265, 266-267; Act of Dec. 14, 1972, sec. 2907.01-.07, 1972 Ohio Laws 1966, 1906-1911; Oregon Criminal Code of 1971, sec. 104-120, 1972 Or. Laws 1873, 1907-1910; Crimes Code, No. 334, ch. 31, 1972 Pa. Laws 1983, 1528-31; Act of Feb. 26, 1976, ch. 158 sec. 22-2 to B4, 1976 S.D. Laws 227, 260-261; Washington Criminal Code, ch. 260, sec. 9A.88, 100, 1975 Wash. Laws 817, 858; Act of Mar. 11, 1976, ch. 43, 1976 W.Va. Acts 241; Act of February 24, 1977, ch. 70, 1977 Wyo. Sess. Laws 228, 228-310 (This list is derived in part from Yao Apasu-Gbotsu et al., Note, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. Miami L. Rev. 521, 526-27 (1986)).

Because the issue presented in *Smith* is *res nova* to the Louisiana Supreme Court, it may benefit the court to consider other states' rationales in similar cases as a background for its own decision.³³

State sodomy statutes have been challenged on a number of grounds under state constitutions, including theories of: 1) violation of privacy, 2) violation of equal protection,³⁴ 3) vagueness,³⁵ 4) cruel and unusual punishment,³⁶ and 5) the establishment of religion.³⁷ In his appeal to the Louisiana Supreme Court, the defendant in *Smith* has challenged the state sodomy statute solely as a violation of privacy. This challenge seems to be the best founded argument since the Louisiana

33. See Nan Feyler, *The Use of the State Constitutional Right to Privacy to Defeat State Sodomy Laws*, 14 N.Y.U. Rev. L. & Soc. Change 973, 991 (1986), in which she states, "Case law from other states may prove persuasive. While these decisions will not be binding on another state court, they help demonstrate the desirability of expansive state privacy protection, and work to assure a state court that it is not alone in interpreting its state constitution forcefully."

34. See, e.g., *Rapheal v. Hogan*, 305 F. Supp. 749 (S.D.N.Y. 1969) (holding that the state's consensual sodomy law did not invidiously discriminate between married and unmarried individuals); *Neville v. State*, 430 A.2d 570 (Md. 1981) (holding that married and unmarried individuals could be prosecuted for engaging in perverted practices under the circumstances of the case); *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976) (holding that equal protection required that private, consensual acts of sodomy by unmarried persons receive the same constitutional protection as did similar acts by married couples); *People v. Onofre*, 415 N.E.2d 936, 938 (N.Y. 1980) (holding that a consensual sodomy statute that prohibited "deviate sexual intercourse" defined elsewhere in the penal law to include "sexual conduct between persons not married to each other" was invalid because it violated the right to equal protection enjoyed by such persons. The statute discriminated on its face between married and unmarried persons and there was no rational basis for the distinction).

35. See, e.g., *State v. Bateman*, 547 P.2d 6, 9 (Ariz. 1976) (holding that a state sodomy law that employed the term "crime against nature" was not void for vagueness); *Jones v. State*, 456 P.2d 429 (Nev. 1969) (holding that the law that proscribed the "infamous crime against nature" and established special penalties where the offense was committed by force or threat with a minor, was not unconstitutionally vague); *State v. White*, 217 A.2d 212 (Me. 1966) (holding that a law prohibiting "the crime against nature with mankind or beast" sufficiently described the offense).

36. See *People v. Roberts*, 256 Cal. App. 2d 488 (1967) (rejecting the argument that a law criminalizing the commission of oral sex violated the state and federal constitutional bans on cruel and unusual punishment.); *Pratt v. Pratt*, 615 F.2d 486 (8th Cir. 1980) (holding that a sentence of 5 to 10 years for sodomy was not cruel and unusual punishment); *State v. Thompson*, 558 P.2d 1079 (Kan. 1976) (holding that a law authorizing higher sentences for forcible sodomy than were available for forcible rape did not violate the constitutional provisions regarding cruel and unusual punishment and equal protection under the law); *Hughes v. State*, 287 A.2d 299 (Md. Ct. Spec. App. 1972) (upholding a law that allowed sentences of up to 10 years for persons engaging in unnatural or perverted sexual practices against a challenge of cruel and unusual punishment).

37. See, e.g., *Hatheway v. Secretary of Army*, 641 F.2d 1376 (9th Cir. 1981) (holding that a military law that prohibited "unnatural carnal copulation" did not violate the establishment of religion despite the religious origin of the laws against sodomy); *State v. Rhinehart*, 424 P.2d 906 (Wash. 1967) (holding that the sodomy statute did not violate the establishment clause. Further, there was no merit in the contention that the statute violated religious rights by imposing the ethics of the majority on others who followed "homosexual practices."); *Stewart v. United States*, 364 A.2d 1205 (D.C. 1976) (holding that even though the sodomy laws were clearly motivated by religious forces, it did not make the local sodomy statute a violation of the constitutional prohibition of laws affecting the establishment of religion). See also Nan Feyler, *The Use of the State Constitutional Right to Privacy to Defeat Sodomy Laws*, 14 N.Y.U. Rev. L. & Soc. Change 973, 979 (1986).

Supreme Court has previously been willing to strike down laws that infringe on the personal autonomy of its citizens. The following section, therefore, will discuss similar challenges brought in other states and consider the application of those challenges under Louisiana law.

A. *Unconstitutional Invasion of Privacy Under State Constitutions*

A challenge to sodomy laws as an unconstitutional invasion of privacy compels state courts to consider a "right to privacy" that is broader than the corresponding federal right as interpreted in *Bowers v. Hardwick*.³⁸ It should be noted initially that many state legislatures repealed their sodomy statutes before the courts were able to interpret them in light of their state constitutions. The courts of several other states have invalidated their sodomy laws based on their state constitutions.³⁹ However, some states have refused to diverge from the federal interpretation of *Bowers*.⁴⁰

1. *Kentucky: A "Rational Basis" Approach*

In *Commonwealth v. Wasson*,⁴¹ the Kentucky Supreme Court rejected the *Bowers* interpretation of the limits of the right of privacy. The defendant in

38. 478 U.S. 186, 106 S. Ct. 2841 (1986).

39. See, e.g., *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *State v. Morales*, 869 S.W.2d 941 (Tex. 1994) (lower Texas court enjoined further enforcement of the sodomy statute); *State v. Pilcher*, 242 N.W. 2d 348 (Iowa 1976); *State v. Ciuffini*, 395 A.2d 904 (N.J. 1978) (extending privacy rights to consensual sodomy); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (invalidating a statute criminalizing consensual sodomy on federal grounds, ignoring state grounds relied on below); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980) (holding unconstitutional a statute prohibiting deviate sexual intercourse). Discussed more fully *infra*.

40. See, e.g., *Neville v. State*, 430 A.2d 570 (Md. 1981) (holding that the Maryland perverted practices statute was constitutionally applied where the defendants engaged in intimate sexual activities in daylight hours in a place open to the public); *Kelly v. State*, 412 A.2d 1274 (Md. Ct. Spec. App. 1980) (holding in part that the right of privacy does not protect the practice of fellatio); *State v. Santos*, 413 A.2d 58, 68 (R.I. 1980) (holding that "the [federal constitutional] right of privacy is inapplicable to private unnatural copulation between unmarried adults"); *State v. Poe*, 259 S.E.2d 304 (N.C. Ct. App. 1979) (holding in part that "the State, consistent with the Fourteenth Amendment can classify unmarried persons so as to prohibit fellatio between males and females without forbidding the same acts between married couples." And further concluding that "the constitutional right of privacy does not protect the defendant in this case."); *Carter v. State*, 500 S.W.2d 368 (Ark. 1973) (holding that the statute prohibiting sodomy was not an unconstitutional invasion of privacy under the federal or state constitutions). See also Thomas E. Pryor, *Does Arkansas Code Section 5-14-122 Violate Arkansas's Constitutional Guarantee of Equal Protection?*, 51 Ark. L. Rev. 521 (1998); *Dixon v. State*, 268 N.E.2d 84, 86 (Ind. 1971) (concluding that there is no constitutional right to privacy that protects heterosexual consensual oral sex); Juli A. Morris *Challenging Sodomy Statutes: State Constitutional Protections for Sexual Privacy*, 66 Ind. L.J. 609, 619 (1991) (noting that, "[f]or the most part, state courts have failed to develop a jurisprudence of privacy rights that can stand apart from federal doctrine . . ."); and *Schochet v. State*, 580 A.2d 176 (Md. 1990).

41. 842 S.W.2d 487 (Ky. 1992). Note also that the two state supreme court cases that struck down criminal sodomy statutes before *Wasson* did not directly address the issue of homosexual sodomy

Wasson argued that his arrest for solicitation of deviate sexual intercourse was unconstitutional under the state constitution. The Kentucky Supreme Court agreed that the statute violated both the privacy and equal protection guarantees of the state constitution.⁴² Initially, the Kentucky Supreme Court explained that its decision would not emulate the decision in *Bowers*. In determining the limits of behavior protected by the Kentucky Constitution, the court noted that it was not restricted to the federal interpretation and recognition of those rights which "are 'deeply rooted in this Nation's history and tradition.'"⁴³

Kentucky had recognized, on more than one occasion, that its constitution provided more protections to its citizens than the minimum provided by the federal Constitution as interpreted by the Supreme Court.⁴⁴ From an early date, the Kentucky courts had seized upon the expansion of individual privacy and continually recognized a right to individual privacy that is broader than the federal right to privacy.⁴⁵ In a 1909 decision, for example, the Kentucky court struck down an ordinance that criminalized possession of intoxicating liquor, even for private use.⁴⁶ As the court explained in *Commonwealth v. Campbell*, "let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws."⁴⁷ In relating *Campbell* to *Wasson*, the court explained that when *Campbell* was decided, the use of alcohol was much more offensive to the "moral majority" than deviate sexual behavior is today.⁴⁸

The Kentucky court further explained that the textual and structural differences between the United States Bill of Rights and the Kentucky Bill of Rights and the

under their respective constitutions. See *Commonwealth v. Bonadio*, 415 A.2d 47, 49-50 (Pa. 1980) (holding that a statute criminalizing sodomy between consenting unmarried adults violated both the Pennsylvania and United States Constitutions); *People v. Onofre*, 415 N.E.2d 936, 939-43 (N.Y. 1980) (striking down the criminal sodomy statute as a violation of the right to privacy and equal protection under the United States Constitution). Discussed more fully *infra*.

42. *Wasson*, 842 S.W.2d. at 501. The Kentucky court also held that the statute was unconstitutional as an infringement on the Equal Protection Clause of the state constitution as homosexuals represented an identifiable class. The state had not met its burden in proving a "legitimate governmental interest justifying a distinction" based on sexual preference.

43. *Wasson*, 842 S.W.2d at 493; cf. *Bowers v. Hardwick*, 478 U.S. 186, 192, 106 S. Ct. 2841 (1986).

44. The court listed as reference cases: *Ingram v. Commonwealth*, 801 S.W.2d 321 (Ky. 1990) (involving protection against double jeopardy); *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989) (holding that children in poorer areas had a constitutional right to an adequate education in a wealthier school district); and *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983) (concluding that it was unconstitutional for public school to provide textbooks to private schools even though the federal constitution allowed such acts).

45. See, e.g., *Commonwealth v. Smith*, 173 S.W. 340 (Ky. 1915) (holding that the police power of the state could only be called into play when it was reasonably necessary to protect the public health and morals or safety); *Hersberg v. City of Barbourville*, 133 S.W. 985 (Ky. 1911) (holding unconstitutional an ordinance that attempted to regulate the smoking of cigarettes in the privacy of one's home); *Lewis v. Commonwealth*, 247 S.W. 749 (Ky. 1923).

46. *Commonwealth v. Campbell*, 117 S.W. 383 (Ky. 1909).

47. *Id.* at 385-86.

48. *Wasson*, 842 S.W.2d at 494.

judiciary's treatment of such differences provided the basis for a decision distinct from *Bowers*. The first and second sections of the Kentucky Bill of Rights provide its citizens with seemingly broader rights than the corresponding provisions of the United States Bill of Rights:

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

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

* * *

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

* * *

Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.⁴⁹

While the "right of privacy" is not explicit in the above sections, commentaries from the Kentucky Constitutional Convention explain how the provisions secure personal freedoms.⁵⁰ The convention intended to assure that individual freedom and protection from governmental interference were paramount in an ordered society unless the actions of an individual infringed upon the rights of another.⁵¹

In its defense of the statute at issue in *Wasson*, the state did not present any witnesses, nor did it offer scientific or sociological evidence. Rather, the state sought to uphold the statute with two justifications. First, the state argued that the majority had the right to criminalize any sexual activity that it deemed immoral, hence "what is beyond the pale of the majoritarian morality is beyond the limits of constitutional protection."⁵² Second, the state argued that Kentucky had always punished sodomy as an offense and should continue on the same course.⁵³ The court was not persuaded by either of the state's arguments and opined that the statute regulated "the most profoundly private conduct and in so doing impermissibly invades the privacy of the citizens of this state."⁵⁴

In explaining why the morals of the majority could not subsume the rights of the minority, the Kentucky court adopted the analysis from the Pennsylvania Supreme Court which had held that:

49. Kentucky Constitution §§ 1 and 2 (1891). See *supra* note 44 for other areas in which the Kentucky court was willing to expand state rights further than the federal government had provided.

50. Official Report of the Proceedings and Debates in the 1890 Convention, Vol. 1, 718.

51. See *id.* (J. Proctor Knott).

52. *Wasson*, 842 S.W.2d at 490.

53. *Id.* The court also declared that "[d]eviate sexual intercourse conducted in private by consenting adults is not beyond the protections of the guarantees of individual liberty in our Kentucky Constitution simply because proscriptions against that conduct have ancient roots." *Id.* at 493(citing *Bowers*, 478 U.S. at 192, 106 S. Ct. at 2844).

54. *Id.* at 491. The court also noted that under the rationale of the Kentucky court in *Commonwealth v. Smith*, 173 S.W. 340 (Ky. 1915), "immorality in private which does 'not operate to the detriment of others' is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution." *Id.* at 496.

With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct *does not harm others*. No harm to the secular interest of the community is involved in atypical sex practice in private between consenting adult partners. . . . No significant state interest justifies legislation of norms simply because a particular belief is followed by a number of people. . . .⁵⁵

Also, in *Campbell* the court had noted that in another context "the theory of . . . [Kentucky's] government is to allow the largest liberty to the individual commensurate with public safety."⁵⁶ Because the private sexual acts between adults did not threaten public safety, the *Wasson* court remained firm in its conviction that the privacy guarantees inherent in the Kentucky Constitution could not be pierced by the preference of the majority.

The *Wasson* court was equally unpersuaded by the state's second argument that the statute was constitutional because the state had always punished sodomy. Initially, the court disagreed with the state's assumption that the current Kentucky law was the same as it always had been.⁵⁷ The statute at issue in *Wasson* was broader than prior law because the "common law tradition punished neither oral copulation nor any form of deviate sexual activity between women" and under prior Kentucky law, penetration of the mouth was not sufficient for a conviction of sodomy.⁵⁸ The acts may have been seen by the majority as immoral, but they were not criminalized.⁵⁹ The court specifically noted, "[d]eviate sexual intercourse conducted in private by consenting adults is not beyond the protections of individual liberty in our Kentucky Constitution simply because 'proscriptions against that conduct have ancient roots.'"⁶⁰ Therefore, the "historical" argument by the state was not sufficient to justify the regulation of private consensual sexual behavior. The state court noted, however, that if the current law was identical to

55. *Wasson*, 842 S.W.2d at 498 (quoting *Pennsylvania v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980) and Model Penal Code, § 207.5-Sodomy and related offenses)). Comment (tent. draft no. 4, 1955). Quoting from *Bonadio*, the Kentucky court explained that the language in the decision was significant "because of the common heritage shared by the Kentucky Bill of Rights of 1792 and the Pennsylvania Bill of Rights of 1790. Decisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are uniquely persuasive in interpreting [the Kentucky Constitution]." *Wasson*, 842 S.W.2d at 498.

56. *Wasson*, 842 S.W.2d 495 (quoting *Commonwealth v. Campbell*, 117 S.W. 383, 387 (Ky. 1909)).

57. Ky. Rev. Stat. 510.01 (1999) punishes "deviate sexual intercourse with another"; Ky. Rev. Stat. 510.01(1) (1999) defines deviate sexual intercourse as "any act of sexual gratification involving the sex organs of one (1) person and the mouth or anus of another."

58. *Wasson*, 842 S.W.2d at 491.

59. See *Commonwealth v. Poindexter*, 118 S.W. 943 (Ky. 1909) in which the court held that penetration of the mouth was not sodomy. Rather, anal penetration was required for such a conviction.

60. *Wasson*, 842 S.W.2d at 493 (internal citations omitted).

prior sodomy laws, the state's argument might have supported the historical and traditional basis for punishing acts of sodomy.

2. *Tennessee: A "Strict Scrutiny" Approach*

In *Campbell v. Sundquist*, the Tennessee Court of Appeals upheld the decision of a lower court to strike down the Homosexuals Practices Act ("HPA")⁶¹ and held, *inter alia*, that an adult's right to engage in consensual and non-commercial sexual activities in the privacy of a home is a matter of intimate personal concern which is at the heart of the state's privacy rights.⁶² The Tennessee court began its analysis, like the court in *Wasson*, by declaring that it was not bound by the holding in *Bowers*.⁶³ It then determined that the Tennessee Constitution guaranteed the fundamental right of privacy to all citizens and found that the HPA infringed upon that right. Therefore, the state was required to provide compelling reasons for the imposition of the statute to satisfy the "strict scrutiny" analysis employed by the court.

Before offering justifications for the HPA, the state argued that Article I, § 8 of the Tennessee Constitution had traditionally been interpreted to provide state citizens with the same "privacy rights" as the federal Constitution.⁶⁴ Therefore, the rights of Tennessee citizens should only encompass the same rights granted by the federal Constitution. The court, however, disagreed with the state's assumption that Article I, § 8 was the sole source of privacy protections and with the assertion that the state rights were coextensive with those granted by the federal Constitution. Even if some Tennessee rights were drafted in a manner similar to the federal rights, there was no reason to assume that there must be complete congruency in the interpretations of those rights.⁶⁵ The court held that the Tennessee right to privacy stemmed from several sources including Article I, § 8, and several sections of the Tennessee Declaration of Rights.⁶⁶ The United States Supreme Court's

61. The Homosexual Practices Act criminalized certain private sexual acts between persons of the same sex. Tennessee Homosexual Practices Act, Tenn. Code Ann. § 39-13-510 (1991).

62. 926 S.W.2d 250, 262 (Tenn. 1996). The court also held that the homosexuals were allowed to maintain their action under the Declaratory Judgment Act even though none of them had been prosecuted under the HPA and that the HPA was unconstitutional. In *Campbell*, homosexuals brought a declaratory judgment action seeking to find the HPA unconstitutional. The circuit court entered summary judgment for homosexuals. The court of appeals affirmed the standing of the homosexuals and held that they were entitled to maintain their action under declaratory judgment even though none of them had been prosecuted under the HPA.

63. *Sundquist*, 926 S.W.2d at 259.

64. *Id.* at 258. Cases offered in support of this statement include: Illinois Cent. R.R. Co. v. Crider, 19 S.W. 618 (Tenn. 1892); State v. Hale, 840 S.W. 2d 307 (Tenn. 1992); Dearborne v. State, 575 S.W. 2d 259 (Tenn. 1978); Daughtery v. State, 393 S.W. 2d 739 (Tenn. 1965).

65. *Sundquist*, 926 S.W.2d at 260.

66. The court found several sources for the right to privacy including: Tennessee Constitution Article I, § 8: "No man to be disturbed but by law. . . . That no man shall be taken or imprisoned, or deseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property. . . ." Tennessee Bill of Rights: § 3: "[N]o human authority can, in any case whatever, control or interfere with the rights of conscience;" § 7: "[T]he people shall be

construction of the Due Process Clause and the federal provision analogous to Article I, § 8 did not restrict the right to privacy in Tennessee.⁶⁷ Specifically, the *Sundquist* court asserted that the Tennessee Constitution and the judiciary's interpretation of the right to privacy under the state constitution were more extensive than the federal right.

The right of individual privacy under the Tennessee Constitution was first expressly recognized by the court in *Davis v. Davis*.⁶⁸ In *Davis*, the court held that an ex-wife could not donate an embryo "created" by the couple during her previous marriage to another woman when the ex-husband objected.⁶⁹ The right of privacy under the Tennessee Constitution was expansive enough to include the husband's right not to procreate. The court reasoned that even though the right of individual privacy was not explicit in the Tennessee Constitution, it was clearly intended to be included and protected by the Tennessee Declaration of Rights.

Because the right to privacy was held to be fundamental under the state constitution, the state in *Sundquist* was required to provide compelling justifications for the HPA in order to overcome a strict scrutiny test.⁷⁰ Tennessee offered five "state interests" in support of the HPA. The justifications included: 1) discouraging acts that could not lead to procreation; 2) discouraging citizens from choosing a lifestyle which is socially stigmatized and leads to suicide, depression and drug and alcohol abuse; 3) discouraging homosexual relationships which are assertedly shallow and merely intended for sexual gratification; 4) prevention of the spread of infectious diseases; and 5) promotion of the moral values of Tennessee citizens.⁷¹

The first asserted state interest, discouraging acts that do not lead to procreation, was deemed not sufficient under federal or state law to serve as a compelling reason to uphold the HPA.⁷² The United States Supreme Court, in *Griswold*, and the Tennessee Supreme Court in *Davis v. Davis*, had previously held that the right of privacy included the right to "procreational" autonomy.⁷³ The

secure in their persons, houses, papers and possessions, from unreasonable searches and seizures." § 19: "Free communication of thoughts and opinions, is one of the invaluable rights of man and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Note also, that the court in *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), held that the right to privacy extended primarily from Article I, § 8.

67. *Sundquist*, 926 S.W. 2d at 260.

68. 842 S.W. 2d 588 (Tenn. 1992).

69. *Id.* at 600; see also Sabine Koji, *Constitutional Law Campbell v. Sundquist: Tennessee's Homosexual Practices Act Violates the Right to Privacy*, 28 U. Mem. L. Rev. 311 (1997) (concluding in part that *Davis* "evidenced the Tennessee Supreme Court's willingness to give rights dealing with procreation and family the highest protection under the state constitution").

70. *Sundquist*, 926 S.W. 2d at 262.

71. *Id.*

72. *Id.*

73. *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S. Ct. 1678, 1682 (1965); *Davis*, 842 S.W. at 601, where the Tennessee Supreme Court held that its individuals had the right to "procreate and the right to avoid procreation." Thus, if there was a constitutional right for married and unmarried persons to obtain contraceptives to avoid procreation, then, surely, procreation cannot be a justification for this statute.

second and third justifications for the HPA, to prevent suicide and substance abuse and to rescue homosexuals from "shallow" relationships, could be considered compelling state interests,⁷⁴ but the state did not present any actual evidence that the HPA addressed or prevented either of these asserted interests. The fourth justification, prevention of the spread of infectious diseases, was also considered compelling by the court, but the state was unable to show that the HPA was narrowly tailored to address this need.⁷⁵ Finally, while the promotion of morals in Tennessee has been classified as a legitimate state interest in other areas, the court held that the infringement of privacy in this case was too extensive.⁷⁶ The Tennessee court explained that:

[W]hen these moral choices are transformed into law, they have constitutional limits . . . Even if we assume that the [HPA] represents a moral choice of the people of this state, we are unconvinced that the advancement of this moral choice is so compelling as to justify the regulation of private, noncommercial, sexual choices between consenting adults. . . .⁷⁷

The rationale of the Tennessee court echoes the reasoning adopted by the Kentucky court in *Wasson*. Under the strict scrutiny applied by the court in *Sundquist*, the "moral choice of the majority" was not a sufficient justification for the infringement of the right to privacy.

3. Georgia: A "Strict Scrutiny" Approach

In *Powell v. State*,⁷⁸ the Supreme Court of Georgia held that the "right to be let alone" as guaranteed by the Georgia "due process clause" provided more extensive rights than the right of privacy protected by the United States Constitution.⁷⁹ At issue in *Powell* was the constitutionality of the Georgia sodomy statute—the same statute that the United States Supreme Court had found valid under the United States Constitution in *Bowers*.⁸⁰ The defendant in *Powell* was initially charged with aggravated sodomy but was convicted of the lesser charge of "sodomy" pursuant to the Official Code of Georgia Annotated 16-6-2 § (a). He

74. This, however, is arguably not a "legitimate state interest," as it is not a part of state police power to "protect" individuals from relationships that they choose to enter just because the relationship may not be as fulfilling as the government thinks it should be.

75. The court stated that the HPA could have the opposite effect and actually increase the spread of infectious diseases. Because the individuals were fearful of prosecution under the HPA, they may be less inclined to seek medical treatment for infections. *Campbell*, 926 S.W.2d at 263-64.

76. The court recognized that many of the state's laws reflect "moral choices" regarding the standard of conduct by which citizens had to conduct themselves. But, at the same time, there are constitutional limits to the impact of such regulations. *Id.* at 264.

77. *Id.* at 264-65.

78. 510 S.E.2d 18 (Ga. 1998).

79. *Id.*

80. O.C.G.A. 16-6-2(a) defines sodomy as the performance of or submission to "any sexual act involving the sex organs of one person and the mouth or anus of another."

appealed his conviction as an unconstitutional invasion of privacy. The Georgia Supreme Court agreed and held that unforced, private, adult sexual activity was encompassed by the right to privacy as guaranteed by Georgia's constitution.⁸¹ The court further explained that it could not think of any other activity that individuals would perceive as more private and more deserving of protection by the government than consensual sexual behavior.⁸² The majority supported this claim by acknowledging that the "right of privacy" had always been valued by the Georgia courts. The *Powell* court noted that since the Georgia Supreme Court became the first court in the country to recognize the right of privacy, in *Pavesich v. New England Life Insurance*,⁸³ the Georgia appellate courts had acquired a "rich appellate jurisprudence in the right of privacy which recognizes the right of privacy as a fundamental constitutional right."⁸⁴

The dissent in *Powell*, however, disagreed with the majority's use of *Pavesich* to validate the conduct in this case.⁸⁵ It argued that because sodomy laws were in effect at the time *Pavesich* was handed down and for decades after the decision, their proscription was consistent with Georgia law.⁸⁶ Furthermore, because the composition of the court was the only factor that had changed since *Pavesich*, the dissent implied that the outcome of the case was the result of the personal preferences of the justices.⁸⁷ Specifically, the dissent asserted, "this constitutional 'right' to engage in sodomy has been manufactured out of whole cloth by the majority's misconstruction of *Pavesich*."⁸⁸ It stated that a constitutional right to privacy obviously cannot include the right to engage in private conduct which was condemned as criminal at the very time that the constitution was ratified.⁸⁹

Because the majority in *Powell* considered privacy to be a fundamental right which was infringed upon by the Georgia law at issue, the state was required to muster some "compelling" interest to support the enforcement of the statute. The state first argued that legislative "police power" to protect its citizens' lives, health, and property and to preserve good order and public morals had been recognized as a "compelling interest" in other areas and should be extended to encompass the

81. 510 S.E.2d 18 (Ga. 1998).

82. *Id.* at 24.

83. 50 S.E. 68 (Ga. 1905). See also Robert N. Katz, *The History of the Georgia Bill of Rights*, 3 Ga. St. L. Rev. 83, 118 (1986-87).

84. *Powell*, 510 S.E.2d at 21.

85. *Id.* at 27. The dissent stated that *Pavesich* had not held that the citizens of Georgia had an immutable right to engage in private consensual sodomy or any other conduct that was proscribed by the Georgia legislature. *Pavesich* only defined the right of privacy generally as an implicit element of "liberty" guaranteed to the citizens.

86. This argument is not impressive. The United State Supreme Court in *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967), was unpersuaded by a similar argument when faced with the constitutionality of Virginia's miscengenation laws. The state asserted that because the miscengenation laws were in existence at the time the Fourteenth Amendment was passed, the framers must have intended then to be consistent with the Fourteenth Amendment. However, the Court was not impressed with this justification and held the statute unconstitutional.

87. *Powell*, 510 S.E.2d at 28.

88. *Id.*

89. *Id.* at 30.

prohibition of sodomy.⁹⁰ However, the Georgia court held that the legislation exceeded the police power of the state. Because the statute's sole purpose was to regulate the private conduct of consenting adults, there was no public benefit from the enforcement of the statute.⁹¹ With no justifiable state interest, the Georgia court would not allow this invasion of the right to privacy under the guise of the "police power."⁹²

The majority also rejected the separation of powers argument by the state that the court should not involve itself in the decisions of the legislature.⁹³ The court explained that merely because the legislature enacts a law that may impact the public's moral choices, courts are not "bound to simply acquiesce."⁹⁴ "Moral legislation," like any other law, was subject to review by the courts under the checks and balances system. The court candidly stated that "if we were called upon to pass upon the propriety of the conduct herein involved, we would not condone it," but recognized that the judiciary could not base its decisions on personal moral beliefs.⁹⁵

B. Sodomy Statutes Upheld Under Federal or State Constitutions⁹⁶

Several state courts have upheld the constitutionality of state sodomy statutes against both federal⁹⁷ and state challenges.⁹⁸ However, the analysis of most state courts in this area has paralleled that of the federal courts. In *State v. Santos*⁹⁹ and *State v. Poe*¹⁰⁰ for example, the respective state courts upheld the application of

90. See *Goldrush II v. City of Marietta*, 482 S.E. 2d 347 (Ga. 1997) (Georgia used the "police power" to combat the negative effects of the combination of alcohol and nude dancing); *Cannon v. Coweta County*, 389 S.E.2d 329 (Ga. 1990) (police power used to limit land usage through zoning restrictions); and *Foster v. Ga. Bd. Of Chiropractic Exam'rs*, 359 S.E.2d 877 (Ga. 1987) ("police power" used to regulate the health professions). See also the sole dissent in *Powell*, which held that it was not the proper function of the court to judicially repeal laws on purely sociological considerations. If the General Assembly of Georgia determined that the long-recognized ban on sodomy should remain in place, it was not the role of the court to interfere with the decision. *Powell*, 510 S.E.2d at 30.

91. As was explained by the Georgia court in *Cannon v. Coweta County*, 389 S.E. 2d 329 (Ga. 1990), to be a valid exercise of "police power," the legislation has to serve a public purpose, be reasonably necessary for the accomplishment of the purpose, and not unduly oppress those regulated by the statute.

92. *Powell*, 510 S.E.2d at 30.

93. *Id.* at 25.

94. *Id.* (citation omitted).

95. *Id.*

96. This section of research proved more difficult in attempting to coalesce the current case law. Several of the cases included "limiting factors" that may impinge their application to other cases. For example, acts of sodomy occurring in public, forced sodomy acts, solicitation of sodomy, and sodomy performed with a minor, are more case specific. When the cases are considered more generally, however, the reasoning employed by the courts is helpful to understand why the state courts upheld their sodomy statutes.

97. See *supra* note 1.

98. *State v. Gray*, 413 N.W. 2d 107 (Minn. 1987).

99. 413 A.2d 58 (R.I. 1980).

100. 252 S.E.2d 843 (N.C. Ct. App. 1979).

their sodomy statutes purely on federal grounds. In *State v. Gray*,¹⁰¹ the Minnesota Supreme Court considered but rejected a challenge to its sodomy statutes on state constitutional grounds.

1. Rhode Island and North Carolina: Analysis Under a "Federal Framework"

In *State v. Santos*,¹⁰² the defendant was charged with transporting women for immoral purposes and committing an abominable crime against nature. The defendant argued that Rhode Island's sodomy statute¹⁰³ violated his right to engage in private, sexual, consensual activities under the state and federal constitutions. The state supreme court, however, held that the decision of unmarried adults to engage in private consensual activity was not of such a fundamental nature to warrant its inclusion in the guarantee of personal privacy.¹⁰⁴ The state court incorporated the "privacy" precedent of the United States Supreme Court concluding that the Supreme Court decisions in *Griswold v. Connecticut*,¹⁰⁵ *Eisenstadt v. Baird*,¹⁰⁶ *Roe v. Wade*,¹⁰⁷ *Carey v. Population Services International*,¹⁰⁸ and *Doe v. Commonwealth*¹⁰⁹ should be read to limit the right of privacy to matters relating to childbearing. Because "private unnatural copulation between unmarried adults" had no relation to childbearing, the right of privacy was deemed inapplicable to the actions in this case.¹¹⁰

In *Santos*, the Rhode Island Supreme Court did not consider whether the state's interest was furthered by the statute or the possibility that the state could

101. 413 N.W.2d 107 (Minn. 1987).

102. 413 A.2d 58 (R.I. 1980). Rhode Island has since declared § 11-10-1 (Supp. 1999) unconstitutional under an Equal Protection analysis in *State v. McGovern*, No. WL/97-0053 (B)(C), 1998 WL 252236 (R.I. Super. Apr. 24, 1998), because the statute unnecessarily distinguished between married and unmarried persons.

103. R.I. Gen. Laws. § 11-10-1 (Supp. 1999).

104. *Santos*, 413 A.2d at 68.

105. 381 U.S. 479, 85 S. Ct. 1678 (1965) (generally holding that the right of privacy forbid the state from prohibiting the use of contraceptives by married persons); *see supra* note 9 and accompanying text.

106. 405 U.S. 438, 92 S. Ct. 1029 (1972) (holding that the state could not prohibit the use of contraceptives by unmarried persons) *see supra* note 11 and accompanying text.

107. 410 U.S. 113, 93 S. Ct. 705 (1973) (holding that the right to privacy restricted the state from proscribing a woman's right to an abortion); *see supra* note 13 and accompanying text.

108. 431 U.S. 678, 97 S. Ct. 2010 (1977) (In which the Supreme Court held that a New York statute that criminalized the unauthorized sale or distribution of contraceptives violated the right to privacy. The Court further noted that even though the outer limits of the protection afforded to individual decision making were not yet defined, decisions relating to marriage, contraception, procreation and family relationships clearly were protected).

109. 425 U.S. 901, 96 S. Ct. 1489 (1976) (the U.S. Supreme Court summarily affirmed a District Court judgment that had upheld a Virginia sodomy statute against a privacy challenge); *see also* James J. Rizzo, *The Constitutionality of Sodomy Statutes*, 45 Fordham L. Rev. 553 (1976) (comment broadly asserts that after *Doe*, the "state prohibition of private consensual acts of sodomy between adults raises no question of the abridgment of fundamental rights in the judgment of the court") *Id.*

110. *Doe v. Commonwealth*, 425 U.S. 901, 425 S. Ct. 1489 (1976).

provide more protection than a collective reading of federal precedents delineating the right of privacy. Although the Rhode Island Superior Court later recognized that the state's purpose in enacting the statute was to "prevent immoral behavior,"¹¹¹ the *Santos* court upheld the statute without discussion of the state's real interest in its enforcement. It is notable that although the defendant challenged the validity of the statute under both federal and state privacy guarantees, the court chose only to address the issue under federal law. The court adhered to a narrow reading of the federal decisions to uphold the Rhode Island statute.¹¹²

In *State v. Poe*,¹¹³ the Court of Appeals of North Carolina held that the prosecution of the defendant under North Carolina's "crime against nature" statute¹¹⁴ did not violate his right to privacy.¹¹⁵ The defendant had argued that because the act of fellatio was done in private, by adults, and with the consent of the parties, his conduct was protected under the right to privacy. The North Carolina court, however, reasoned that the privacy protections afforded by the United States Supreme Court in *Griswold* and *Eisenstadt* were not applicable to this case. Specifically, the court stated, "[i]n this case the state has proscribed certain sexual conduct. In *Eisenstadt* sexual conduct was not proscribed—merely the use of contraceptives while engaging in that conduct by unmarried persons."¹¹⁶ The court then concluded its discussion of the privacy issue by noting that the state was allowed to forbid certain types of sexual conduct under the federal Constitution.

Although the reasoning of the state court in *Poe* is admittedly brief, it is instructive in two ways. First, the court did not address the possibility that it could extend privacy protections beyond those provided by the federal government. Like the Rhode Island court in *Santos*, the *Poe* court offered a limited interpretation of the federal precedent construing the right of privacy and upheld the statute. The second notable aspect of *Poe* is the lack of discussion concerning the state's justification for the statute. The court firmly stated that the "state can proscribe certain types of sexual conduct" and required no substantive reasoning by the state to support the application of the statute. Further, because no fundamental right was

111. *State v. Lopes*, No. PI 90-3789, 1994 WL 930907 (R.I. Super. Mar. 14, 1994).

112. The opinion did not contain any reference to the state law claim raised by the defendant. The absence of this discussion could mean that the court considered the state law to be parallel to the federal interpretation in *Bowers*. However, it could also be inferred that under these facts, the state court was unwilling to strike down the statute, but left open the possibility that under more appealing facts, the court would strike down the statute.

113. 252 S.E.2d 843 (N.C. 1979).

114. N. C. Gen. Stat. § 14-177 (1999).

115. N.C. Gen. Stat. § 14-77 (1999) provides: "If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony and shall be fined or imprisoned in the discretion of the court." Defendant was initially charged with the rape of a female and commission of the crime against nature. The court dismissed the charge of rape and defendant was only convicted of the performance of fellatio.

116. *Poe*, 252 S.E.2d at 845.

deemed to be infringed upon, the North Carolina court did not discuss the varying levels of scrutiny that could be applied.¹¹⁷

While *Santos* and *Poe* were based on a refusal to extend *Griswold*, the United States Supreme Court's decision in *Bowers* seems to provide state courts with a clearer avenue through which they can uphold the enforcement of state sodomy statutes.¹¹⁸ Rather than sifting through the holdings of *Griswold* and its progeny to determine whether the right of privacy was intended to encompass the private sexual acts regulated by sodomy statutes, state courts can rely on the holding in *Bowers* to conclude that homosexual sodomy is not a protected fundamental right.

2. Minnesota: Upholding Its Sodomy Law Under a "State Framework"

In *State v. Gray*,¹¹⁹ the male defendant was charged with a violation of the state sodomy statute for allegedly engaging in sex with a male prostitute.¹²⁰ The defendant argued that the sodomy statute was unconstitutional because there was a fundamental right under the federal and state constitutions for consenting adults to engage in private sexual conduct in the privacy of their home. The Minnesota Supreme Court began its analysis by noting that the United States Supreme Court decision in *Bowers v. Hardwick* clearly defeated the defendants' argument that the state statute violated the federal Constitution. However, the court agreed that state constitutions were allowed to provide more fundamental rights than the federal Constitution and that fundamental rights were not limited to those expressly identified in the state constitution.¹²¹ The *Gray* court noted that while the right to privacy established in the Minnesota Bill of Rights only protects fundamental rights, it was not limited by the United States Supreme Court's decisions in deciding whether a right was considered fundamental.¹²²

117. The court did not discuss the applicability of even the rational basis to the facts of the case. Presumably, the court would have found a rational relationship between the government regulation and the conduct proscribed, but the decision did not reflect any such analysis.

118. 478 U.S. 186, 106 S. Ct. 2841 (1986); see, e.g., *Schochet v. State*, 580 A.2d 176 (Md. 1990) (holding that the unnatural or perverted sexual practices, prohibited in Md. Code Ann., Crimes and Punishments art. 27 § 554 (1957), did not encompass within its scope consensual, noncommercial heterosexual activities between adults in the privacy of the home.); *Santillo v. Commonwealth of Virginia*, 517 S.E.2d 733 (Va. 1999) (holding that defendant's conviction under the state sodomy statute was not unconstitutional because the victim was a minor and the proscribed conduct was not consensual).

119. 413 N.W.2d 107 (Minn. 1987).

120. Defendant had allegedly picked up another male at a public place where the two retired to his home and Gray performed sodomous acts upon the other and Gray paid the other at the conclusion of the act. Minn. Stat. § 609.293 (1986) subdivision 1 defines sodomy as "carnally knowing any person by the anus or by or with the mouth." Minn. Stat. § 609.293 subdivision 5 (1986) states that "whoever . . . voluntarily engages in or submits to an act of sodomy with another may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3000 or both."

121. 413 N.W.2d 107 (Minn. 1987).

122. *Id.* at 111. The Court drew from its analysis in *State v. Fuller*, 374 N.W.2d 722 (Minn. 1985) in which the court stated that "as the highest court of this state, we are independently responsible for safeguarding the rights of [our] citizens."

After hinting that the Minnesota right to privacy may be interpreted beyond the limits of the federal jurisprudence, the *Gray* court turned to the issue of whether the defendant had standing to challenge the sodomy statute. Ultimately, the court concluded that Gray did not have standing to challenge the statute because a decision in his case would "not affect persons not before the court so directly that their interest should be considered."¹²³ Although the defendant was not charged with a prostitution offense, the court reasoned that "[t]he facts involved would sustain a charge of prostitution against Gray" and "the lack of a charge does not erase from our review the fact of its occurrence."¹²⁴ The court then explained that although the sodomous acts were not performed in public, they were "public in every other way."¹²⁵ Because Gray had met the other "participant" in a public park known to be a haven for young prostitutes, the encounters between the two men were "one night stands," and the acts were performed for compensation, the court refused to accept the behavior as "private." Rather, the court concluded that "[g]iven the public nature of this case, the closing of the bedroom door did not insulate the activity from the law."¹²⁶ However, the court limited the decision in *Gray* to its facts and left the door open for a future challenge to the statute when presented with different facts.¹²⁷

By formulating a "commercial sex" distinction, the Minnesota court effectively evaded the issue of whether the right to privacy protects adult, private consensual sodomy.¹²⁸ The court seemed bold in its asserted willingness to extend the right of privacy from the state constitution beyond the parameters set by the federal jurisprudence, but fell short of such an extension in *Gray*.

III. LOUISIANA LAW

A. Overview of Louisiana Privacy Guarantees

Unlike the United States Constitution, the text of Article I, § 5 of the Louisiana Constitution expressly guarantees that every citizen shall be secure in his "person" against "unreasonable searches, seizures or *invasions of privacy*."¹²⁹ The text of the Article has been interpreted to provide greater protections to individuals than the

123. *Gray*, 413 N.W. 2d at 113.

124. *Id.* at 114.

125. *Id.* at 113.

126. *Id.* at 114.

127. The court specifically stated, "[t]oday's decision is limited to a holding that any asserted Minnesota constitutional privacy right does not encompass the protection of those who traffic in commercial sexual conduct." *Id.*

128. See *Constitutional Law: Minnesota Recognizes a Right to Privacy*, 14 Wm. Mitchell L. Rev. 193 (1988) (suggesting that the court created the distinction for the purpose of denying the particular defendant the privacy protections in this case). The note specifically states, "[o]ne can imply from the decision that the reason the court did not address the issue was its unwillingness to let the Minnesota Constitution protect an admitted sex offender." *Id.* at 198.

129. La. Const. art. 1, § 5.

federal Constitution.¹³⁰ As the Louisiana Supreme Court stated in *Guidry v. Roberts*:¹³¹

[O]ur state constitution's declaration of individual rights . . . represents more specific . . . [and] may represent broader protection of the individual,¹³² and is . . . far broader and more definitively articulated than corresponding rights in the Federal Constitution.¹³³

The expansive scope of Article I, § 5 has been recognized most often in the area of unreasonable search and seizure.¹³⁴ However, in *Arsenaux v. Arsenaux*¹³⁵ the court extended the protection of the privacy clause to civil litigation. The court held that a wife could not be compelled to disclose evidence of an abortion allegedly obtained by her during the existence of the marriage.¹³⁶ Forced disclosure of the information was considered a violation of her privacy rights under federal jurisprudence and state safeguards inherent in Article I, § 5 of the Louisiana Constitution.¹³⁷

130. *State v. Perry*, 610 So. 2d 746, 755 (La. 1992). The *Perry* court stated, "there does not appear to have been a single instance in which this court has held that the Declaration of Rights affords less protection of individual liberties than did the Bill of Rights or other provisions of the federal constitution under the pre-existing Supreme Court interpretations." *Id.* But as other scholars have recognized, the deference to and persuasiveness of the state constitution over the federal Constitution in all cases was not carried out in later opinions. See John Devlin, *1992-1993 Louisiana Constitutional Law: Review of Recent Developments*, 54 La. L. Rev. 683 (1994); Lisa Munyon, Comment, "It's a Sorry Frog Who Won't Holler in his Own Pond": *The Louisiana Supreme Court's Response to the Challenges of New Federalism*, 42 Loy. L. Rev. 313 (1996). See also John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade be Alive and Well in the Bayou State?*, 51 La. L. Rev. 686 (1991). In the examination of the origin of privacy rights in Louisiana the author points out that "The Supreme Court of Louisiana has on numerous occasions expressed its agreement with these general principles and held that the state constitution provides greater protection of individual rights than does the federal Constitution." *Id.* at 688. Compare, Timothy Lenz, "Rights Talk" *About Privacy in State Courts*, 60 Alb. L. Rev. 1613, 1615 (1997) in which the author posits that the Louisiana "right to privacy" is "qualified" because the clause refers only to searches and seizures rather than declaring a broad, general right to privacy.

131. 335 So. 2d 438 (La. 1976) (Tate, J.).

132. *Id.* at 448. (Tate, J.).

133. *Id.* at 452. (Summers, J., dissenting).

134. *State v. Tucker*, 626 So. 2d 720 (La. 1993) (The Louisiana Supreme Court explained that the freedom from unreasonable searches and seizures was more expansive than the Federal counterpart, but the Court then analyzed and decided the case like the United States Supreme Court had in *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547 (1991) to effectively give the defendant less protection from government search and seizure; *State v. Church*, 538 So. 2d 993 (La. 1989) (Court held DWI roadblocks were not constitutional under the State Constitution); *State v. Hernandez*, 410 So. 2d 1381 (La. 1982) (Court held that a vehicle search contemporaneous to a lawful arrest was prohibited by La. Const. Art. I § 5); *State v. Breaux*, 329 So. 2d 696 (La. 1976).

135. 428 So. 2d 427 (La. 1983).

136. *Id.* at 430.

137. *Id.* See also Richard Bullock, Comment, *The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties*, 51 La. L. Rev. 787, 811 (1991) (noting that the court in *Arsenaux* explained, "there are strong constitutional considerations [Article I, § 5] weighing against the admission of this evidence.").

In *Hondroulis v. Schuhmacher*, the Louisiana Supreme Court extended the right to privacy even further and held that the right applied to a decision whether to obtain or reject medical treatment.¹³⁸ The plaintiff in *Hondroulis* had claimed that her consent before surgery was not "informed" because she was not aware of all foreseeable risks involved.¹³⁹ The *Hondroulis* court noted that the decision to undergo medical treatment was similar to individual decisions concerning marriage,¹⁴⁰ contraception,¹⁴¹ and family relations.¹⁴² The effect of *Hondroulis* was significant because it explicitly allowed the "privacy provision" in Article I, § 5 to be employed in areas affecting personal autonomy.¹⁴³ *Hondroulis* has been hailed as the first time that the Louisiana Supreme Court "squarely recognized that the state constitutional right of privacy also incorporates and independently protects autonomy-type privacy rights from unreasonable legislative interference."¹⁴⁴

Likewise, in *State v. Perry*,¹⁴⁵ the Court recognized that the scope of Article I, § 5 necessarily protected the personal autonomy of insane prisoners on death row. The court held that the state could not medicate an incompetent death row prisoner with anti-psychotic drugs against his will to accommodate the state's execution. Forced medication by the state violated the prisoner's right to personal autonomy as recognized in Article I, § 5 of the Louisiana Constitution.¹⁴⁶

Scholars have agreed that the Framers of the 1974 Louisiana Constitution intended "privacy" to extend beyond the criminal sphere of protection to protect personal autonomy from infringement by state regulations. One scholar has argued that because the deliberations over the scope of "privacy" in Louisiana took place in the immediate wake of the United States Supreme Court's decisions in *Roe* and *Doe*, the founders were aware of the necessary implications of an express right to

138. 553 So. 2d 398 (La. 1988).

139. *Id.* The constitutional impact of the decision was to provide that signed medical consent forms did not create an irrefutable presumption of informed consent.

140. *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967).

141. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1972).

142. *Price v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438 (1944).

143. John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade be Alive and Well in the Bayou State?*, 51 La. L. Rev. 686, 707 (1991). See also Cindy Matherne, *Hondroulis v. Schuhmacher: The Crusade Back to Canterbury*, 50 La. L. Rev. 1195 (1990).

144. Devlin, *supra* note 143, at 707.

145. 610 So. 2d 746 (La. 1992). See also John Devlin, *Louisiana Constitutional Law: Review of Recent Developments: 1992-93*, 54 La. L. Rev. 683, 684 (1994) (author notes that while the holding in *Perry* was "narrow" and "unlikely to be often repeated," it "represents an important step in the Louisiana Supreme Court's ongoing relationship with its federal counterpart, and a significant milestone in the interpretation of the state constitution's guarantees of privacy. . .").

146. *Perry*, 610 So. 2d at 747. Specifically, the court held that involuntary medication was an unjustified invasion of the individual's brain and body. . . and a seizure of the control of his mind and thoughts and the usurpation of this right to make decisions regarding his health or medical treatment. The court distinguished *Perry* from *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, in which the U.S. Supreme Court held that while forcing antipsychotic drugs was impermissible, the state was allowed to administer them if there was an overriding justification for the medications and a determination of medical appropriateness. *Perry*, 610 So. 2d at 751.

privacy.¹⁴⁷ The right of privacy should thus be interpreted to protect more than criminal rights. It also served as a shield against attacks on personal autonomy by the state and other individuals. The Coordinator of Legal Research at the 1974 Louisiana Constitutional Convention explained that the right of privacy in Article I, § 5 of the constitution has effects "beyond the domain of criminal procedure; and the section establishes an affirmative right to privacy which will also have an impact on the non-criminal areas of the law."¹⁴⁸ Further, the placement of the privacy provision in the Louisiana Constitution separate and apart from the provisions of criminal procedure begged the necessary conclusion that the right of privacy was not intended to be limited to criminal procedure but to apply to other areas of the law.

B. Louisiana Courts and Louisiana Revised Statutes 14:89

The constitutionality of Louisiana Revised Statutes 14:89¹⁴⁹ has been challenged in the Louisiana Supreme Court on more than one occasion. In *State v. McCoy*,¹⁵⁰ for example, the Louisiana Supreme Court held that the statute was not an unconstitutional invasion of the federal right to privacy.¹⁵¹ In *State v. Baxley*,¹⁵² the court reversed a decision which held that the statute was an unconstitutional invasion of privacy under the Louisiana Constitution Article I, § 5 by denying standing to the appellant.¹⁵³ In his dissent, Chief Justice Pascal

147. Devlin, *supra* note 143, at 700. In *Roe and Doe* the U.S. Supreme Court generally held that the right to privacy of the Fourteenth Amendment protected a woman's right to an abortion. Therefore, the state had only a limited right to regulate abortions.

148. Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 20 (1974). Hargrave also predicted that the Article I, § 5 would be a "fertile ground for development in tort law as well as the non-criminal aspects of government operation." *Id.* at 21.

149. *See supra* note 2.

150. *State v. McCoy*, 337 So. 2d 192 (La. 1976).

151. *Id.* at 196. The defendant had argued that the statute was unconstitutional under *Griswold* if applied to consenting adults. However, the Louisiana Supreme Court relied on the U.S. Supreme Court's then recent affirmance of a Virginia court decision (*Doe v. Commonwealth's Attorney for City of Richmond*, 425 U.S. 901, 96 S. Ct. 1489 (1976)) that had upheld the constitutionality of the Virginia statute criminalizing consensual sodomy. The Court also held that La. R.S.14:89 (1986) was not unconstitutionally vague and indefinite and the verdict of a crime against nature was responsive to a charge of aggravated crime against nature. *See also*: *State v. Lindsey*, 310 So. 2d 89 (La. 1975); *State v. Woljar*, 477 So. 2d 80 (1985) (rejecting defendants arguments that La. R.S.14:89(A)(2) was unconstitutionally vague and that solicitation was merely an attempted crime against nature and it was unconstitutional to elevate an attempt to the same status as the completed offense); *State v. Neal*, 500 So. 2d 374, 379 (La. 1987) (holding that La. R.S. 14:89(A)(2) was not unconstitutionally vague and did not violate the defendant's freedom of speech); *State v. Langendorfer*, 389 So. 2d 1271 (La. 1980) (affirming defendant's conviction of forcible rape and simple crime against nature while not passing judgment on the defendant's argument that the statute was an unconstitutional invasion of privacy).

152. 633 So. 2d 142 (La. 1994).

153. On appeal, the Louisiana Supreme Court held that because the defendant was charged with violating La. R.S.14:89(A)(2), he did not have standing to challenge the constitutionality of La. R.S.14:89(A)(1). The court never reached the issue of whether La. R.S. 14:89(A)(1) violated the state constitutional right to privacy because the defendant was not charged under the specific subpart of the

Calogero argued that Louisiana Revised Statutes 14:89 was an invasion of privacy under the Louisiana Constitution.¹⁵⁴ He reasoned that because the statute affected individual privacy, it should be narrowly drawn and must be justified by a compelling state interest. Finding no justification in the state's arguments, he concluded the statute was unconstitutional.¹⁵⁵ The majority's opinion in *Baxley* has been criticized for dodging the constitutional issue and basing its decision on the less compelling procedural issue of standing. As one critic explained, "[b]y confining itself to 'standing' and a dexterous severing of the statute far beyond the state's own approach, the court skirted any discussion of the constitutional issues involved and successfully preserved the sodomy law on the books."¹⁵⁶

The Louisiana Supreme Court had another opportunity to review the facts in *Baxley* when the case was again presented a year later.¹⁵⁷ The court held that the statute criminalizing solicitation of another with intent to engage in anal copulation did not, on its face, violate state equal protection guarantees, was not enacted for a discriminatory purpose, and did not carry an excessive sentence.¹⁵⁸ The court reasoned that even though there was a disparity between the punishment for solicitation of prostitution and the punishment for solicitation of a crime against nature, the statutes applied to homosexuals and heterosexuals equally.¹⁵⁹ Although the statutes punished distinct acts in different ways, separate classes of individuals were not treated differently. In holding that the punishment under the statute was not excessive, the court deferred to the "province of the legislature" to determine which crimes were more "offensive to the public morals than others."¹⁶⁰

statute. It is also interesting to note that the Criminal District Court in *McCoy* based its opinion on prior assertions by the Louisiana Supreme Court in *State v. Neal*, 500 So. 2d 374 (La. 1987) and *State v. Perry*, 610 So. 2d 746 (La. 1992). The district court reasoned that the sodomy statute was clearly unconstitutional as "Our Constitution creates an explicit right to privacy. Article I, § 5 protects our citizens from invasions of privacy that the federal government does not." The Supreme Court was not persuaded.

154. 633 So. 2d 142, 146 (La. 1994).

155. *Id.*

156. Evan Wolfsan & Robert Mower, *When the Police are in Our Bedrooms, Shouldn't the Court Go in After Them? An Update on the Fight Against "Sodomy" Laws*, 21 Fordham Urb. L.J. 997 (1994).

157. *State v. Baxley*, 656 So. 2d 973 (La. 1995) (holding did not reflect any consideration of the "privacy issue" present in *Smith* as La. R.S. 14:89 was not challenged as an infringement on the right to privacy).

158. The trial court had held that La. R.S.14:89 was unconstitutional on its face because it punished solicitation for a "crime against nature" more stringently than it punished a crime for prostitution under La. R.S. 14:82. The disparity is clear. Under La. R.S. 14:89, the first offense for solicitation of unnatural carnal copulation is a felony and subjects the defendant to a fine of not more than \$2000 or imprisonment for not more than five years or both. But, a first offense for solicitation of prostitution under La. R.S.14:82 is a misdemeanor and subject the defendant to a fine of not more than \$500 or imprisonment for not more than six months.

159. *Baxley*, 656 So. 2d at 979.

160. *Id.*

IV. *STATE V. SMITH*: WILL LOUISIANA CONSTITUTIONAL RIGHTS EXCEED THOSE AFFORDED BY THE FEDERAL CONSTITUTION?

In *State v. Smith*,¹⁶¹ the Louisiana Supreme Court is faced with a challenge to the constitutionality of Louisiana Revised Statutes 14:89 as an invasion of privacy under the Louisiana Constitution.¹⁶² The defendant in *Smith* was initially charged with one count of aggravated crime against nature and one count of simple rape. The trial court found the defendant not guilty of simple rape or aggravated crime against nature, but did find the defendant guilty of the responsive verdict of simple crime against nature under Louisiana Revised Statutes 14:89(A)(1).¹⁶³ In his appeal to the fourth circuit, the defendant argued that his conviction under 14:89 was unconstitutional because the statute was vague, overbroad, and a violation of his right to privacy. The fourth circuit dismissed the defendant's claims that the statute was vague or overbroad, but held that the statute was an unconstitutional invasion of the fundamental right to privacy under the state constitution.¹⁶⁴ Because a fundamental right was infringed, the fourth circuit employed strict judicial scrutiny to determine whether the statute was necessary to accomplish a compelling governmental end.¹⁶⁵ According to the court of appeal, the statute failed the strict scrutiny test because the state had offered no compelling interest to justify the criminalization of noncommercial sexual conduct that occurred without force between two consenting adults. The opinion stated that the state had made no effort to justify its interest:

We have received no guidance from the State of Louisiana that will assist us in deciding the constitutionality of [Louisiana Revised Statutes] 14:89 (A)(1) in the context of this appeal. The District Attorney, although arguing that there is no sound reason to depart from the long history of jurisprudence upholding 14:89, has advanced no compelling state interest.

Following the decision of the fourth circuit, the state applied for writs to the Louisiana Supreme Court. In its appeal, the state presented two principal arguments: 1) fellatio or oral sex does not enjoy protection under the Louisiana Privacy Clause—Louisiana Constitution Article I, § 5; and 2) the acts in question were not consensual acts.¹⁶⁶ Neither of these two arguments should be sufficient for the supreme court to reverse the decision of the appellate court. The recurrent plea throughout petitioner's brief was that because there was no evidence adduced

161. *State v. Smith*, 729 So. 2d 648 (La. App. 4th Cir. 1999).

162. *Smith* seems to provide the Court with the "ideal fact pattern" in which to strike down La. R.S. 14:89. It does not include violent or public acts and is challenged in a "heterosexual" context. As is noted later, the court may be more willing to strike down the statute when applied to heterosexual conduct than if applied to homosexual conduct.

163. *State v. Smith*, 729 So. 2d 648 (La. App. 4th Cir. 1999).

164. *Id.* at 651-54.

165. *Id.* at 651-52.

166. See Brief of Appellant at 4, *State v. Smith*, 729 So.2d 648 (La. App. 4th Cir. 1999) (No. 99-KA-0606).

during the trial pertaining to the privacy issue, the state should not now be forced to justify the statute before the supreme court. After noting this point, however, the state did not attempt to offer any compelling justifications for the statute.¹⁶⁷

Since *Smith*, other circuits have applied the privacy clause to hold other criminal statutes unconstitutional. In *State of Louisiana v. Brennan*,¹⁶⁸ for example, the first circuit extended the protection of the privacy clause of the state constitution to strike down Louisiana Revised Statutes 14:106.1, dealing with "obscene devices," as unconstitutional.¹⁶⁹ The court suggested that the decision of the fourth circuit in *Smith* provided the impetus for its holding. Citing *Smith*, the concurring opinion reasoned,

[O]ur brethren of the Fourth Circuit concluded that the statute (14:89) violated the right to privacy under the Louisiana Constitution to the extent that it criminalizes the performance of private, consensual, non-commercial acts of sexual intimacy between individuals who are legally capable of giving their consent. If Louisiana's right to privacy protects non-commercial, consensual oral sex . . . it could be asserted that the Legislature would face great difficulty proscribing or even restricting the sale of obscene devices intended for private use in the home between consenting adults.¹⁷⁰

The fact that other circuits are using the fourth circuit's decision in *Smith* as a "springboard" to extend the right of privacy in other areas should prompt the Louisiana Supreme Court to decide this case on the merits and provide guidelines for the appellate courts to follow. The decisions in the lower courts illustrate the need for a delineation of the scope of the right to privacy in areas infringing on personal autonomy and "sexual behavior," whether it be an expansive or limited interpretation.

In the case now before the supreme court, the state has urged the Louisiana Supreme Court to follow the decisions in *Bowers* and *McCoy*, arguing that there is no right to sodomy under the Privacy Clause of the Louisiana Constitution.¹⁷¹ However, the state's reliance on *Bowers* is misplaced. First, Louisiana is not under

167. Also, the state urges the court to defer its decision on the constitutionality of La. R.S. 14:89 (1986) to await the appeal of ongoing litigation over the same statute in Civil District Court in Orleans Parish. See *supra* note 166 at 6, where the state refers to the litigation in *Louisiana Electorate of Gays and Lesbians Inc. v. State of Louisiana*, Docket number 94-09260. However, the fact that there is concurrent litigation on the same statute should not permit the state to escape its duty to justify the statute in *Smith*.

168. *State of Louisiana v. Brennan*, 739 So. 2d 368 (La. App. 1st Cir. 1999).

169. La. R.S. 14:106.1 (1986) prohibits the knowing and intentional promotion of obscene devices.

170. *State of Louisiana v. Brennan*, 739 So. 2d 368 (La. App. 1st Cir. 1999). See also *Williams v. Pryor*, 41 F. Supp. 2d 1257 (1999), in which the Northern Division of the United States District Court in Alabama held that the Alabama statute prohibiting the sale or use of obscene devices violated the fundamental right to privacy and bore no reasonable, rational relation to a legitimate state interest. *Id.* at 1292-93.

171. La. Const., Art. I, § 5.

any duty to follow the holding in *Bowers*.¹⁷² In fact, the opinion in *Bowers* clearly explained that its decision did not affect contrary conclusions of the same issue under state law.¹⁷³ The Louisiana Supreme Court has no reason to limit its analysis to the interpretation of the right of privacy under federal law. If the court is sincere in its opinion that the Louisiana Constitution provides greater privacy rights than those assured under the federal Constitution, the statute in question should be declared unconstitutional. The decision in *McCoy* is no more persuasive merely because it was also based on a claim to privacy under the federal Constitution. The result in that case was inevitable given the state court's obligation to follow the reasoning of the United States Supreme Court because the statute had been challenged on federal grounds.¹⁷⁴ Because *Smith* has challenged the statute solely on state constitutional grounds, the decision in *McCoy* is not applicable.

Finally, because the Louisiana Supreme Court has repeatedly interpreted Article I, § 5 of the Louisiana Constitution to provide privacy protections beyond the domain of criminal procedure and to be broader than its federal counterpart, it should operate under those principles and uphold the decision of the appellate court. After the decisions in *Perry* and *Hondroulis*, the court should recognize that the state constitution's guaranty of privacy should protect individual autonomy. The state conveniently does not discuss the extent of personal autonomy rights provided to Louisiana citizens. The Louisiana Supreme Court, therefore, must resolve the issue of whether it is tolerable for the state to intrude on such private acts between consenting individuals through Louisiana Revised Statutes 14:89. The state has given the court no reason to answer the question in the affirmative.

V. LESSONS LEARNED: WHAT CAN THE LOUISIANA SUPREME COURT TAKE FROM THESE DECISIONS?

In reaching its decision in *State v. Smith*, the Louisiana Supreme Court should take guidance from the other states that have confronted the same issue. Those states that have rejected their sodomy statutes as an invasion of privacy should support the arguments asserted by the defendant in *Smith*. However, the states that have rejected challenges to their sodomy statutes may temper the persuasiveness of the defendant's position. There are overlapping and unique aspects of the cases that should be carefully considered by the Louisiana Supreme Court.

172. Paula Brantner, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 *Hastings Const. L.Q.* 495 (Winter 1992). The author pointed out that after *Bowers*, "the strongest possibility for sodomy law reform may rest with the state courts." The majority in *Bowers* expressly stated that its decision "did not affect state court decisions invalidating those laws on state constitutional grounds."

173. *Bowers v. Hardwick*, 478 U.S. 186, 190, 106 S. Ct. 2841, 2843 (1986).

174. *State v. McCoy*, 337 So. 2d 192, 196 (La. 1976).

A. *Fundamental Rights and the Appropriate Standards of Review*

1. *Fundamental Rights*

At the outset, it should be noted that the Louisiana Supreme Court is not restrained by the holding in *Bowers* that there is no fundamental right to engage in homosexual sodomy.¹⁷⁵ Each of the state courts that rejected its state sodomy statutes clearly explained that the breadth of the right of privacy under the state constitution was in no way limited by *Bowers*.¹⁷⁶ For example, because the Kentucky Constitution provided an explicit right to privacy, the court in *Wasson* concluded that the consensual sexual acts between adults should fall within the scope of that right.¹⁷⁷ Although neither the Georgia nor the Tennessee Constitutions contained an explicit protection of privacy, both courts reasoned that within the text of their constitutions and jurisprudential history there had developed a guarantee of privacy which was broad enough to encompass private consensual sexual acts between adults.¹⁷⁸

However, states are not required to establish rights more expansive than those provided by the federal Constitution, and several state courts have refused to forge beyond the federal limits delineated in *Bowers* to establish a broader right of privacy. In *Santos*, *Poe*, and *Gray*, the state courts upheld their sodomy statutes on grounds set forth by the United States Supreme Court in *Griswold*, *Eisentadt*, *Roe*, *Carey* and *Doe* without any attention to their state constitutions.¹⁷⁹

Article I, § 5 of the Louisiana constitution contains an explicit right of privacy. This right has been interpreted by scholars and Louisiana courts to extend protection beyond criminal law to areas of personal autonomy.¹⁸⁰ The opinions in *Hondroulis* and *Perry* are illustrative of the Louisiana courts' willingness to extend the "right of privacy" to civil rights as well as those affected by criminal statutes. The court in those cases recognized the fundamental right of citizens and prisoners to refuse or reject medical treatment since governmental interference in those decisions would infringe on areas of personal autonomy.

The right of adults to choose to engage in private consensual sodomy does not seem any less "personal" or "private" than the right of adults to decide what medical treatment they find appropriate for themselves. It would be hard to articulate a holding that restricted the decisions made between consenting adults in a private, *sexual context* that remained consistent with prior decisions that

175. 478 U.S. 186, 106 S. Ct. 2841 (1986).

176. *Commonwealth v. Wasson*, 842 S.W.2d 487, 493 (Ky. 1992); *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. 1996); *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998).

177. *Wasson*, 842 S.W.2d at 491.

178. See *Powell v. State* discussed *supra* notes 84-89 for the discussion of *Pavesich*, in which the Georgia Court recognized the fundamental right to privacy for its citizens. See *Sundquist*, 926 S.W.2d at 260, for the ringing declaration by the Tennessee court that even though not explicit in its constitution, "we have no hesitation in drawing the conclusion that there is a right of individual privacy guaranteed under and protected by the liberty clauses of the Tennessee Declaration of Rights."

179. See *supra* notes 97-128 and accompanying text.

180. See *supra* notes 135-148 and accompanying text.

prohibit such governmental interference in decisions made in a *medical context*. The physical, sexual acts between consenting adults that occur in private merit treatment as a fundamental right. In *State v. Smith*, the amicus brief filed by the Lambda organization argued that “[s]ex is a chosen activity that may create or affirm a deep bond while excluding the outside world and all other relations. Certainly no one engaged in consensual sex expects other[s] to trespass on them; they regard the very ideas of governmental intrusion as foreign and unforeseeable.”¹⁸¹

The rationale of the state courts in Tennessee and Georgia also provides persuasive authority for the court to determine that the right at issue in *Smith* should be “fundamental.” While neither states’ constitution provides an explicit right to privacy, both states recognize that their judiciaries have expanded the scope of their constitutions to include the right of privacy. Further, both courts determined that the proscriptions of the state sodomy statutes infringe on the fundamental right of privacy.

Given the intent and prior interpretation of Article I, § 5, the Louisiana Supreme Court should distinguish *Bowers* and affirm the fundamental right of Louisiana’s consenting adults to be free from governmental interference in their private decisions regarding private sexual conduct. Further, the court should consider as persuasive the rationale of sister state courts that have declared such a right to be fundamental under their own state constitutions.

2. *Appropriate Standard of Review*

The Louisiana Supreme Court may also refer to the decisions of sister states in its consideration of the standard of review for evaluation of the constitutionality of Louisiana Revised Statutes 14:89. The Tennessee and Georgia courts employed a strict scrutiny test to determine whether their sodomy laws were justified infringements on the recognized fundamental right to privacy under their state constitutions. Under a strict scrutiny analysis, both courts concluded that the infringement of the right of adults to engage in private, consensual sexual activities was not necessary to achieve a compelling state interest. Using a rational basis standard of review, the Kentucky court held that the state’s justification for its sodomy statute was not rationally related to a legitimate governmental end.¹⁸²

Assuming the Louisiana Supreme Court recognizes that the Louisiana Constitution encompasses private, consensual sexual acts between adults as a fundamental right, it should invoke the strict scrutiny standard of review as applied by the Tennessee and Georgia courts and determine whether the infringement is necessary to satisfy a compelling state interest. Further, the court should refrain from utilizing the “undue burden test” selectively used by the United States

181. Amicus Brief by the Lambda Organization on behalf of the Appellee at 4, *State v. Smith*, 729 So.2d 648 (La. App. 4 Cir. 1999) (No. 97-KA-1393).

182. *Commonwealth v. Wasson*, 842 S.W. 2d 487, 491 (1992).

Supreme Court in its analysis of several "fundamental rights."¹⁸³ It seems axiomatic that a court could in one breath determine that a right is "fundamental," and in the next allow the state to restrict its exercise because the "burden" by the state was not too intrusive. As a "fundamental right," the acts proscribed by Louisiana Revised Statutes 14:89 deserve no less than strict scrutiny in determining whether the statute infringes on the exercise of that right. Even if the Louisiana Supreme Court were to hold that no fundamental right is infringed by Louisiana Revised Statutes 14:89, it may still find, as the Kentucky court did in *Wasson*, that its application does not satisfy a rational basis analysis.

3. *State Justifications for the Regulation of Sodomy Through Legislation?*

If the Louisiana Supreme Court chooses to employ the strict or rational basis test, the state should be required to offer justification for its infringement of the right to privacy and to demonstrate how the legislation is narrowly tailored to further the purported state interest. To date, the state has failed to offer a single rationale for the continued enforcement of Louisiana Revised Statutes 14:89.

One justification offered by all of the states in support of their sodomy statutes was the "morality of the majority," presumably made manifest in the states' legislation. The states argued that the will of the majority should not be superseded by the courts' own opinions. In turn, each of the respective state courts that struck down state sodomy statutes found the "morality of the majority" justification insufficient to allow the infringement on individual privacy. In discussing the weight ascribed to the "morals of the majority" argument in a strict scrutiny analysis, the Georgia Supreme Court in *Powell* referred to such arguments in *Campbell* and *Wasson* and concluded, "[n]o sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority . . . legislative enactments are not exempt from judicial review testing their constitutional mettle."¹⁸⁴ In *State v. Bonadio*,¹⁸⁵ the

183. See *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992) (holding that state legislatures could regulate the "fundamental right" of a woman to obtain an abortion as long as the restriction did not constitute an "undue burden"); *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 108 S. Ct. 1319 (1988) (rejecting a free exercise challenge to the Forest Service's plan to permit timber harvesting in a forest traditionally used by Indian tribes as sacred ritual grounds because the burden was not sufficiently severe as to require the government to demonstrate a compelling interest).

The "undue burden test" requires a court to first determine whether a state regulation imposes an "undue burden" on the exercise of a fundamental right. If the state regulation is found to place a "substantial obstacle" in the path of the exercise of a fundamental right, the strict scrutiny test is then used to determine whether the state justifications are necessary to reach a compelling end. However, if the restrictions do not impose an "undue burden" on a fundamental right, the state need only satisfy the rational basis standard of review.

184. *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).

185. 415 A.2d 47 (Pa. 1980) (holding that the statute violated the Equal Protection guarantees of the state and federal constitution because it created a classification based on marital status where such differential treatment was not supported by a sufficient state interest). *Id.* at 51. The case addressed the constitutionality of the statute on Equal Protection grounds, but the asserted state justifications prove

Pennsylvania Supreme Court opined that a state statute prohibiting voluntary deviate sexual intercourse was unconstitutional and noted:

Valid exercise of the police power to regulate the public health, safety, welfare and morals is not unlimited. Rather, for the state's action to be justified, it must appear that the public interest requires such an interference and that the means are reasonably necessary to accomplish the purpose and not unduly oppressive upon individuals.¹⁸⁶

The court further acknowledged the states' role in protecting the public from offensive displays of sexual behavior, forced sexual conduct, sexual abuse to minors, and cruelty to animals, but noted that other statutes existed to protect the public from such acts.¹⁸⁷

Beyond an assertion that sodomy statutes protect the morals of the majority, Tennessee offered the most extensive list of "justifications" for its sodomy statute. The state's espoused interests included the prevention of suicide, drug abuse, shallow and self-gratifying relationships and the spread of disease. These justifications were deemed by the court to be compelling, but were rejected because the proscription of sodomy was not necessary to advance a state interest.¹⁸⁸ Hence, the role of the courts in evaluating the constitutionality of sodomy legislation should be to ensure that the opinions of the majority manifested in legislation do not infringe upon the protected rights of the minority without some actual need for such regulations.

The Louisiana Supreme Court should consider the reasoning of courts in other states rejecting the argument that the morals of the majority should subsume the rights of the minority. The brief filed on behalf of the defendant in *Smith* provides persuasive authority to reject a "moral majority" argument.¹⁸⁹ In part, the defendant argues that without a legitimate benefit to the public welfare, Louisiana Revised Statutes 14:89 cannot be upheld on the "bald" assertion of public morality. Further, the state has clearly refused to provide any justification for the statute.

None of the cases decided by the state courts that have upheld their states' sodomy statutes against an invasion of privacy challenge have required the state to present any exacting public need for the regulation. This result is not surprising, however, because the courts in *Santos*, *Poe*, and *Gray* ultimately concluded that there was no fundamental interest at stake through the application of the sodomy statutes.

helpful in the discussion of state interests for sodomy statutes in general.

186. *Id.* at 49 (citing *Lawton v. Steele*, 152 U.S. 133,137, 14 S. Ct. 499 (1894)).

187. *Id.*

188. *Campbell v. Sundquist*, 926 S.E.2d 250, 262-64 (Tenn. 1996).

189. American Civil Liberties Union Brief filed on behalf of defendant at 15, *State v. Smith*, 729 So. 2d 648 (La. App. 4th Cir. 1999)(No. 97-KA-1393).

B. Limits on a Decision in Smith

As the amicus briefs filed on behalf of the defendant suggest, the Louisiana Supreme Court must not dodge the issue presented in *Smith* because of its wariness to legitimate violent or public sexual acts.¹⁹⁰ Even the United States Supreme Court has held that although a city can enforce ordinances directed at the conduct to be prohibited, it should not attempt to do so through laws that are "constitutionally infirm."¹⁹¹ A decision to revoke 14:89 could be limited to affect only the intrusion of the government only into the private consensual acts between adults.

Finally, *Smith* seems to present the Louisiana Supreme Court with an opportunity to declare Louisiana's sodomy statute unconstitutional. The facts of *Smith* involve "heterosexual sodomy." There were no forced acts, no compensation for performance of sodomous acts, and no relations with minors. The acts were done in "private." However, the effects of Louisiana Revised Statutes 14:89 reach both heterosexuals and homosexuals. Therefore, the Court should concern itself more with the correct analysis of the state's constitution than with the popular (or unpopular) opinion of its decision.

VI. CONCLUSION

State courts were explicitly given the latitude in *Bowers* to interpret their state constitutions independently from the federal interpretation. There is no question that states have the freedom to invalidate sodomy laws on state constitutional grounds.¹⁹² The Louisiana Supreme Court should embrace the permission of the United States Supreme Court and overturn Louisiana Revised Statutes 14:89 as an unconstitutional invasion of privacy. The text and history of Article I, § 5 support the decision of the court to give a broad reading to the privacy protections concerning personal autonomy in Louisiana. The jurisprudence has already "paved the way" for expansive interpretations of behavior inherent in personal autonomy. In *Griswold v. Connecticut*, Justice Douglas asked and answered a critical question, "Would we allow the police to search the sacred premises of marital bedrooms for the telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."¹⁹³ Privacy concerns are paramount when dealing with the private, consensual, sexual behavior of adults. Absent any state justification, the court should take, without reservation, the bold and imperative step to strike down Louisiana Revised Statutes 14:89 as an unconstitutional invasion of individual privacy.

Martha Rundell

190. See *supra* note 166, at 14.

191. *Coates v. Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686 (1971). Cf. *Brief supra* note 166, at 15.

192. *Bowers v. Hardwick*, 478 U.S. 186, 190 S. Ct. 2841 (1986).

193. *Griswold v. Connecticut*, 381 U.S. 479, 485-86, 85 S.Ct. 1678, 1684 (1965). Although the quote from *Griswold* refers specifically to the "marriage context," *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1972) later expanded the holding to apply to non-married individuals.