CASE NOTES

State v. Smith: Pillow Talk and Privacy

On November 8, 1996, the Criminal District Court for Orleans Parish found Mitchell E. Smith not guilty of aggravated crime against nature and of the simple rape of Yvonne Lauro.[1] Nevertheless, having heard corroborating testimony from Smith and Lauro that there was oral sex, the court did find Smith guilty of "simple crime against nature."[2] Smith appealed the judgment, contesting the constitutionality of subpart A(1) of Louisiana's sodomy statute on the basis of supposed (1) vagueness, (2) overbreadth, and (3) invasion of privacy.[3] The Fourth Circuit Court of Appeals of Louisiana unanimously reversed Smith's conviction and *held* that while the statute is neither unconstitutionally vague nor overbroad, it is an unconstitutional infringement on the right to privacy insofar as it criminalizes noncommercial sexual intimacy between consenting adults. *State v. Smith*, 729 So. 2d 648 (La. Ct. App. 4th Cir. 1999).

Unlike the United States Constitution, the Louisiana Constitution of 1974 expressly assures that "[e]very person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."[4] While the

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1. *See* State v. Smith, 729 So. 2d 648, 649 (La. Ct. App. 1999).

2. *Id.* The evidence presented established that Smith and Lauro visited the same bar on September 24, 1999, where the two had at least one drink together before driving together to another bar and eventually to a motel. *See id.* at 649-50. Smith and Lauro's versions of the events diverged as to what transpired once the couple left for the motel: Lauro's testimony evidenced rape and Smith's evidenced consensual sexual activity. *See id.* However, both Lauro and Smith testified that, whether forcibly or on her own accord, Lauro performed oral sex on Smith. *See id.* at 650. Presumably, it was expert testimony attesting to the hallucinatory side-effects associated with Lauro's epilepsy medication that dissuaded the court as to Lauro's credibility. *See id.* at 650-51. The court rejected all of Lauro's testimony except those aspects that corroborated Smith's testimony. *See id.* at 651, 653. The court's gleaning of a responsive verdict largely went largely uncontested. *Cf.* State v. McCoy, 337 So. 2d 192, 196 (La. 1976) (rejecting the defendant's contention that the verdict convicting him of a crime against nature was not responsive where defendant had been charged with an aggravated crime against nature.) A lesser offense is implicit in the definition of a greater offense provided all the elements of the lesser offense are included in the definition.

3. *See Smith*, 729 So. 2d at 651-52. In Smith's final assignment of error, he argued that even if the statute was found to be constitutional on its face, its application was discriminatory because Lauro was not prosecuted for her involvement. *See id.* It was unnecessary for the court to address this last issue, however, once it found subpart A(1) of Louisiana's sodomy statute unconstitutional. *See id.* at 654, n.4.

4. LA. CONST. of 1974, art. 1, § 5. This provides in full as follows:

parameters of protection of this constitutional right to privacy remain indistinct, if not nebulous, the notion of individual liberty is deeply imbedded in Louisiana jurisprudence.[5] Albeit a tentative inception, the right to privacy was first enforced in Louisiana as a quasi-property right nearly 190 years ago in *Denis v. Leclerc*.[6] And in 1905, in *Itzkovitch v. Whitaker*, the Supreme Court of Louisiana embraced the right to privacy as a separate actionable right.[7] Enjoining the defendant from exhibiting the plaintiff's photograph in the "rogue's gallery" without the plaintiff's permission, the *Itzkovitch* decision affirmed the principle that "[t]here is a right in equity to protect a person from such invasion of rights."[8] Jurists and legal writers agree it was *Itzkovitch* that squarely aligned Louisiana with what was then a rapidly evolving doctrine of a right to privacy among American jurisdictions.[9]

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§ 5 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. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by the search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

Id. Cf. U.S. CONST. amend. IV:

[T]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

5. *See infra* notes 6-23 and accompanying text.

6. 1 Mart. (o.s.) 297 (1811) (enjoining the publication of a private letter and affirming judgment for contempt against defendant for advertising display of letter at his office), *cited and discussed in* Hamilton v. Lumbermen's Mut. Cas. Co., 82 So. 2d 61, 64 (La. Ct. App. 1955).

In *Hamilton*, the court noted that Louisiana was in step with sister states as "[p]rior to 1890 no court recognized the . . . right to privacy *per se*." *Hamilton*, 82 So. 2d at 63. Rather, in adhering to a trend set by early English courts, most courts employed "auspices of principles of property, contracts, libel, assault, confidential relations, etc." as a means of giving effect to rights we would now locate well within the penumbras of the right to privacy. *Id.*

7. 39 So. 499 (1905), *aff'd on reh'g*, 42 So. 228 (1906).

8. *Id.* at 500. *See also* Schulman v. Whitaker, 42 So. 227 (1906) (also enjoining defendant from exhibiting plaintiff's photograph in "rogue's gallery"); Schwartz v. Edrington, 62 So. 660 (1913) (enjoining publication of plaintiff's name on list of petitioners for incorporation of the village of Gretna).

9. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (promoting a cause of action for a tortious violation of the right to privacy against an insurance agency that used the insured's name and information about his car accident in a newspaper advertisement without obtaining permission). In 1890, Samuel D. Warren and

In the years since *Itzkovitch*, Louisiana courts have expounded on the right to privacy, defining it as "the right to be let alone" and as "the right to live one's life in seclusion without being subjected to unwarranted and undesired publicity."[10] It has been deemed by pragmatists to be the right to an "inviolate personality."[11] And, it has been named by humanists "the most comprehensive of rights and the right most valued by civilized men."[12] The right to privacy has served as the springboard for the incorporation and protection of a myriad of individual interests, including protection against unreasonable search and seizure, against the "unreasonable compilation or disclosure of information about individuals," and against invasion of privacy in tort.[13]

Louis D. Brandeis published their seminal article urging the right to privacy be recognized as a separate and distinct right. *See id.* Fifteen years later, Georgia birthed the right to privacy in *Pavesich v. New England Mut. Life Ins. Co*., wherein the court inferred from a person's right to be secure in one's person, home, papers, and effects an "implied recognition of the existence of a right of privacy. . . ." 50 S.E. 68, 71 (Ga. 1905) (enjoining the unauthorized use of a photograph for advertising purposes). In the ensuing months, Louisiana and her sister states followed suit. *See Hamilton*, 82 So. 2d at 64 (outlining the history of the right to privacy in Louisiana thus far).

According to Professor John Devlin, "Louisiana courts have 'adopted, in wholesale fashion, the four branch analysis of Dean Prosser and the Restatement (Second) of Torts,'" the very analysis originally conceptualized and articulated by Warren and Brandeis. 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, 691 n.20 (1990), (citing Parish Nat'l Bank v. Lane, 397 So. 2d 1282 (La. 1981)). As Devlin also points out, though, the right to privacy in the sense of private tort has long been vested in Louisiana Civil Code article 2315, which assures that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." *Id.* Since its enactment in 1974, the courts have relied on section 5 as supplemental textual support for the proposition that invasion of privacy constitutes an actionable tort for which the injured party is entitled to the redress named in article 2315. *See id.* at 707 n.76 (citing Easter Seal Soc'y v. Playboy Enter., 530 So. 2d 643, 647 (La. Ct. App. 1988); *Parish*, 397 So. 2d at 1286; Roshto v. Hebert, 439 So. 2d 428, 430 (La. 1983); Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386, 1387-89 n.2 (La. 1979)).

10. Tooley v. Canal Motors, Inc., 296 So. 2d 453, 454 (La. Ct. App. 1974) (quoting *Hamilton*, 82 So. 2d at 63 (citations omitted)).

11. Pack v. Wise, 155 So. 2d 909, 913 (La. Ct. App. 1963) (recognizing the condition of an inviolate personality) (quoting *Hamilton*, 82 So. 2d at 63).

12. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting); *overruled in part by* Berger v. State, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967).

13. Devlin, *supra* note 9, at 689, 707 (citing State v. Church, 538 So. 2d 993 (La. 1989) (holding DWI roadblocks as violative of the state constitutional guarantee of privacy if there is no reasonable suspicion or probable cause); State v. Hernandez, 410 So. 2d 1381 (La. 1982) (holding warrantless searches are contrary to state constitutional guarantee of privacy); Trahan v. Larivee, 365 So. 2d 294 (La. App. 3d Cir. 1978) (holding publication or disclosure of employee evaluation reports violated the right to privacy); *Easter Seal*, 530 So. 2d at 643 (noting invasion of privacy is a tort, but holding plaintiffs failed to carry the burden of proof); *Roshto*, 439 So. 2d at 428 (noting that unwarranted invasion of a person's right of privacy may give rise to liability for the resulting

In a chain of jurisprudence initiated in the early 1980s, the right to privacy has been construed to include the right to obtain or reject medical treatment.[14] It was in one of these instances, in fact, that the Supreme Court of Louisiana first articulated that the right to privacy "incorporates and independently protects autonomy."[15] Confronted with *Hondroulis v. Schumacher*, the Supreme Court of Louisiana held a patient's consent to medical treatment must be fully informed in order to comport with protections against invasion of privacy.[16] According to the court: "Article I, Section 5 of the 1974 Louisiana Constitution expressly guarantees that every person shall be secure in his person against unreasonable 'invasions of privacy.' This safeguard was intended to establish an affirmative right to privacy impacting non-criminal areas of law. . . ."[17]

This safeguard was intended to create a "right of personal privacy, or a guarantee of certain areas or zones of privacy."[18] Stated succinctly, the court ringingly endorsed an expanded version of the right to privacy that includes bodily integrity.[19] The *Hondroulis* decision introduced into Louisiana's privacy model protection of the "interest in independence in making certain important decisions" and led the way for the protection of a veritable bounty of personal decisions.[20]

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harm); *Jaubert*, 375 So. 2d at 1386 (noting that a violation of the right to privacy constitutes a breach of duty, or fault, and may be actionable under Louisiana Civil Code art. 2315)).

14. *See, e.g.*, State v. Perry, 610 So. 2d 746 (La. 1992) (holding that the right to privacy affords protection against the medication of an incompetent death row prisoner against his will with antipsychotic drugs to carry out his death sentence); Hondroulis v. Schumacher, 553 So. 2d 398, 410 (La. 1989) (holding that right to privacy mandates a patient's consent to medical treatment be informed); Ciko v. City of New Orleans, 427 So. 2d 80 (La. Ct. App. 1983) (holding that police do not have the authority to force a visibly injured person to receive medical treatment, and dismissing plaintiff's claim for damages against the City of New Orleans alleging negligence by the police officer that permitted plaintiff to refuse medical treatment after an automobile accident).

15. Devlin, *supra* note 9, at 708. *See also Hondroulis*, 553 So. 2d at 398.

16. 553 So. 2d at 415-22.

17. *Id.* at 415.

18. *Id.* at 414 (quoting Roe v. Wade, 410 U.S. 113, 152 (1973)).

19. *See id.*

20. *Id.* at 414, (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)). *See also* John Devlin, *Louisiana Constitutional Law*, 51 LA. L. REV. 295, 303-04 (listing as potential candidates for inclusion in this realm of personal autonomy the right to control personal appearance, the right to refuse nutrition, the right to obtain or refuse psychological treatments, the right to obtain or refuse life support, the right to live with whom and in the manner desired, the right to possess controlled items or substances in private, the right to obtain an abortion, and the right to engage in consensual sexual activity with other adults).

The *Hondroulis* decision is noteworthy also for its deliberate insistence that in drafting the Louisiana Constitution of 1974, there was every intention by the legislature to explicitly state affirmative rights.[21] Indeed, it is a well-established principle that the right to privacy guaranteed to Louisiana citizens is both more expansive and more express than that provided in the United States Constitution.[22] As stated by the Louisiana Supreme Court in *Hernandez*: "[Louisiana's] constitutional declaration of right is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution."[23]

While Louisiana citizens' right to privacy is far-reaching, that is not to say it has been or is without limitation. Quite the contrary, Louisiana has a long history of excluding sexual intimacy from the penumbra of privacy protection.[24] Wedded to the line of jurisprudence interpreting the federal right to privacy afforded in the U.S. Constitution, Louisiana courts have held some brands of sexual intimacy between consenting adults to be wholly outside the pale of constitutionally protected privacy.[25]

The Supreme Court of Louisiana faced the prospect of expanding the parameters of constitutionally protected privacy in *State v. McCoy*,

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21. *See Hondroulis*, 553 So. 2d at 415.

22. *See, e.g.*, State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982); State v. Abram, 353 So. 2d 1019 (La. 1978); State v. Hutchinson, 349 So. 2d 1252 (La. 1977); State v. Overton, 337 So. 2d 1201 (La. 1976). *See also* Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1 (1974); Louis Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9 (1975).

23. *Hernandez*, 410 So. 2d at 1385.

24. *See, e.g.*, State v. Neal, 500 So. 2d 374 (La. 1987) (deeming insubstantial defendant's argument that the right to privacy insulates all private sexual acts of consenting adults); State v. McCoy, 337 So. 2d 192 (La. 1976) (rejecting defendant's argument that Louisiana's law punishing crimes against nature offended the constitutionally protected right of privacy).

In earlier cases the right to privacy was not raised as a defense. Rather, constitutional contest was usually based on vagueness or overbreadth arguments. However, implicit in the absence of the privacy argument is the absence of the conception by either the courts or society at large that sexual intimacy was a matter of privacy. *See, e.g.*, State v. Lindsey, 310 So. 2d 89 (La. 1975); State v. Young, 193 So. 2d 243 (1966); State v. Bonanno, 163 So. 2d 72 (1914); State v. Long, 63 So. 180 (1913); State v. Vicknair, 28 So. 273 (1900); State v. Williams, 34 La. Ann. 87 (1882) (deciding challenges brought for overbreadth and vagueness).

25. *See* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (upholding a Georgia statute making it a criminal offense to engage in consensual sodomy, and stating that "the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable").

but flatly declined to do so.[26] Appealing a conviction under Louisiana's sodomy statute, defendant McCoy challenged the constitutionality of the statute.[27] In particular, the defendant argued that the application of the statute to consenting adults offended the right to privacy as recognized by the U.S. Supreme Court.[28] However, the *McCoy* court was bolstered by an *au courant* U.S. Supreme Court decision in which the Court rejected an identical constitutional challenge to the Virginia law punishing crimes against nature.[29] Thusly armed, the Louisiana Supreme Court ultimately upheld the constitutionality of the Louisiana statute.[30]

The court also rejected the contention that the statute's vagueness violated the constitutional requirement that a penal provision define a criminal activity in terms sufficient to inform the accused of the "nature and cause" of the charges against her.[31] Justice Marcus dismissed the vagueness assertion swiftly with an elementary syllogism: the statute was deemed sufficiently definite under the Louisiana Constitution of 1921; the corresponding provisions relating to definiteness under the Louisiana Constitution of 1921 and 1974 are fundamentally the same; therefore, the statute must be sufficiently definite under the Louisiana Constitution of 1974.[32]

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26. 337 So. 2d at 196.

27. *See id.* at 196. *See also* LA. REV. STAT. 14:89 A(1) & (2) (West 1997). Subpart A(1) of Louisiana's sodomy statute defines a crime against nature as

> [T]he unnatural carnal copulation by a human being with another of the same sex or opposite sex or with 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.

Id.

Subpart A(2) covers "[t]he solicitation by a human being of another with the intent to engage in any unnatural carnal copulation for compensation." *Id.*

28. *See McCoy*, 337 So. 2d at 196. The court noted that defendant had proffered this argument in light of the right to privacy recognized in *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), but was presumably unpersuaded that the Supreme Court's decision was apposite. *See id.*

29. *See* Dennis v. Commonwealth's Att'y for Richmond, 425 U.S. 901 (1976), *aff'g*, 403 F. Supp. 1199 (E.D. Va. 1975).

30. *See McCoy*, 337 So. 2d at 196.

31. *Id.* at 195 (quoting LA. CONST., art. 1, § 13 (providing that the accused in a criminal prosecution shall be informed of the nature and cause of the accusation against him)).

32. *See id.* It was with reference to this facet of the majority opinion that Justice Calogero administered a begrudging concurrence. *See id.* at 196. Justice Calogero opined that the statute lacked the degree of clarity prescribed for penal provisions by the Louisiana

The Supreme Court of Louisiana inquired into the issue of vagueness more closely ten years later in *State v. Neal*.[33] It was subpart A(2) that was at issue in *Neal*, but the court held that, as corresponding provisions, subparts A(1) and A(2) of Louisiana's sodomy statute survive vagueness challenges for the same set of reasons.[34] That is, history and jurisprudence have imposed meaning upon the statute adequate for a potential offender to have notice of what conduct is criminally proscribed.[35] Writing for the majority, Justice Dennis was of the opinion that it was commonly understood that the statute "refers only to two specified practices: sodomy (anal-genital intercourse of a specified nature . . .) and oral-genital activity (whereby the mouth of one of the participants is joined with the sexual organ of the other participant)."[36]

Typical of vagueness challenges, defendant Neal coupled his with a charge of overbreadth.[37] As to this argument, Justice Dennis discounted the suggestion that enforcement of the statute would impermissibly deter "cloistered sexual conduct of consenting adults" because the statute is "*aimed at solicitations of sexual acts for compensation*."[38] Ultimately, Justice Dennis dismissed the argument and expressly limited the contention of overbreadth to cases where an impermissible application of a statute would affect speech.[39]

The court summarily disposed of other constitutional arguments as "insubstantial," including the allegation that sexual intimacy between consenting adults should be insulated from federal

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Constitution of 1974, but confessed a compulsion to concur with what was seemingly evolving into a majority rule in Louisiana. *See id.*

33. 500 So. 2d 374 (La. 1987).

34. *See id.* at 375-77.

35. *See id.*; *see also* State v. Phillips, 365 So. 2d 1304 (La. 1978) (stating "[a] statute defining a crime against nature, even though the statute itself does not specify the details of the crime, will not be held unconstitutionally vague if it has been sufficiently defined by authoritative judicial interpretation that a potential offender has notice of what is criminally prescribed") (citations omitted), *quoted in Neal*, 500 So. 2d at 376.

36. *Neal*, 500 So. 2d at 376.

37. *See id.* at 377.

38. *Id.* (emphasis added). Presumably, Justice Dennis intended to confine this statement to subpart A(2) of the statute. Any other reading would not only suggest Justice Dennis had intuited some legislative purpose behind the statute, but that such legislative purpose had heretofore been disregarded in applying the statute to situations other than solicitation. Recall, for example, State v. McCoy, 337 So. 2d 192 (La. 1976), a criminal prosecution under the statute for aggravated crime against nature.

39. *See Neal*, 500 So. 2d at 377. Justice Dennis's holding could be stretched to subpart A(1) because as a practical matter even an overly expansive application of subpart A(1) would only affect conduct. *See id.*

regulation.[40] In light of the United States Supreme Court's rejection of an essentially identical position in *Bowers v. Hardwick*[41] the preceding year, the Supreme Court of Louisiana dismissed wholesale the idea that sexual intimacy between consenting adults might be insulated from federal regulation.[42] As Justice Dennis stated flatly, "The right to privacy does not shield all private sexual acts from state regulation."[43]

Unlike the court in *Neal*, the court in *State v. Baxley* determined that a defendant facing charges only under subpart A(2) of Louisiana's sodomy statute did not have proper standing to challenge the constitutionality of the entire statute.[44] However, in the concurring and dissenting opinions to *Baxley*, there is an incipient recognition that Louisiana's sodomy statute maneuvered where it did not belong.[45]

In an opinion concurring in part and dissenting in part, Justice Calogero opined that "few areas of personal autonomy are more private than sexual intimacy between consenting adults."[46] Appraising the statute's unconstitutionality, Justice Calogero argued that subpart A(1) of the statute is so unduly comprehensive it absorbs all sexual activity, "both heterosexual and homosexual, both private and public, and both commercial and non-commercial," and thereby

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40. *See id.* Among the arguments dismissed was the contention that the statute was enforced in a discriminatory fashion, stating the record was devoid of any such evidence. *See id.* at 379. Touting the principle that ignorance of the law is no excuse, the court also rejected the contention that the statute was unconstitutional because it did not adequately convey to the potential offender the knowledge of the type of activity proscribed. *See id.* And finally, the court rejected the argument that the statute authorized a cruel and unusual punishment as well as the argument that defendants' rights to equal protection had been violated because these issues had not been raised below. *See id.*

41. 478 U.S. 207 (1986).

42. *See Neal*, 500 So. 2d at 378.

43. *Neal*, 500 So. 2d at 378. Justice Dennis also noted that the potentially private conduct with which the defendants in *Neal* were concerned would not be affected by the enforcement of the statute against solicitations of sodomy, an activity which usually occurs in public. *See id.* at 378-79.

44. 633 So. 2d 142, 146 (La. 1994). To have standing, a defendant must challenge the constitutionality of a statute which affects her adversely. *See id.* (citing State v. Brown, 389 So. 2d 48, 50 (La. 1980)). The overarching issue for the trial court was apparently whether the statute was severable. *See id.* at 144-45. The trial court ultimately held that it was not, and that because subpart A(1) was unconstitutional, subpart A(2) must be struck down by default. *See id.* On appeal, however, the Supreme Court found it unnecessary to address the issue of severability because it did not bear on whether the defendant had standing. *See id.* at 144-45.

45. *See id.* at 146-47 (Calogero, C.J., concurring in part and dissenting in part); *see id.* at 147 (Ortigue, J., dissenting).

46. *Id.* at 147 (Calogero, C.J., concurring in part and dissenting in part).

infringes upon the constitutionally guaranteed right to privacy.[47] Moreover, Justice Calogero was of the opinion that because subparts A(1) and (2) of the statute are indivisible, and because subpart A(1) of the statute is unconstitutional, the entire statute must collapse.[48] Additionally, in a dissenting opinion, Justice Ortique stated, that at the least, Louisiana's sodomy statute should be overhauled to reflect the moral vocabulary of contemporary society.[49]

In the noted case, the Fourth Circuit Court of Appeals of Louisiana was asked to find that subpart (A)(1) of Louisiana's sodomy statute violated the privacy guaranteed by Article 1, section 5 of the Louisiana Constitution.[50] Focusing its attention on the fact that the statute "criminalizes the performance of private, consensual, noncommercial acts of sexual intimacy between individuals who are legally capable of giving their consent," the court ultimately concluded that the statute does infringe unconstitutionally on the right to privacy.[51]

The court began its analysis with an examination of the defendant's contention that the statute is unconstitutionally vague and overbroad.[52] Adhering to the rationale expressed in preceding decisions, the court held that the statute, in combination with its historically and judicially imposed meanings, defines the criminal conduct with sufficient clarity to give potential offenders adequate notice of the conduct proscribed and to provide "adequate standards for those charged with determining the accused's guilt or innocence."[53] As to the statute's alleged overbreadth, the court also adhered to prior decisions holding challenges for overbreadth to be inappropriate where the statute at issue criminalizes conduct as opposed to speech.[54]

In the next level of analysis, the court addressed whether the statute encroaches on constitutionally protected privacy.[55] Underscoring that the noted case is the first time that a Louisiana court has been presented with a constitutional challenge to

47. *Id.* at 146 (Calogero, C.J., concurring in part and dissenting in part).
48. *See id.* at 146-47 (Calogero, C.J., concurring in part and dissenting in part).
49. *See id.* at 147 (Ortique, J., dissenting).
50. *See* State v. Smith, 729 So. 2d 648, 654 (La. App. Ct. 1999).
51. *Id.* at 654.
52. *See id.* at 651.
53. *Id.*
54. *See id.* (citing State v. Neal, 500 So. 2d 374, 377 (La. 1987)).
55. *See id.* at 651-54.

Louisiana's sodomy statute in the context of noncommercial sexual activity between allegedly consenting adults, the court espoused the principle that some activities and decisions are categorically private.[56] Specifically, Justice Murray stated that "[a]mong the decisions that an individual may make without unjustified governmental interference are personal decisions relating to marriage, procreation, contraception and family relationships."[57] Making this reading of state constitutional provisions square with narrower readings of federal provisions, the court noted that while the right to privacy afforded in the U.S. Constitution may not shield from regulation sexual activity between consenting adults, it is well-settled that the guarantee of privacy afforded in the Louisiana Constitution of 1974 is more capacious.[58]

The court then proceeded to sift through relevant precedent. First, the court pointed out that while *McCoy* rejected a constitutional challenge to Louisiana's sodomy statute, the challenge had seemingly been limited to the statute's encroachment on the federal right to privacy.[59] At least, there was no express reference to the kind of friction between the statute and state guarantees of privacy that was at issue in the noted case.[60] Second, the court's reading of *Neal* and *Baxley* confined those opinions, for all intents and purposes, to the constitutionality of subpart A(2) of the statute and presumably dismissed any reference to subpart A(1) as dicta.[61] As the court noted, while "the parameters of the state constitutional right to privacy in the sexual area have not been determined," it is clear that they do not include solicitation of commercial sexual conduct.[62] Thus, having distinguished prior jurisprudence, the court effectively wiped the slate clean for determining the constitutionality of subpart A(1) of

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56. *See id.* Recall that antecedent cases can be lumped together as criminal prosecutions. *See, e.g.*, State v. Baxley, 633 So. 2d 142 (La. 1994) (consisting of a prosecution for soliciting crime against nature where defendant approached an undercover officer and offered to compensate him for oral sex); *Neal*, 500 So. 2d at 374 (consisting of a prosecution for solicitation of crime against nature); State v. McCoy, 337 So. 2d 192 (La. 1976) (consisting of a prosecution for aggravated crime against nature where defendant forced a woman to have oral-genital sex with him).

57. *Smith*, 729 So. 2d at 652.

58. *See id.*; *see also supra* note 4 and accompanying text.

59. *See id.*

60. *See id.*

61. *See id.*

62. *Id.* (quoting State v. Baxley, 633 So. 2d 142, 145 (La. 1994)).

Louisiana's sodomy statute in the context of state constitutional guarantees of privacy.[63]

Standing on the brink of new law, the court imported a highly organized, if not formulaic, standard for evaluating the constitutionality of a state action that burdens a constitutionally protected right.[64] Indicating that there may be some permissible burdens, the court proffered a two-facet test.[65] First, the state interest spurring the burdensome legislation must be at least compelling.[66] Second, the state action employed must be of a degree necessary to further that interest and no more.[67]

Thus engaged in strict judicial scrutiny, the court examined the platform sister states have assumed in striking down their own sodomy statutes and compiled a working vocabulary of what interests justify government interference. In particular, the court looked to *Campbell v. Sundquist*,[68] wherein the Tennessee Supreme Court rejected the argument that sodomy statutes were justified because the state had a compelling interest in prohibiting sexual conduct that (1) "would not lead to procreation;" (2) would result in "short-lived, shallow" relationships "initiated for the purpose of sexual gratification;" and (3) are contrary to the "social morality and the collective will of the state's citizens."[69]

Any suggestion of a state interest was wholly lacking in the noted case. The court, however, took it upon itself to mull over those interests mentioned in *Campbell*.[70] Following Tennessee's lead, the Fourth Circuit concluded that a state interest in "discouraging [sexual] acts that cannot lead to procreation" not only falls short of a compelling interest but smacks of unconstitutional invasion all by itself.[71] Additionally, the court undercut the proposition that a crime against nature statute might aid in discouraging "short-lived, shallow relationships," pointing out that the statue speaks only to one brand of sexual intimacy, both within and without marriage and has no bearing

63. *See id.* at 652-53.
64. *See id.* at 653.
65. *See id.*
66. *See id.*
67. *See id.*
68. 926 S.W.2d 250 (Tenn. Ct. App. 1996).
69. *Smith*, 729 So. 2d at 653 (citing *Campbell*, 926 S.W.2d at 263-64).
70. *See id.*
71. *Id.*

on the duration or quality of intimacy.[72] Finally, the court assumed a philosophical stance and rejected the suggestion that a social repugnance or moral condemnation of sodomy could constitute a compelling state interest.[73]

At first blush, the noted case is a revolutionary moment packed with legal precision and human interest. Even after a more penetrating inspection, it is not so easy to discern the opinion's tarnish. After all, a finding that the Louisiana sodomy statute is unconstitutional is definitively at odds with prior jurisprudence. Moreover, the opinion should be paraded for courageously declining to impose a narrow standard of social morality. But, truth be told, the careful manner in which the court undercut its own boom is disheartening. Maybe the court's insistence that the noted case marks the first time this issue has presented itself in this context could be read as a strict adherence to precedential scope.[74] Realistically, the court artfully dodged the political ramifications of breaking absolutely with twenty years of jurisprudence *constante*. The court missed an opportunity to quash, once and for all, a massive encroachment on what is undoubtedly the most private area of personal autonomy.

Even if the noted case is read at least as a literal abrogation of Louisiana's sodomy statute, there remain stones of a crumbling foundation to be carted off. The court may have done an injustice in ruling on the privacy issue while merely alluding to the statute's impermissible criminalization of private sexual intimacy between consenting adults.[75] It may very well be that those assignments of error recited in the opinion were the only ones properly raised in the district court, in which case the Fourth Circuit's hands were tied. Irrespective, however, the possibility that someone could "say homosexuals have no right to commit a crime [sodomy] in private" is extant, as are the "misguided beliefs about behavior and sex" that keep sodomy laws on the books.[76] Perhaps New Orleans attorney John Rawls was not so far off the mark when he said, "We have waited six years to eat steak, and we've been given a hamburger."[77]

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72. *Id.*
73. *See id.* at 653-54. *See also* Powell v. State, 510 S.E.2d 18, 25-26 (Ga. 1998).
74. *See id.* at 649-52.
75. *See* Melinda Shelton, *N.O. Civil Court Judge Strikes Down La. Sodomy Law*, IMPACT NEWS, Mar. 26, 1996, at 1, 7.
76. *Id.* at 1.
77. *Id.*

From a more pragmatic standpoint, however, the blind spots in the court's rationale may not be fatal. Louisiana is hardly alone in her legal maneuvers. In fact, according to Lambda Legal Defense and Education Fund, at least sixty-six percent of states have eliminated their respective sodomy statutes.[78] Moreover, the chief similarity among these states is a like indulgence of a state right to privacy and a corresponding silence regarding the supposed criminality of sodomy.[79] It is arguable that these cases and their progeny disabuse the notion that a resounding rumble is the only effective way of exorcising a state of homophobic legislation.

According to author Susan Ayres, decisions like these are highly effective tools in subverting the socially constructed straight mind, running as they do against the grain of United States Supreme Court decisions construing the federal Constitution.[80] Though perhaps quietly, these cases "de-center" federal jurisprudence and its "compulsory heterosexuality."[81]

Ayres looks closely at *Commonwealth v. Wasson*,[82] and points out that though the Kentucky constitution does not explicitly reserve a right to privacy, the Kentucky Supreme Court interprets its Bill of

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78. *See* Lambda Legal Defense and Education Fund, *State-by-State Sodomy Law Update* (visited Jan. 15, 1999) <http://www.lambdalegal.org/cgi-bin/pages/states/sodomy-map>. According to Lambda, the following states still have sodomy laws applying only to same-sex partners: Texas, Kansas, Missouri, Oklahoma, and Arkansas. *See id.*

The following states have sodomy laws applying to different-sex and same-sex partners: Idaho, Utah, Arizona, Minnesota, Mississippi, Alabama, Florida, Virginia, North Carolina, South Carolina, and Massachusetts. As of January 15, 1999, Lambda still lists Louisiana among these. *See id.* Obviously, however, after the holding in *Smith* this may no longer be the case.

The following states do not have sodomy laws: Washington, Oregon, California, Nevada, Montana, Wyoming, Colorado, New Mexico, North Dakota, South Dakota, Nebraska, Iowa, Wisconsin, Michigan, Illinois, Ohio, Kentucky, Tennessee, Georgia, West Virginia, Pennsylvania, Maryland, New Jersey, New York, Connecticut, Rhode Island, Vermont, New Hampshire, Indiana, Missouri, Hawaii, Alaska, the District of Columbia, and Maine. *See id.*

79. *See, e.g.*, Powell v. State, 510 S.E.2d 18, 26 (Ga. 1998) (holding Georgia sodomy statute, "insofar as it criminalized the performance of private, unforced, noncommercial acts of sexual intimacy between persons legally able to consent 'manifestly infringe upon a constitutional provision' which guarantees to the citizens of Georgia the right of privacy") (citations omitted); Gryczan v. State, 942 P.2d 112 (Mt. 1997) (holding that the state sodomy statute constituted a governmental intrusion into the plaintiff's right to privacy unsupported by sufficient governmental interests); Campbell v. Sundquist, 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996) (same); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (same).

80. *See* Susan Ayres, *Coming Out: Decision-Making in State and Federal Sodomy Cases*, 62 ALB. L. REV. 355, 377-79 (1998) (citing Bowers v. Hardwick, 478 U.S. 186, 190-96 (1986), discussed *supra* at n.25).

81. *Id.* at 391.

82. 842 S.W.2d 487 (Ky. 1992).

Rights as implicitly protecting the inalienable right to privacy.[83] In the court's own words:

> Man in his natural state has the right to do whatever he chooses and has the power to do. When he becomes a member of organized society, under governmental regulation, he surrenders, of necessity, all his natural right the exercise of which is, or may be, injurious to his fellow citizens. This is the price that he pays for governmental protection, but it is not within the competency of a free government to . . . invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society.[84]

This powerful passage "privileg[es] private rights over public rights," an emphasis wholly contrary to that of federal jurisprudence in the realm of privacy.[85] The crux of *Wasson*'s rejection of the straight mind, however, lies in its almost adamant refusal to let federal jurisprudence control.[86] As the court so succinctly states, "[S]tate constitutional jurisprudence . . . is not limited by the constraints inherent in federal . . . analysis."[87]

In addition to exemplifying a certain resistance, however, it is Ayers' understanding that these cases also beget certain ethical conclusions.[88] Pondering the destruction of the "epistemic regime of presumptive heterosexuality," Ayers contends that cases such as *Campbell v. Sundquist* promote the ethics of care.[89] That is, in Tennessee's rejection of majority morals as a compelling government interest on which to uphold the state sodomy statute, Tennessee effectively dispelled generic moral standards and embraced "an ethics of care for the . . . other."[90]

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83. *See* Ayres, *supra* note 80, at 391.

84. *Wasson*, 842 S.W.2d at 494-99 (quoting Commonwealth v. Campbell, 117 S.W. 383 (Ky. 1909)) (emphasis omitted).

85. Ayres, *supra* note 80, at 379.

86. *See id.* at 379-82.

87. *Wasson*, 842 S.W.2d at 493. *See also* Powell v. State, 510 S.E.2d 18 (Ga. 1998) (holding the right to privacy guaranteed in Georgia is far more extensive than the right of privacy protected by the U.S. Constitution as construed in *Bowers*); Gryczan v. State, 283 Mont. 433, 448 (Mt. 1997) (holding that regardless of whether *Bowers* was correctly decided, it was not controlling in Montana); Campbell v. Sundquist, 926 S.W.2d 250, 259 (Tenn. App. 1996) (holding that Tennessee was not bound by the United States Supreme Court decision in *Bowers*).

88. *See* Ayres, *supra* note 80, at 390.

89. *Id.* at 391, 396 (quoting JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 22-23 (1990)).

90. *Id.* at 396.

Exhibiting both an ethic of care and an opposition to federal compulsory heterosexuality, *Smith* certainly seems to take a more critical stance than its initial reception would suggest. Of course, theoretical and academic discourse aside, the ultimate test is whether *Smith* and its protection of intimate privacy rights will withstand future deliberations.[91] If the trend pronounced in sister states is any indication though, it is arguable that the criminalization of consensual sexual conduct between adults has indeed expired. Contributing to the impact of cases like *Wasson* and *Campbell* is a wake of approving authority suggesting *Smith* may stand the test of time after all.[92]

Emma E. Antin

91. As of April 9, 2000, *Smith* is scheduled to be heard by the Louisiana Supreme Court on Tuesday, April 11, 2000.

92. *See* Young v. Commonwealth, 968 S.W.2d 670, 672 (Ky. 1998) (citing *Wasson* with approval and stating that consensual sexual activity between persons over the age of sixteen is not illegal in Kentucky); Harris v. Commonwealth, 878 S.W.2d 801, 802 (citing *Wasson* with approval); Decker v. Carroll Academy, 1999 Tenn. App. LEXIS 336, *32-33 (Tenn. Ct. App. May 26, 1999) (citing *Campbell* with approval); Planned Parenthood of Middle Tenn. v. Sundquist, 1998 Tenn. App. LEXIS 562, *68 (Tenn. Ct. App. Aug. 12, 1998) (same); State v. Burkhart, 1999 Tenn. Crim. App. LEXIS 1189, *41 (Tenn. Crim. App. Dec. 6, 1999) (same); State v. Vaughn, 1998 Tenn. Crim. App. LEXIS 1106, *7-9 (Tenn. Crim. App. Oct. 23, 1998) (same).

For cases approving *Gryczan v. State*, 942 P.2d 112 (Mt. 1997), see Armstrong v. State, 989 P.2d 364 (Mt. 1999); State v. Scheetz, 950 P.2d 722 (Mt. 1997).

For cases citing *Powell v. State*, 510 S.E.2d 18 (Ga. 1998), with approval for the proposition that sex between consenting adults should not be regulated by the state, see *Brewer v. State*, 271 Ga. 605 (Ga. 1999); *Johnson v. State*, 513 S.E.2d 291 (Ga. App. 1999); *McBee v. State*, 314, 521 S.E.2d 209 (Ga. App. 1999).