

1998

Gayle S. Petersen d/b/a Leather and Lace v. South Salt Lake City : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

George Knapp; Strong and Hanni.

W. Andrew Mccoullough; Mccullough, Jones and Ivins .

Recommended Citation

Reply Brief, *Petersen v. South Salt Lake*, No. 980109 (Utah Court of Appeals, 1998).
https://digitalcommons.law.byu.edu/byu_ca2/1410

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT

KFU

45.9

.S9

DOCKET NO. 980109

BRIEF

IN THE UTAH SUPREME COURT

STATE OF UTAH

GAYLE S. PETERSEN,	:	Case No. 980109
d/b/a LEATHER AND LACE,	:	
	:	
Plaintiff/Appellant,	:	
	:	Priority 15
v.	:	
	:	
SOUTH SALT LAKE CITY,	:	
a Municipal Corporation	:	
	:	
Defendant/Appellee.	:	

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, UTAH, THE HONORABLE TYRONE MEDLEY

REPLY BRIEF OF APPELLANT GAYLE S. PETERSEN

W. ANDREW MCCULLOUGH (2170)
MCCULLOUGH, JONES & IVINS, L.L.C.
Attorneys for Appellant
853 West Center Street
Orem, Utah 84057
Telephone: (801) 224-2119/328-2688

GEORGE KNAPP (7567)
STRONG & HANNI
Attorneys for Appellee
9 Exchange Place
Suite 600
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

FILED

JAN 05 1999

CLERK SUPREME COURT
UTAH

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENTS	1
ARGUMENT	2
POINT I:	
THE DISTRICT COURT DID NOT RULE THAT S.O.B. LICENSES ARE NOT TRANSFERABLE FROM PLACE TO PLACE; AND DEFENDANT MAY NOT NOW CLAIM THAT SUCH LICENSES ARE NOT TRANSFERABLE	2
POINT II:	
PLAINTIFF HAS NOT WAIVED HER CONSTITUTIONAL OBJECTIONS TO THE CITY ORDINANCES	7
POINT III:	
PLAINTIFF HAS PROVIDED A PROPER BASIS FOR USING THE UTAH STATE CONSTITUTION TO GRANT HER RELIEF	10
POINT IV:	
PLAINTIFF HAS NOT RECEIVED DUE PROCESS UPON THE DENIAL OF HER NEW CITY BUSINESS LICENSE	16
POINT V:	
THE ZONING ORDINANCE IS UNCONSTITUTIONALLY VAGUE IN FAILING TO SET FORTH THE FORM OF MEASUREMENT	17
CONCLUSION	17
MAILING CERTIFICATE	18
ADDENDUM	19
A. Pap's A.M. v. City of Erie	
B. Powell v. State	
C. South Salt Lake City Ordinance	

CASE AUTHORITY TABLE OF AUTHORITIES CITED

<u>Barnes v. Glen Theatre,</u> 501 U.S. 560 (1991)	11,12
<u>Bowers v. Hardwick,</u> 478 U.S. 186 (1986)	15

<u>California v. LaRue,</u> 409 U.S. 109 (1972)	11
<u>Doran v. Salem Inn,</u> 422 U.S. 61 (1981)	11
<u>FW/PBS v. Dallas,</u> 493 U.S. 215 (1990)	16
<u>Langnes v. Green,</u> 282 U.S. 531 (1931)	3
<u>Nakatomi Investments v. City of Schenectady,</u> 949 F.Supp. 988 (N.D.N.Y. 1997)	11
<u>Pap's A.M. v. City of Erie,</u> _____ A.2d _____, (Pa. 1998)	11
<u>Powell v. State</u> _____ SE.2d _____, (Ga. 1998)	15
<u>Schad v. Mount Ephraim,</u> 452 U.S. 61 (1981)	11
<u>State v. South,</u> 924 P.2d 354 (Utah 1996)	3
<u>State v. Thompson,</u> 810 P.2d 415 (Utah 1991)	14
<u>Tripplett Grille, Inc. v. City of Akron,</u> 40 F. 3d 129 (6th Cir. 1994)	11
<u>United States v. Miller,</u> 425 U.S. 435 (1976)	14
<u>West v. Thompson Newspapers,</u> 872 P.2d 999 (Utah 1994)	13
<u>Winegar v. Froerer Corp.,</u> 813 P.2d 104 (Utah 1991)	10

IN THE UTAH SUPREME COURT

STATE OF UTAH

---oooOooo---

GAYLE S. PETERSEN,	:	REPLY BRIEF OF
d/b/a LEATHER AND LACE,	:	APPELLANT
	:	
Plaintiff/Appellant,	:	
	:	
vs.	:	
	:	
SOUTH SALT LAKE CITY,	:	Case No. 980109
a Municipal Corporation	:	
	:	
Defendant/Appellee.	:	

---oooOooo---

SUMMARY OF ARGUMENTS

I. Defendant is incorrect that the Court ruled in its favor on the question of whether S.O.B. licenses are transferrable. There is much support within the trial court's ruling for Defendant's contention that such licenses are transferrable.

II. This action brought by Plaintiff is not a "facial attack" on the S.O.B. ordinance of the City of South Salt Lake. Plaintiff argues that the City's interpretations of its ordinances are invalid and unreasonable. Plaintiff also argues, in the alternative, that the contested ordinance provisions, as interpreted by Defendant, are unconstitutional as applied to Plaintiff.

III. There is ample authority within both the United States and Utah Constitutions to protect Plaintiff's freedom of expression from the unreasonable regulations promulgated by Defendant.

IV. Plaintiff has never obtained her due process rights upon denial of her city business license, as distinguished from her S.O.B. license, which is transferrable.

V. Defendant argues that the ordinance does not fail for vagueness. Defendant appears, however, to be in the process of further amendments to the ordinance to cure the vagueness. That is a tacit admission of the vagueness problem.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT RULE THAT S.O.B. LICENSES ARE NOT TRANSFERABLE FROM PLACE TO PLACE; AND DEFENDANT MAY NOT NOW CLAIM THAT SUCH LICENSES ARE NOT TRANSFERABLE.

Plaintiff has set forth in her main brief, a careful review of the ruling of the District Court on the question of transferability of her business license and her S.O.B. license. As previously stated, the District Court appeared confused between the transferability provisions of the South Salt Lake Sexually Oriented Business (S.O.B.) ordinance and the transferability provisions of the general business licensing ordinance of the City of South Salt Lake. The history, interaction, and provisions of each of those ordinances have been previously described by Plaintiff. It has also been previously noted that the City of South Salt Lake has appealed none of the provisions of the ruling of the District

Court, and may not now argue their own appeal of the District Court's ruling.

In the case of State v. South, 924 P.2d 354 (Utah 1996), this Court reviewed the necessity of filing a cross appeal by a party which had generally prevailed below. In doing so, this Court referred to the United States Supreme Court decision in Langnes v. Green, 282 U.S. 531 (1931). This court stated that a prevailing party must cross appeal "if they wish to attack a judgment of a lower court for the purpose of enlarging their own rights or lessening the rights of their opponent." id. at 355. A cross-appeal would not be necessary merely to affirm the lower court's ruling, even if the appellee argues reasons for upholding the decision alternate to the reasons adopted by the lower court.

The City now argues its own interpretation of §3b-15-18, claiming that the provisions providing that "it is unlawful to conduct business under a license pursuant to this chapter at any location other than the licensed premises" prohibits Plaintiff from moving her S.O.B. business license from one place to another. The District Court has ruled that claim to be in error. See Appellee's's Brief, page 9, and ruling of District Court, R 345-6. The lower Court ruled that Plaintiff has a property interest in the license, and that she retained that property interest when she moved from one place to another. The Court, of course, stated that Plaintiff would have to comply with local rulings regarding notifying the City of her move, and such things as complying with

building codes and fire ordinances. That is provided for in the City general business licensing ordinance; and as previously argued, the Court's ruling is internally inconsistent on that matter. While the City should be dealing with the internal inconsistency, the City alternately appears to be appealing the trial Court's ruling or trying to explain it away as something that it is not. This Court has no jurisdiction to give the City more than it now has; so neither effort on the part of the City should be successful. Unlike the ruling in South, Defendant is demanding more than it already has. While the trial court ruling is generally in Defendant's favor, it is significant that the trial court ruled that the wording of the ordinance does not prevent a transfer of the business license. While Defendant claims that this would prohibit Plaintiff from moving her license, the trial court ruled that the prohibition was far less than complete. It obviously got hung up on procedural questions of how to insure that Plaintiff complied with other business regulations; but did not rule that the license is not transferrable to a new location. Plaintiff has addressed and solved these problems in her previous brief. This, in the view of the trial Court, should be enough. In Defendant's view, there is nothing Plaintiff can do to comply with their ordinance. That claim does demand more than Defendant now has; and the City's failure to appeal prevents them from having it. In this respect, it is interesting to note that Defendant argues, in its conclusion, that the order of the trial court is "correct in

all respects". If that is true, Defendant needs to explain the court's rulings regarding the property right which Plaintiff has retained in her S.O.B. license. The failure of the City to do so shows the weakness in its arguments.

South Salt Lake, in a rather novel argument, suggests that Plaintiff is attempting to invoke the doctrine of equitable estoppel against Plaintiff's "present interpretation of the ordinance." Plaintiff is not arguing estoppel. She is merely pointing out that the City's "present interpretation" is not reasonable. The lower Court agreed almost completely with Plaintiff on this point. The City ordinance must be intelligible in order to be enforceable. If a person of average intelligence cannot tell what is expected of him or her, the ordinance falls for vagueness. This is particularly important in the area of Constitutionally protected expression (Pl. Br. p. 27-8). The City, (br. 11), admits that it has changed its interpretation of the ordinance, without notice to anyone. The City appears to believe that it has the right to do so, and that those caught by surprise by the reinterpretation just have to live with it. This new interpretation was expressly rejected by the trial court; and the rejection is well reasoned and should be sustained. Plaintiff's counsel, some time ago, asked the South Salt Lake City Attorney for an interpretation of a certain portion of the ordinance, as to whether a sexually oriented business could move from one place to another without obtaining a new license and starting over. The

City Attorney indicated that such a transfer could be made. This was not only an opinion by the sitting City Attorney; it was an opinion by the drafter of the ordinance; and it was an official act of the City itself. Defendant now suggests that "the sexually oriented business ordinance had been twice amended" since the opinion of the City Attorney was rendered (Def. br. p.13). As set forth in the Affidavit of Clint Balmforth (R. 186-190) provided to the District Court in support of Defendant's Motion for Summary Judgment, these particular portions of the ordinance have not been changed through the three revisions. Accepted practice for changing the law in the United States is for the legislative body of the City or State to make the change. Once an interpretation has been rendered, it must be lived with, because to do otherwise would invite total confusion. The City of South Salt Lake was certainly aware that another sexually oriented business, relying on the representations of the South Salt Lake City Attorney, had made a switch from one location to another. The City Council did nothing to alter the law in order to prevent that from occurring again.

It is not Plaintiff who is arguing "estoppel" at all. It is now Defendant who is suggesting that it can reinterpret its own ordinance from time to time, as it sees fit; and it is its position that notice needs be given to the citizens of the City. In other words, if you rely on precedent in the City of South Salt Lake, you are likely to get burned. Since, however, the lower Court (R. 344-

6) did not buy Defendant's reinterpretation, Plaintiff does not have to justify her failure to comply with it.

The City suggests that accepting Plaintiff's (plus Mr. Balmforth's, plus the trial court's) interpretation of the ordinance would allow "Plaintiff to put her business on wheels and move about the City at will." That is not true. The general business licensing ordinance of the City of South Salt Lake requires that a business be located in a particular area; and the areas for a sexually oriented business are carefully prescribed and limited. Prior to opening the new location, Plaintiff must submit to an inspection by the business licensing officials, fire officials, and the health department. This is far from putting the business "on wheels." This simply allows Plaintiff to relocate when business reasons require it, as any other business can do. Her relocation, of course, must be into an area specifically zoned for it. The City has failed to suggest any valid interest that is infringed upon by allowing Plaintiff to relocate her business into another properly zoned area. Plaintiff's business was previously located in an area in which it was a non-conforming use. Plaintiff's relocation into a properly zoned area should be applauded by the City, not contested.

POINT II

PLAINTIFF HAS NOT WAIVED HER CONSTITUTIONAL OBJECTIONS TO THE CITY ORDINANCES.

This is an action in which Plaintiff below sought to review

the South Salt Lake City sexually oriented business licensing ordinance as that ordinance was applied to her. The major disagreements between the parties were whether the sexually oriented business ordinance licensing provisions allowed that license to be transferred from one place to another, and whether Plaintiff's new business location was properly located according to the provisions of the ordinance. Plaintiff cited considerable constitutional law to the effect that Plaintiff's business is protected by the First Amendment to the United States Constitution and Article I Section 15 of the Constitution of Utah. Certain provisions of the ordinance, which may be construed to inappropriately prevent Plaintiff's use of her free expression rights, are unconstitutional, as applied to this Plaintiff. The Memorandum in support the Motion for Summary Judgment and dated September 16, 1997 set out those issues in some detail. That Motion was further supported by Plaintiff's responsive memorandum dated October 23, 1997. Defendant's counter-motion for Summary Judgment and his memoranda in support thereof were considerably more broad in its citation of constitutional principles. Defendant in its counter-motion specifically asked that the Court find the law to be facially valid, and spent considerable space in its memorandum setting forth its assertions that the ordinance taken as a whole was constitutional. The Court asked during oral argument whether Plaintiff meant to make a facial attack on the ordinance as a whole; and Plaintiff's counsel indicated that he had not intended

to do so.

Defendant's counsel has apparently misread Plaintiff's Motion and the memoranda in support of it from the beginning. It is Defendant who continually refers to a facial attack on the ordinance. Plaintiff has never made such an attack; and apparently Defendant's counsel cannot tell one when he sees one. The absence, however, of a facial attack on the constitutionality of an ordinance does not preclude a challenge to certain sections of the ordinance as they are applied to this particular Plaintiff. That has been what Plaintiff has been doing from the beginning.

Counsel for Defendant was asked at the oral arguments by the Court "Are you an expert in this field?" (Tr. 32). Defendant's counsel replied "Not unless I became one in the last 30 days." (Tr. 33). Counsel for Defendant does not hold himself out as an expert on First Amendment issues; and it is obvious that he is not. Plaintiff has made cogent, clear and consistent arguments on her legal points throughout this action, and the Court has ruled thereon. The Court, in its memorandum decision of February 11, 1998 stated:

Prior to discussing the aforementioned sub-issues, the Court believes that considered as a whole City's S.O.B. Ordinance #96-1 is constitutional. As a whole the Ordinance gives fair notice regarding prohibited and regulated conduct. (memorandum decision p. 4).

Since the overall constitutionality of the ordinance was never challenged, this statement must be considered as dicta. Nevertheless, Defendant did attempt to defend the entire ordinance

in its own counterclaim and its motion for summary judgment. It cannot now claim that it wasn't aware of challenges to the ordinance.

Plaintiff waived none of its initial arguments, and the Court below considered them all, and did not consider any of them waived. The oral arguments were relatively brief. They were largely confined to questions from the bench, as the Court indicated from the beginning that it had certain questions of both parties. Mr. Knapp, in the beginning of his oral arguments stated "I will try to be brief and not be too redundant on that material". (transcript p. 2). The fact that Mr. Knapp did not argue each and every detail of his memorandum did not mean he waived the prayer of his Complaint. The Court granted Defendant the relief requested. Plaintiff's failure to argue each and every point of her memorandum did not waive her claims either. This Court has previously stated:

In reviewing the trial court's ruling, we accept the facts and inferences in the light most favorable to the losing party. Because summary judgment is granted as a matter of law, we may reconsider the trial court's legal conclusions. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

The issues were framed below; they were argued in the memoranda; and they were specifically decided by the Court below.

POINT III

PLAINTIFF HAS PROVIDED A PROPER BASIS FOR USING THE UTAH STATE CONSTITUTION TO GRANT HER RELIEF.

Defendant suggests that Plaintiff has not properly preserved her right to claim relief under the Constitution of the State of

Utah. Plaintiff believes she has fully briefed the issue, with what law is available in the State of Utah. In connection with that, Defendant suggests that the idea that nude dancing is protected expression is very new, only being noted in dicta in California v. LaRue, 409 U.S. 109 (1972) and not pronounced as "marginally" within the protections of the First Amendment until Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991). That, of course, is not true. After LaRue, the United States Supreme Court recognized nude dancing as protected expression in the case of Doran v. Salem Inn, 422 U.S. 922 (1975) and affirmed it in Schad v. Mount Ephraim, 452 U.S. 61 (1981), among others. In the Barnes case, of course, United States Supreme Court upheld a prohibition of nude dancing, under certain circumstances, which it determined were not an attempted infringement of First Amendment Rights. There has been much debate on the meaning attached to the fractured opinions of the Court in that matter. See Tripplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir.1994) and Nakatomi Investments v. City of Schenectady, 949 F. Supp. 988 (N.D.N.Y. 1997). Of particular significance in this area of law, is the recent Pennsylvania Supreme Court decision in Pap's A.M. v. City of Erie, ____ A.2d ____, (Pa. 1998) declining to follow Barnes at all. Because the opinion has not yet been published, Plaintiff will include a copy of the opinion from the Pennsylvania Supreme Court website as an addendum hereto. The Pennsylvania Supreme Court reasoned that there was no opinion upholding a prohibition of

nude dancing which commanded a majority of the Court. Because of the failure of the United States Supreme Court to reach a majority decision on any point, the Pennsylvania Supreme Court found no precedential value whatsoever in the Barnes case. That Court was invited, as this Court is invited, to use the Constitution of the State in order to uphold the protection of nude dancing in the State of Pennsylvania. The Court found it unnecessary to do so, as the Federal Constitutional guarantees are sufficient, assuming that Barnes is not controlling precedent. The Pennsylvania Court then found that:

. . . one of the purposes of the Ordinance is to combat negative secondary effects. That, however, is not its only goal (opinion at p. 11).

The Court then went on to adopt the opinion of Justice White, dissenting in Barnes, quoting:

It is only because the nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication. id.

Having determined that the dancing ordinance at issue in that case was content based, the Pennsylvania Court applied strict scrutiny, and struck down the ordinance. Once again, Plaintiff in this action is not asking this court to declare the ordinance invalid on its face. The ordinance is, however, content based; and any doubts on the overbreadth and vagueness issues should be decided in favor the party seeking constitutional protections.

Defendant suggests that a majority of other states have refused to use their State Constitutions to extend protections to adult entertainment. The recent decision by the Supreme Court of Pennsylvania does not rely on the State Constitution. Nevertheless, it appears clearly that the State court did not believe it necessary to do so, based upon its First Amendment analysis. If this Court were to follow that analysis, it would find sufficient protection for Plaintiff to continue her business without undue governmental interference. For other State Court decisions, see Plaintiff's main brief.

Defendant also cites Supreme Court decisions in Utah, which suggest an antagonism by this Court to expressive rights such as those claimed by Plaintiff. In doing so, Defendant notes in passing that "this Court expressly disavowed the language and rationale" of the authority Defendant wishes to rely upon. Defendant somehow suggests that this Court should rely on it anyway. Obviously, it should not.

Defendant dismisses the ruling of this Court in West v. Thompson Newspapers, 872 P.2d 999 (Utah 1994) in which this court stated that there is an independent protection in the Utah Constitution for expressive freedoms. The framers of the Constitution of Utah, Defendant claims, were religious men who would never have countenanced activities of the type at issue here.

Perhaps neither would those who drafted the Bill of rights to the United states Constitution. Nevertheless, both provisions were drafted to protect minority viewpoints from the oppressive power of majority disfavor, using the power of government.

It is perhaps instructive to look at actions of this court regarding other important an fundamental right guaranteed by both Constitutions. The United States Supreme Court, in the case of United States v. Miller, 425 U.S. 435 (1976) held that a depositor of a financial institution has no legitimate expectation of privacy in his bank records, and consequently has no standing under the Fourth Amendment to challenge their seizure. The Supreme Court of Utah, however, found that Article I Section 14 of the Constitution of Utah does indeed protect personal records, in the case of State v. Thompson, 810 P.2d 415 (Utah 1991). The Supreme Court held:

We hold that under article I section 14 of the Utah Constitution, defendants under the facts of this case had a right to be secure against unreasonable searches and seizures of their bank statements, "checks, savings, bonds, loan applications, loan guarantees, and all papers which [they] supplied to the bank to facilitate the conduct [their] financial affairs upon the reasonable assumption that the information would remain confidential." 810 P.2d at 418.

This Court did not base its holding in that case on either the text of the Constitutional provisions, or its history. Both provisions protect individuals from "unreasonable" intrusions of government officials. This Court made a determination that the intrusions of governmental officials in seizing documents from

banks were not reasonable. The United States Supreme Court has been unwilling to make the same determination. Thankfully, citizens of this State have an added protection against a practise that really is not reasonable. Plaintiff asks this Court to make the same kind of determination here. Other Courts have found sufficient authority in constitutional law to protect expression in this manner; and it is a freedom that is under attack based solely on the content of the message conveyed.

Likewise, the United States Supreme Court declined, in Bowers v. Hardwick, 478 U.S. 186 (1986), a case out of the State of Georgia, to extend the constitutional right to privacy to consensual homosexual acts. It took another 12 years for the Georgia Supreme Court to declare that such a right exists under the Georgia Constitution; but it did so in November, 1998, in the case of Powell v. State, ___ SE.2d ___, (Ga. 1998). A copy of that decision is included as an addendum hereto. Once again, it is not textual differences in the constitutions which have been relied upon; but instead a determination by the State's highest court that the government has no legitimate interest in regulating certain aspects of intimate relations. Plaintiff believes that the City of South Salt Lake has gone beyond its legitimate functions in the regulations it has applied to her; and this Court should so find.

POINT IV

PLAINTIFF HAS NOT RECEIVED DUE PROCESS UPON THE DENIAL OF HER NEW CITY BUSINESS LICENSE.

Defendant points out, in its brief (P. 42) that Plaintiff did not file a request for an administrative appeal of the denial of her new business license, until after this litigation was commenced. That is true. Plaintiff applied for the city business license at her new place of business, on the same day this litigation was commenced. This litigation was originally designed only to test the denial of the transfer of her SOB license, a completely different matter. When Plaintiff was denied a new business license as well, she followed proper administrative procedure in appealing that denial. The City has, of course, inextricably connected those two licenses, which it has no legal right to do. Plaintiff only asks this Court to rule that she can transfer the SOB license, and obviously it is then proper for Plaintiff to demand that her separate business license also be issued. To do less would indeed deny Plaintiff her rights to due process. See FW/PBS v. Dallas, 493 U.S. 215 (1990) in which the Court held a local licensing ordinance unconstitutional for failure to state time limits for issuance of the license, and a prompt judicial review of any denial.

POINT V

THE ZONING ORDINANCE IS UNCONSTITUTIONALLY VAGUE IN FAILING TO SET FORTH THE FORM OF MEASUREMENT.

Defendant, in its brief, only briefly refers to Plaintiff's arguments concerning the vagueness of the way in which distances between businesses are measured. In doing so, however, Defendant makes the claim, in a footnote (Br. 41) that South Salt Lake has added a new section of the ordinance, § 5.56.065, setting forth the standard of measurement. It would seem that such an enactment would be a tacit admission that one is needed. Plaintiff notes, however, that the recent recodification just received from the South Salt Lake City Attorney contains no such new section. The relevant sections are attached as Addendum C. If the City itself cannot determine what sections of the ordinance are in effect, it is unreasonable to force Plaintiff to guess at what the ordinance means.


CONCLUSION

Plaintiff has shown, based on solid legal authority, that her right to freedom of expression has been denied by the application of South Salt Lake's ordinance to her. She has also shown that the ordinance, as applied to her, is unconstitutionally vague; and she has shown that the city has claimed the right of unbridled discretion in construing its own ordinances as it sees fit, from time to time. Plaintiff's business is being legally conducted; and

the Court should so find.

DATED this 4th day of January, 1999.

MCCULLOUGH, JONES & IVINS, L.L.C.



W. Andrew McCullough
Attorney for Appellant

CERTIFICATE OF SERVICE

delivered
I hereby certify that on the 5th day of January, 1999, I
~~mailed~~ two true and correct copies of Appellant's Reply Brief to
George Knapp, attorney for Appellee, Strong & Hanni, 9 Exchange
Place, Suite 600, South Salt Lake City, Utah 84111.



appeal\petersen.br2

ADDENDUM

- A. Pap's A.M. v. City of Erie
- B. Powell v. State
- C. South Salt Lake City Ordinance

ADDENDUM A

[J-142-1997]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PAP'S A.M. t/d/b/a KANDYLAND,	:	Nos. 016 and 017 Western
	:	District Appeal Docket 1997
Appellant	:	
v.	:	Appeal from the Order of the
	:	Commonwealth Court of
THE CITY OF ERIE, JOYCE A.	:	Pennsylvania, entered March 27,
SAVOCCHIO, CHRIS E. MARAS,	:	1996 at Nos. 445 and 446 C.D.
MARIO S. BAGNONI, ROBERT C.	:	1995, Reversing the Order of
BRABENDER, DENISE ROBINSON, and	:	the Court of Common Pleas of
JAMES N. THOMPSON, in their	:	Erie County, Pennsylvania,
official capacities,	:	Civil Division entered January
	:	18, 1995 at No. 60059 of 1994
Appellees	:	
	:	674 A.2d 338 (Pa. Commw. Ct.
	:	1996).
	:	
	:	ARGUED: September 16, 1997

OPINION OF THE COURT

MR. JUSTICE CAPPY

DECIDED: OCTOBER 21, 1998

This is an appeal by allowance from the order of the Commonwealth Court reversing the trial court's order permanently enjoining the enforcement of the City of Erie's Ordinance 75-1994 ("Ordinance"), and striking the Ordinance in its entirety. For the following reasons, we now reverse.¹

On September 28, 1994, the City Council for the City of Erie ("City Council") enacted the Ordinance.² The Ordinance states,

¹ We have jurisdiction over this matter pursuant to 42 Pa.C.S. § 724.

² The Ordinance states in relevant part:

1. A person who knowingly or intentionally in a public place:
 - a. engages in sexual intercourse;
 - b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code;
 - c. appears in a state of nudity, or
 - d. fondles the genitals of himself, herself or

inter alia, that it is a summary offense to appear in a "state of

(. . . continued)

another person commits Public Indecency, a
Summary Offense.

2. "Nudity" means the showing of the human male or female genital (sic), pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

4. The prohibition set forth in subsection 1(c) shall not apply to:

- a. Any child under ten (10) years of age; or
- b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.

.

6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this ordinance. Should a court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

nudity". In order to avoid being in a "state of nudity," a female person over the age of ten years of age would have to wear, at a minimum, what are commonly known as "pasties" and a "G-string". The effective date for the Ordinance was October 12, 1994.

Pap's A.M. ("Appellant") is the operator of an establishment known as "Kandyland" which features nude erotic dancing performed by women. On October 14, 1994, Appellant filed a complaint in equity, naming the City of Erie, the mayor for the City of Erie, and the members of the City Council ("Appellees") as defendants. In its complaint, Appellant requested a declaratory judgment declaring the Ordinance unconstitutional as well as injunctive relief and attorney's fees.

The Court of Common Pleas of Erie County held hearings on this matter. On January 18, 1995, the trial court determined that the Ordinance was unconstitutionally overbroad on its face. It therefore granted the permanent injunction and struck down the Ordinance. The trial court, however, denied Appellant's request for attorney fees.

Appellant and Appellees cross-appealed to the Commonwealth Court. The Commonwealth Court determined that the trial court erred when it held that the Ordinance was unconstitutionally overbroad. Furthermore, it determined that Appellant's additional claim that the Ordinance impermissibly infringed upon Appellant's right to freedom of expression as guaranteed by the United States and Pennsylvania Constitutions was not borne out. It therefore reversed the trial court's order striking the Ordinance and

awarding Appellant injunctive relief.³

Appellant then filed a petition for allowance of appeal with this court. We granted review, limited to the issues of whether the Ordinance violates the right to freedom of expression as guaranteed by the United States and Pennsylvania Constitutions and whether the Ordinance is unconstitutionally overbroad.⁴

In examining whether the Ordinance violates Appellant's freedom of expression as guaranteed by the First Amendment⁵, we must initially determine whether nude dancing constitutes expressive conduct which is within the First Amendment's protective ambit. The act of being in the nude is not, in and of itself, entitled to First Amendment protection because no message is being conveyed. Cf. Texas v. Johnson, 491 U.S. 397, 403-406, 109 S.Ct. 2533, 2539-2540, 105 L.Ed.2d 342, 352-354 (1989) (act of desecrating flag is not critical point in determining whether actor is engaging in expressive conduct; rather, the question to be answered is whether the actor intended to convey a particularized message). Yet the act of dancing nude, with its

³ Since the Commonwealth Court found that the Ordinance was constitutional, it saw no need to address Appellant's claim that it was entitled to attorney's fees.

⁴ In reviewing the determination of the court below, our scope of review is plenary as the issues presented in this case are questions of law. See Phillips v. A-BEST Products Co., 542 Pa. 124, 130, 665 A.2d 1167, 1170 (1995).

⁵ The First Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 855 n. 1, 102 S.Ct. 2799, 2802 n.1, 73 L.Ed.2d 435, ____ n. 1 (1982).

attendant erotic message, is an expressive act entitled to First Amendment protection. We can say this with certainty because a majority of the United States Supreme Court recently endorsed such a view in Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Although Barnes was an otherwise hopelessly fragmented decision, eight of the nine members of the Court agreed that nude dancing, as it portrayed an erotic message, is expressive conduct and is entitled to some quantum of protection under the First Amendment. Id. at 565-566, 111 S.Ct. at 2460, 115 L.Ed.2d at 511 (Rehnquist, C.J., authoring the opinion announcing the judgment of Court, joined by O'Connor and Kennedy, JJ.); id. at 581, 111 S.Ct. at 2468, 115 L.Ed.2d at 521 (Souter, J., concurring); id. at 587, 111 S.Ct. at 2471, 115 L.Ed.2d at 525 (White, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.)

As we have determined that nude dancing is entitled to some First Amendment protection, we must next decide whether the Ordinance is related to the suppression of expression. Johnson, 491 U.S. at 403, 109 S.Ct. at 2539, 105 L.Ed.2d at 352. In making this determination, we determine whether the governmental interest in enacting the Ordinance was a content-neutral one. See United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680 (1968). Resolution of this inquiry is critical to our analysis for if the Ordinance is related to the suppression of expression, then the onerous strict scrutiny test applies. Johnson, 491 U.S. at 403, 109 S.Ct. at 2539, 105

L.Ed.2d at 352; see also United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736, 744 (1983) (content-based restrictions will be upheld only if they are narrowly drawn to accomplish a compelling governmental interest.) If, however, the governmental interest is content-neutral, and therefore is unrelated to the suppression of expression, "then the less stringent standard . . . announced in United States v. O'Brien for regulations of noncommunicative conduct controls."⁶ Johnson, 491 U.S. at 403, 109 S.Ct. at 2539, 105 L.Ed.2d at 352.

In determining whether the Ordinance is related to the suppression of free expression, the Commonwealth Court below turned for guidance to the United States Supreme Court's decision in Barnes, supra, a case which presented a situation very similar to the one presented in the matter sub judice. After engaging in the difficult task of determining what, if any, holding could be gleaned from the hopelessly fragmented Barnes Court, the Commonwealth Court determined that the concurring opinion authored

⁶ The O'Brien Court stated that the "government regulation is sufficiently justified" if it meets all factors of the following four-part test:

- 1) Promulgation of the regulation is within the constitutional power of the government;
- 2) The regulation furthers an important or substantial governmental interest;
- 3) The governmental interest is unrelated to the suppression of free expression; and
- 4) The incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680 (1968).

by Justice Souter was dispositive.

We, too, begin our analysis of whether the Ordinance is content-based by reviewing the Barnes decision. The Court in Barnes analyzed an Indiana statute, which is strikingly similar to the Ordinance we are examining, to determine whether that statute violated the First Amendment. Unfortunately for our purposes, the Barnes Court splintered and produced four separate, non-harmonious opinions. We must review each of the opinions to see if any holding can be gleaned from them.

The Chief Justice, in his opinion announcing the judgment of court, concluded that nude dancing is expressive conduct within the peripheral boundaries of First Amendment protection. He determined that the statute in question was a content-neutral restriction on speech since the governmental interest in protecting societal order and morality was unrelated to the suppression of free expression. Id. at 568, 111 S.Ct. at 2461, 115 L.Ed.2d at 512. He went on to conclude that the statute met the less stringent standard of O'Brien.

Justice Scalia authored a separate concurring opinion. Barnes, 501 U.S. at 572, 111 S.Ct at 2463, 115 L.Ed.2d at 515 (Scalia, J. concurring). Although he agreed with the Chief Justice's conclusion that the statute was constitutional, Justice Scalia arrived at this conclusion by a radically different route. Disagreeing with the other eight members of the Court, he would have found that nude dancing is entitled to no First Amendment protection, and that only a rational basis for the statute need

exist for the statute to be found constitutional. Id. at 580, 111 S.Ct. at 2468, 115 L.Ed.2d at 520.

Justice Souter also agreed with the result reach by the Chief Justice, but wrote separately to express his view that the content-neutral governmental interest forwarded by the statute was prevention of the negative secondary effects (such as prostitution, sexual assault, and other criminal acts) which are associated with nude dancing establishments. Id. at 582, 111 S.Ct. at 2469, 115 L.Ed.2d at 522 (Souter, J., concurring).

Justice White's dissenting opinion, which was joined by Justices Marshall, Blackmun, and Stevens, garnered the most votes of any of the Barnes opinions. Id. at 587, 111 S.Ct. at 2471, 115 L.Ed.2d at 525 (White, J., dissenting). Justice White expressed the opinion that the purpose of the statute was "to protect the viewers from what the State believes is the harmful message that nude dancing communicates." Id. at 591, 111 S.Ct. at 2473, 115 L.Ed.2d at 527. Thus, since the statute was content-based, it was subject to analysis under the strict scrutiny test, a test which the dissenters believed the statute could not pass because the statute was not narrowly tailored. Id. at 594, 111 S.Ct. at 2475, 115 L.Ed.2d at 529.

From this hodgepodge of opinions, the Commonwealth Court selected the concurring opinion authored by Justice Souter as expressing the position of the Court and accorded it the status of binding precedent. In arriving at this conclusion, the Commonwealth Court quoted the United States Supreme Court's dictate

that where "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260, 266 (1977). Applying Marks to the Barnes opinions, the Commonwealth Court concluded that Justice Souter's opinion provided those "narrowest grounds" and therefore accorded it precedential effect.

While we empathize with the Commonwealth Court's plight when faced with trying to make sense out of Barnes, we cannot agree that Justice Souter's concurring opinion is binding precedent. We agree that it is possible to cobble together a holding out of a fragmented decision.⁷ Yet, in order to do so, a majority of the Court must be in agreement on the concept which is to be deemed the holding. It is certainly permissible to find that a Justice's opinion which stands for the "narrowest grounds" is precedential, but only where those "narrowest grounds" are a sub-set of ideas expressed by a majority of other members of the Court. The mere finding that one Justice expressed a narrower belief than others does not dispense with the requirement that a majority of the Court need agree on a concept before that concept can be treated as binding precedent.

It is simply not possible to find that Justice Souter's

⁷ In fact, we have done so in this opinion at page 5, supra.

position in Barnes commanded five votes. Even if we were to assume arguendo that his concurring opinion provided an approach which was "narrower" than, and yet still encompassed by and consistent with, the one taken by the Chief Justice, such a concession would provide only four votes for Justice Souter's position. The fifth vote for Justice Souter's position is not forthcoming. It cannot be provided by Justice Scalia, who believed that restrictions on nude dancing are not to be analyzed pursuant to the First Amendment. Nor can it be said that the dissenters, who rejected the notion that the state's goal of combating secondary effects via the statute rendered the statute content-neutral, were in agreement with Justice Souter.

We find that the Commonwealth Court's determination that Justice Souter's "secondary effects" rationale represents the "holding" of Barnes is simply not borne out. In fact, aside from the agreement by a majority of the Barnes Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the Barnes Court agreed. Thus, although we may find that the opinions expressed by the Justices prove instructive, no clear precedent arises out of Barnes on the issue of whether the Ordinance in the matter sub judice passes muster under the First Amendment.

Having determined that there is no United States Supreme Court precedent which is squarely on point, we turn to our own independent examination of the Ordinance itself to determine whether it is related to the suppression of free expression. The

City Council stated plainly in the Ordinance that it was adopting this regulation

for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

We acknowledge that one of the purposes of the Ordinance is to combat negative secondary effects. That, however, is not its only goal. Inextricably bound up with this stated purpose is an unmentioned purpose that directly impacts on the freedom of expression: that purpose is to impact negatively on the erotic message of the dance. We find that Justice White expressed this position most eloquently in his dissenting opinion in Barnes when he declared that

it cannot be [said] that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication.

Barnes, 501 U.S. at 592, 111 S.Ct. at 2474, 115 L.Ed.2d at 528

(White, J. dissenting). We believe that Justice White's analysis is directly applicable to the situation before us now, and that the

stated purpose for promulgating the Ordinance is inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing.

We find further support for our rationale in the United States Supreme Court's holding in Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). In Forsyth County, a county ordinance imposed a fee for the issuance of parade permits. The administrator responsible for setting the fee was directed to take into account, among other things, the possible costs of police protection needed at certain events. Id. at 127, 112 S.Ct. at 2399, 120 L.Ed.2d at 109. "The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content.

Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit." Id. at 134, 112 S.Ct. at 2403, 120 L.Ed.2d at 113-114.

As in the matter sub judice, the governmental entity in Forsyth declared that the ordinance permitting the adjustable fee was content-neutral because it was "aimed only at a secondary effect - - the cost of maintaining public order." Id. at 134, 112 S.Ct. at 2403, 120 L.Ed.2d at 114. The Court flatly rejected this argument, stating that the secondary effects rationale was inextricably linked with the suppression of speech for the negative secondary effects were related to the content of the expressive message conveyed by the marchers. The Court cogently stated that "[l]isteners' reaction to speech is not a content-neutral basis for

regulation." Id.

Similarly, the negative secondary effects associated with nude dancing are inextricably linked to the erotic message of the dance.

Thus, as in Forsyth County, we find that a content-neutral reason is insufficient to save the Ordinance since it is inextricably linked with a content-based motivation for the restriction.

Since the Ordinance's restrictions are content-based, we must now determine if the Ordinance passes the strict scrutiny test. Grace, 461 U.S. at 177, 103 S.Ct. at 1707, 75 L.Ed.2d at 744. In order to pass the strict scrutiny test, the burden is on Appellees to establish that the Ordinance is narrowly drawn to accomplish a compelling governmental interest. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118, 112 S.Ct. 501, 509-510, 116 L.Ed.2d 476, 488 (1991).

We begin our review of this issue by noting that Appellees have not presented us with a strict scrutiny analysis as part of their brief. Establishing that the Ordinance passes the strict scrutiny test is a burden for Appellees to bear. Simon & Schuster, supra. Appellees' utter failure to carry their burden on this point would be a sufficient reason to find that the strict scrutiny test was not met here.

Furthermore, our own independent analysis of this issue leads us to conclude that the strict scrutiny test cannot be satisfied. The most compelling governmental interest which could be articulated in connection with the Ordinance is the interest in deterring sex crimes. It is beyond cavil that curbing crimes such

as prostitution and rape is a compelling governmental interest.

Yet, that determination satisfies only one half of the strict scrutiny test. It still must be established that the Ordinance is narrowly tailored to meet this compelling interest. On this front, we come to the inescapable conclusion that the Ordinance must fail.

We agree with Justice White's statement in Barnes that there are several ways to combat these social ills without banning the expressive activity of nude dancing. Justice White suggested that "the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators, that nude entertainment be limited to certain hours, or even that establishments providing such entertainment be dispersed throughout the city." Barnes, 501 U.S. at 594, 111 S.Ct. at 2475, 115 L.Ed.2d at 529. These restrictions, unlike the restrictions found in the Ordinance, could be viewed as content-neutral restrictions on the time, place, and manner in which nude dancing could be conducted, and, if so, would not trigger the strict scrutiny test.

Furthermore, we also find it highly circuitous to prevent rape, prostitution, and other sex crimes by requiring a dancer in a legal establishment to wear pasties and a G-string before appearing on stage. We believe that imposing criminal and civil sanctions on those who commit sex crimes such as prostitution or rape would be a far narrower way of achieving the compelling governmental interest.

Now that we have determined that the Ordinance places an

unconstitutional burden on Appellant's freedom of expression, we next consider Appellees' claim that we may sever the unconstitutional portions rather than striking the Ordinance in its entirety. In support of their position, Appellees' rely upon 1 Pa.C.S. § 1925⁸ and the "Construction and Severability" clause of the Ordinance.⁹

When we determine that an ordinance is unconstitutional, we sever the unconstitutional portions if "the remainder of the [Ordinance] . . . shall not be affected thereby" 1 Pa.C.S. § 1925. Yet, we are specifically directed that we may not sever the unconstitutional portions of an ordinance where "the valid provisions of the [Ordinance] are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the [City Council] would have enacted the remaining valid provisions without the void one" Id.

Appellees assert that this court may "sever" the Ordinance by merely "sever[ing] only the necessary 'expressive' nudity from the ordinance" Appellees' Brief at 13. As there is no language in the Ordinance which separates non-expressive nudity

⁸ Section 1925 is part of the Statutory Construction Act ("Act"). In construing an ordinance, we follow the dictates of the Act even though the Act applies specifically to statutes and is not expressly applicable to local ordinances. Patricca v. Zoning Bd. of Adjustment of the City of Pittsburgh, 527 Pa. 267, 590 A.2d 744 (1991).

⁹ See footnote 1, supra, for the full text of the "Construction and Severability" clause of the Ordinance.

from expressive nudity, we presume that Appellees would have this court draft such language and insert it into the Ordinance.

Such a position shows a fundamental misunderstanding of the mechanics of severing void portions of a statute as well as the constitutional doctrine of separation of powers. In severing void portions of a statute or ordinance, a court is empowered merely to strike existing language; the judiciary is given no authority to draft its own language and insert it into the statute or ordinance.

Limitations on the power to sever statutes and ordinances are consistent with the constitutional doctrine of the separation of powers, a doctrine which has been at the heart of our governmental system since the 1776 Plan or Form of Government for the Commonwealth or State of Pennsylvania. Dauphin County Grand Jury Investigation Proceedings (No. 2), 332 Pa. 342, 352-353, 2 A.2d 804, 807 (1938). By this doctrine, the legislative branch, and not the judicial branch, is given the power to promulgate legislation. The Federalist No. 47 (James Madison). To aggregate to ourselves the power to write legislation would upset the delicate balance in our tripartite system of government. We therefore decline Appellees' invitation.¹⁰

¹⁰ Appellees' citation to Commonwealth, Dept. of Education v. First School, 471 Pa. 471, 370 A.2d 702 (1977) for the proposition that we may rewrite the Ordinance is unavailing. In First School, this court merely excised all portions of a statute which referred to giving financial aid to sectarian schools, leaving all those provisions which gave financial aid to non-sectarian schools. No portion of First School endorsed this court violating the

Yet another option for severing the Ordinance would be to remove §§ 1(c) and 2, the provisions which concern the bar to public nudity. We find this option to be tenable. In severing those portions of the Ordinance, we would remove but one of the four prohibitions. The other three forbidden activities¹¹ are independent of the public nudity ban, and striking §§ 1(c) and 2 would in no fashion render those other provisions inoperative. The other three prohibitions are thus not so "essentially and inseparably connected with" the public nudity ban that we could conclude that the City Council would have opted not to enact the valid provisions without §§ 1(c) and 2. We thus find that severance is appropriate pursuant to 1 Pa.C.S. § 1925, and sever §§ 1(c) and 2 from the Ordinance.

The order of the Commonwealth Court below is reversed. ¹²

Madame Justice Newman did not participate in the consideration

(. . . continued)
separation of powers by engaging in the legislative function of drafting legislation.

¹¹ Those three activities are: publicly engaging in sexual intercourse; publicly engaging in deviate sexual intercourse; and, publicly fondling genitalia. Footnote 2, supra.

¹² As we have determined that the Ordinance violates Appellant's freedom of expression as guaranteed by the United States Constitution, there is no need for us to determine whether the comparable provision found in Article I, § 7 of the Pennsylvania Constitution is also violated. Furthermore, we need not address either Appellant's claim that the Ordinance is unconstitutionally overbroad, or Appellees' claim that Appellant lacks standing to raise this overbreadth challenge.

or decision of this matter.

Mr. Justice Castille files a concurring opinion in which Mr. Justice Zappala joins.

ADDENDUM B

Return-Path: <cbegner@mindspring.com>
Received: from camell14.mindspring.com (camell14.mindspring.com
[207.69.200.64])
by pimaialy-ext.prodigy.com (8.8.5/8.8.5) with ESMTTP id NAA32068
for <RFGF83A@prodigy.com>; Mon, 30 Nov 1998 13:21:20 -0500
Received: from isjfvklh (user-37kb09n.dialup.mindspring.com
[207.69.129.55])
by camell14.mindspring.com (8.8.5/8.8.5) with ESMTTP id NAA06878
for <RFGF83A@prodigy.com>; Mon, 30 Nov 1998 13:21:10 -0500 (EST)
Message-Id: <199811301821.NAA06878@camell14.mindspring.com>
From: "cory begner" <cbegner@mindspring.com>
To: "MR ANDREW MCCULLOUGH" <RFGF83A@prodigy.com>
Subject: Re: sodomy in GA
Date: Mon, 30 Nov 1998 12:52:56 -0500
X-MSMail-Priority: Normal
X-Priority: 3
X-Mailer: Microsoft Internet Mail 4.70.1155
MIME-Version: 1.0
Content-Type: text/plain; charset=ISO-8859-1
Content-Transfer-Encoding: 8bit

andy: i am herein attempting to send you the powell case. hope
it works. cory
<Picture: LEXIS®-NEXIS® Xchange™><Picture: Explore or search sources
available for current LEXIS-NEXIS menu><Picture: View listing of most
recent results><Picture: View listing of scheduled searches><Picture:
Change your personalized settings><Picture: Sign-off this
product><Picture:
Help><Picture: LEXIS®-NEXIS® Communication Center><Picture: LEXIS®-
NEXIS®
Internet Office>
<Picture: Search>
<Picture: Get a Document>
<Picture: Check a Citation>
<Picture>
<Picture>

Source:GA Supreme Court and Court of Appeals CasesType:Boolean FREESTYLE
™
prev <Picture> Document 1 of 1 <Picture> next<Picture><Picture: KWIC
display format><Picture: FULL display format>
<Picture><Picture>
FOCUS | Save As ECLIPSEMore Like This View Printable Page | Deliver
Documents1998 Ga. LEXIS 1148, *

ANTHONY SAN JUAN POWELL v. THE STATE

S98A0755.

SUPREME COURT OF GEORGIA

1998 Ga. LEXIS 1148

November 23, 1998, Decided

NOTICE: [*1] NOT FINAL UNTIL EXPIRATION OF THE REHEARING PERIOD.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BY THE COURT.

PRIOR HISTORY: Gwinnett County Superior. Trial Judge: Hon. Fred A.
Bishop,
Jr. Date of Judgment Appealed: 10-10-97. Notice of Appeal Date: 11-06-
97.
Lower Ct # :96B34486.

DISPOSITION: Judgment reversed.

CORE TERMS: sodomy, consensual, right of privacy, privacy, adult, right to privacy, consenting, morality, sexual, police power, federal constitution, constitutional right, state constitution, act of sodomy, guaranteed, acts of sodomy, public policy, proscription, fundamental right, right to engage, regulation, aggravated, wisdom, niece, constitutional right of privacy, right of privacy guaranteed, compelling state interest, sexual conduct, sexual assault, criminalizing

COUNSEL: For ANTHONY SAN JUAN POWELL: Brenda Joy Bernstein, Atlanta, GA. Steven H. Sadow, Atlanta, GA.

For THE STATE: Pamela Danette South, A.D.A, Lawrenceville, GA. Daniel J. Porter, D.A., Gwinnett Justice & Administration Center, Lawrenceville, GA.

Amicus Appellee: Hon. Thurbert E. Baker, A.G., Department of Law, Atlanta, GA. Michael E. Hobbs, A.A.G, Department of Law, Atlanta, GA.

Amicus Appellant: Stephen Randall Scarborough, LAMBDA LEGAL DEF/EDUC FUND, INC., Atlanta, GA.

JUDGES: BENHAM, Chief Justice. All the Justices concur, except Carley, J., who dissents. SEARS, Justice, concurring.

OPINIONBY: BENHAM

OPINION: BENHAM, Chief Justice.

Anthony San Juan Powell was charged in an indictment with rape and aggravated sodomy in connection with sexual conduct involving him and his wife's 17-year-old niece in Powell's apartment. The niece testified that appellant had sexual intercourse [*2] with her and engaged in an act of cunnilingus without her consent and against her will. Powell testified and admitted he performed the acts with the consent of the complainant. In light of Powell's testimony, the trial court included in its jury charge instructions on the law of sodomy. The jury acquitted Powell of the rape and aggravated sodomy charges and found him guilty of sodomy, thereby establishing that the State did not prove beyond a reasonable doubt that the act was committed "with force and against the will" of the niece. See OCGA § 16-6-2 (a). Powell brings this appeal contending the statute criminalizing acts of sodomy committed by adults without force in private is an unconstitutional intrusion on the right of privacy guaranteed him by the Georgia Constitution. Powell also contends that the trial court erred when it offered the jury the opportunity to consider the unindicted charge of sodomy by sua sponte instructing the jury on the law of sodomy.

1. In keeping with the well-established principle that this Court will

not
decide a constitutional question if the appeal can be decided upon other
grounds (Bd. Of Tax Assessors v. Tom's Foods, 264 Ga. 309, 310 (444
S.E.2d
[*3] 771) (1994)), we first address the non-constitutional issues
raised
by the appeal. The first issue is the sufficiency of the evidence. OCGA
§
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." Appellant's admission at trial that he placed his mouth upon
the
genitalia of his wife's niece, and the niece's testimony similarly
describing appellant's conduct constitute sufficient evidence to
authorize
a rational trier of fact to conclude beyond a reasonable doubt that
appellant committed sodomy. Jackson v. Virginia, 443 U.S. 307 (99 S. Ct.
2781, 61 L. Ed. 2d 560) (1979); Carter v. State, 122 Ga. App. 21 (4)
(176
S.E.2d 238) (1970), overruled on other grounds in Hines v. State, 173
Ga.
App. 657 (2) (327 S.E.2d 786) (1985).

2. Appellant next contends that the trial court erred when, without
request
by the State or appellant, it instructed the jury on the law of sodomy
and
permitted the fact-finder to return a verdict on that included charge.

In Stonaker v. State, 236 Ga. 1, 2 (222 S.E.2d 354) (1976), this Court
set
forth rules "to clarify for the trial courts what must [*4] be charged
and what may be charged and what need not be charged in the area of
lesser
included crimes in criminal trials." The second rule stated that the
trial
court could, "of [its] own volition and in [its] discretion, charge on a
lesser crime of that included in the indictment and accusation." Id.;
Rodriguez v. State, 211 Ga. App. 256 (2) (439 S.E.2d 510) (1993). Thus,
when the evidence authorizes a charge on an offense included in the
offense
for which the defendant is being tried, the trial court is authorized to
instruct the jury on the included offense sua sponte. Alford v. State,
200
Ga. App. 483, 484 (408 S.E.2d 497) (1991). Sodomy is an offense included
in
the crime of aggravated sodomy (Stover v. State, 256 Ga. 515 (2) (350
S.E.2d 577) (1986)), and the evidence summarized in Division 1
authorized a
charge on the law of sodomy as an included offense. Accordingly, the
trial
court acted within the Stonaker framework when it exercised its
discretion
and instructed the jury on the included offense of sodomy.

3. Lastly, we address appellant's constitutional challenge to OCGA § 16-
6-2
(a). In so doing, we are mindful that a solemn act of the General
Assembly
[*5] carries with it a presumption of constitutionality that is
overturned
only when it is established that the legislation "manifestly infringes
upon
a constitutional provision or violates the rights of the

people....[Cit.]"

Miller v. State, 266 Ga. 850 (2) (472 S.E.2d 74) (1996). Appellant contends that the statute criminalizing intimate sexual acts performed by adults in private and without force impermissibly infringes upon the right of privacy guaranteed all Georgia citizens by the Georgia Constitution. n1

- - - - -Footnotes- - - - -
- -
- -

n1 Privacy rights protected by the U.S. Constitution are not at issue in this case. Thus, not applicable to this discussion are Bowers v. Hardwick, 478 U.S. 186, 191-92 (106 S. Ct. 2841, 92 L. Ed. 2d 140) (1986), where the U.S. Supreme Court ruled that the right of privacy protected by the U.S. Constitution did not insulate private sexual conduct between consenting homosexual adults from state proscription because the U.S. Constitution did not "extend a fundamental right to homosexuals to engage in acts of consensual sodomy[;]" and King v. State, 265 Ga. 440 (458 S.E.2d 98) (1995), where this Court was faced with a defendant's assertion of the federal right of privacy. See also Katz v. United States, 389 U.S. 347, 350-51 (88 S. Ct. 507, 19 L. Ed. 2d 576) (1976), where the Court opined that the protection of a person's general right to privacy, i.e., the right to be left alone, was left largely to the individual States.

- - - - -End Footnotes- - - - -
- -
- - [*6]

The right of privacy has a long and distinguished history in Georgia. In 1905, this Court expressly recognized that Georgia citizens have a "liberty of privacy" guaranteed by the Georgia constitutional provision which declares that no person shall be deprived of liberty except by due process of law. Pavesich v. New England Life Ins., 122 Ga. 190, 197 (50 S.E. 68) (1905). The Pavesich decision constituted the first time any court of last resort in this country recognized the right of privacy (Katz, The History of the Georgia Bill of Rights, 3 GSU L. Rev. 83, 118 (1986); Gouldman-Taber Pontiac v. Zerbst, 213 Ga. 682 (100 S.E.2d 881) (1957)), making this Court a pioneer in the realm of the right of privacy. Bodrey v. Cape, 120 Ga. App. 859, 866 (172 S.E.2d 643) (1969). See also Cox Broadcasting Corp. v. Cohn, 231 Ga. 60 (200 S.E.2d 127) (1973), rev'd 420 U.S. 469 (95 S. Ct. 1029, 43 L. Ed. 2d 328) (1975), where this Court proudly noted that the right of privacy "was birthed by this court" in Pavesich. By the time the U.S. Supreme Court recognized the existence of a right of privacy in the U.S. Constitution (Griswold v. Connecticut, 381 U.S. 479 (85 S. Ct. [*7] 1678, 14 L. Ed. 2d 510) (1965)), the Georgia courts had developed a rich appellate jurisprudence in the right of privacy. Today, Georgia recognizes the right of privacy as a fundamental constitutional right, "having a value

so essential to individual liberty in our society that [its] infringement merits careful scrutiny by the courts." *Ambles v. State*, 259 Ga. 406 (2b) (383 S.E.2d 555) (1989).

In *Pavesich*, the Court found the right of privacy to be "ancient law," with "its foundation in the instincts of nature[,] derived from "the Roman's conception of justice" and natural law, making it immutable and absolute. 122 Ga. at 194. The Court described the liberty interest derived from natural law as "embracing the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common good." *Id.*, at 195. "Liberty" includes "the right to live as one will, so long as that will does not interfere with the rights of another or of the public" (*id.*, at 196), and the individual is "entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has the [*8] right to arbitrarily take away from him his liberty." *Id.*, at 197. The *Pavesich* Court further recognized that the "right of personal liberty" also embraces "the right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law...." *Id.* Stated succinctly, the Court ringingly endorsed the "right 'to be let alone' so long as [one] was not interfering with the rights of other individuals or of the public." *Id.* n2

- - - - -Footnotes- - - - -
- -
- -

n2 The Court saw the right of persons to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures as an "implied recognition of the existence of a right of privacy...." *Id.*, at 198-99.

- - - - -End Footnotes- - - - -
- -
- -

In the ensuing years since *Pavesich* was decided and Georgia's right of privacy recognized, the Georgia appellate courts have expounded on the right of privacy, describing it as protection for the individual from unnecessary public scrutiny (*Athens Observer v. Anderson*, 245 Ga. 63 (263 S.E.2d 128) [*9] (1980)); as the right of the individual "to be free from ... the publicizing of one's private affairs with which the public has no legitimate concern" (*Gouldman-Taber Pontiac v. Zerbst*, supra, 213 Ga. 683); "the right to define one's circle of intimacy" (*Macon-Bibb County &c. Auth. v. Reynolds*, 165 Ga. App. 348, 350 (299 S.E.2d 594) (1983)); and the right "to be free of unwarranted interference by the public about matters

[with] which the public is not necessarily concerned, or to be protected from any wrongful intrusion into an individual's private life which would

outrage ... a person of ordinary sensibilities." Georgia Power Co. v. Busbin, 149 Ga. App. 274 (6) (254 S.E.2d 146) (1979). This Court has determined that a citizen's right of privacy is strong enough to withstand

a variety of attempts by the State to intrude in the citizen's life. In Zant v. Prevatte, 248 Ga. 832 (286 S.E.2d 715) (1982), the Court ruled that

the State's assertion of a duty to protect a prisoner's health and its interest in preserving human life did not amount to the compelling state interest which could override a sane state prisoner's refusal to eat or submit to medical treatment [*10] for the effects of starvation. In State

of Georgia v. McAfee, 259 Ga. 579 (385 S.E.2d 651) (1989), the Court again

ruled that a citizen's constitutional right of privacy and liberty under which he refused medical treatment was not outweighed by any interest the

State might have in the preservation of life. In Harris v. Cox Enterprises,

256 Ga. 299, 302 (348 S.E.2d 448) (1986), Georgia's strong public policy in

favor of open government was required to bend in favor of the individual's

right of privacy when matters about which the public had no legitimate concern were at issue. It is clear from the right of privacy appellate jurisprudence which emanates from Pavesich that the "right to be let alone"

guaranteed by the Georgia Constitution is far more extensive than the right

of privacy protected by the U.S. Constitution, which protects only those matters "deeply rooted in this Nation's history and tradition" or which are

"implicit in the concept of ordered liberty...." Bowers v. Hardwick, 478 U.S. 186, 191-92 (106 S. Ct. 2841, 92 L. Ed. 2d 140) (1986). n3

- - - - -Footnotes- - - - -
- -
- -

n3 It is a well-recognized principle that while provisions of a state constitution may not be judicially construed as affording less protection

to that State's citizens than a parallel provision in the federal constitution may provide, the state constitution may provide more protection than the U.S. Constitution. See Creamer v. State, 229 Ga. 511 (3) (192 S.E.2d 350) (1972). On several fronts, the Georgia Constitution has been construed as providing greater protection to its citizens than does the federal constitution. State v. Miller, 260 Ga. 669 (398 S.E.2d 547) (1990) (Georgia Constitution provides broader protection than the First Amendment); Green v. State, 260 Ga. 625 (398 S.E.2d 360) (1990) (Georgia Constitution grants a broader right against self-incrimination than the federal constitution); Fleming v. Zant, 259 Ga. 687, 690 (386 S.E.2d 339) (1989) (Georgia Constitution provides a more extensive guarantee against cruel and unusual punishment than does the federal constitution); Colonial Pipeline Co. v. Brown, 258 Ga. 115 (3) (365 S.E.2d

827) (1988) (Georgia Constitution's excessive fines clause is more expansive than the Eighth Amendment); D.B. v. Clarke County Bd. of Educ.,

220 Ga. App. 330 (1) (469 S.E.2d 438) (1996) (Georgia Constitution's guarantee of a free education is broader than that provided by the U.S. Constitution). See also Grissom v. Gleason, 262 Ga. 374 n.1 (418 S.E.2d

27)

(1992), where this Court observed that Georgia's equal protection clause might be interpreted to offer greater rights than the equal protection clause found in the federal constitution.

Georgia is not alone in providing its citizens with a broader right of privacy than that provided by the federal constitution. Appellate courts in

Montana (*Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (Mont. 1997);

Tennessee (*Campbell v. Sundquist*, 926 S.W.2d 250 (Tn. App. 1996);

Kentucky

(*Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1993); Texas (*Texas State*

Emp. Union v. Dept. of Mental Health, 746 S.W.2d 203 (Tex. 1987); and

New

Jersey (*State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (N.J. 1977)), have

all interpreted the right of privacy guaranteed by their respective

state

constitutions as being more extensive than that provided by the Ninth

Amendment.

- - - - -End Footnotes- - - - -

- -

- - [*11]

While Georgia citizens' right to privacy is far-reaching, that is not to say that the individual's right to privacy is without limitation. The Pavesich court recognized that the right could be waived by the individual

(122 Ga. at 199); could be subsumed when the individual was required to "perform public duties..." (Id., at 196), and had to yield "in some particulars ... to the right of speech and of the press." Id., at 204.

See

also *Cox v. Brazo*, 165 Ga. App. 888 (303 S.E.2d 71) (1983) (individual

has

no right of privacy in information published by another when individual

had

publicized the information); *Cabaniss v. Hipsley*, 114 Ga. App. 367 (151

S.E.2d 496) (1966) (exotic dancer has no right of privacy in a photo

which

she had permitted others to use for publicity purposes); *Cummings v.*

Walsh

Constr. Co., 561 F. Supp. 872 (S.D. Ga. 1983) (under Georgia law, a

supervisor does not violate a woman's right of privacy by telling

co-workers of their affair when the woman had told other co-workers of

the

relationship). Nor will an individual's right of privacy serve as the

basis

for liability against one who publishes facts which are a matter of

public

record (*Reece v.* [*12] *Grissom*, 154 Ga. App. 194 (267 S.E.2d 839)

(1980)), or against one who publishes photographs of the subject matter

of

a public investigation. *Waters v. Fleetwood*, 212 Ga. 161 (91 S.E.2d 344)

(1956). See also *Tucker v. News Pub. Co.*, 197 Ga. App. 85 (1) (397

S.E.2d

499) (1990) (publication of information connected with a matter of

public

interest or a public investigation does not violate the right of

privacy).

Through the appeals of defendants convicted of sexual assault who have

asserted the constitutional right of privacy on appeal, we have ruled

that

a defendant may not successfully assert a privacy right when the acts

are

committed: in a public place (*Stover v. State*, supra, 256 Ga. 515 (1));

in
exchange for money (Ray v. State, 259 Ga. 868 (3) (389 S.E.2d 326)
(1990));
or with those legally incapable of consenting to sexual acts. Id.;
Richardson v. State, 256 Ga. 746 (2) (353 S.E.2d 342) (1987).

Today, we are faced with whether the constitutional right of privacy
screens from governmental interference a non-commercial sexual act that
occurs without force in a private home between persons legally capable
of
consenting to the act. While Pavesich and its [*13] progeny do not set
out the full scope of the right of privacy in connection with sexual
behavior, it is clear that consensual sexual behavior conducted in
private
between adults is covered by the principles espoused in Pavesich since
such
behavior between adults in private is recognized as a private matter by
"any person whose intellect is in a normal condition...." Pavesich,
supra,
at 194. Adults who "withdraw from the public gaze" (122 Ga. at 196) to
engage in private consensual sexual behavior are exercising a right
"embraced within the right of personal liberty." Id. We cannot think of
any
other activity that reasonable persons would rank as more private and
more
deserving of protection from governmental interference than consensual,
private, adult sexual activity. See Gryczan v. State, 283 Mont. 433, 942
P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tn. App.
1996); State v. Morales, 826 S.W.2d 201 (Tex. App. 1992), rev'd on other
grounds, 869 S.W.2d 941 (Tex. 1994). We conclude that such activity is
at
the heart of the Georgia Constitution's protection of the right of
privacy.

Having determined that appellant's behavior falls within the area
protected
by the right [*14] of privacy, we next examine whether the
government's
infringement upon that right is constitutionally sanctioned. As judicial
consideration of the right to privacy has developed, this Court has
concluded that the right of privacy is a fundamental right (Ambles v.
State, supra, 259 Ga. 406 (b)) and that a government-imposed limitation
on
the right to privacy will pass constitutional muster if the limitation
is
shown to serve a compelling state interest and to be narrowly tailored
to
effectuate only that compelling interest. Phagan v. State, 268 Ga. 272
(1)
(486 S.E.2d 876) (1997); Zant v. Prevatte, supra, 248 Ga. at 833-34. But
see Christensen v. State, 266 Ga. 474 (2) (a) (468 S.E.2d 188) (1996),
where the Court's plurality opinion employed the "legitimate state
interest" yardstick to measure the State's limitation on the defendant's
asserted right of privacy. n4 Implicit in our decisions curtailing the
assertion of a right to privacy in sexual assault cases involving sexual
activity taking place in public, performed with those legally incapable
of
giving consent, performed in exchange for money, or performed with force
and against the will of a participant, is the [*15] determination that
the State has a role in shielding the public from inadvertent exposure
to
the intimacies of others, in protecting minors and others legally
incapable
of consent from sexual abuse, and in preventing people from being forced

to submit to sex acts against their will. The State fulfills its role in preventing sexual assaults and shielding and protecting the public from sexual acts by the enactment of criminal statutes prohibiting such conduct:

OCCA § 16-6-1 (rape); § 16-6-2(a) (aggravated sodomy); § 16-6-3 (statutory rape); § 16-6-4 (child molestation and aggravated child molestation); § 16-6-5 (enticing a child for immoral purposes); § 16-6-5.1 (sexual assault of prisoners, the institutionalized, and the patients of psychotherapists); § 16-6-6 (bestiality); § 16-6-7 (sexual assault of a dead human being); § 16-6-8 (public indecency); §§ 16-6-9 - 12 (prostitution, pimping, pandering); and § 16-6-15 (solicitation of sodomy), § 16-6-16 (masturbation for hire), and by the vigorous enforcement of those laws through the arrest and prosecution of offenders. In light of the existence of these statutes, the sodomy statute's *raison d'etre* can only be to regulate [*16] the private sexual conduct of consenting adults, something which Georgians' right of privacy puts beyond the bounds of government regulation.

- - - - -Footnotes- - - - -
- -
- -

n4 As authority for the position that the State need only establish that legislation alleged to intrude upon the right of privacy has a "reasonable relation to a legitimate state purpose[.]" the Christensen plurality cited *Blincoe v. State*, 231 Ga. 886 (1) (204 S.E.2d 597) (1974). In that case, this Court stated, "It can not be questioned that the state has no right, under the guise of exercising the police power, to invade the personal rights and liberty of the individual citizen by legislation which has no reasonable relation to a legitimate state purpose." This statement in *Blincoe* sets forth the threshold burden which must be met by legislation alleged "to invade the personal rights and liberty of the individual citizen...." It does not affirmatively require a rational review test when an individual invokes a fundamental right such as the right to privacy. In that situation, the State must establish that the legislation under attack serves a compelling state interest and is narrowly drawn to achieve that interest. *Phagan, supra*, *Zant v. Prevatte, supra*.

- - - - -End Footnotes- - - - -
- -
- - [*17]

Citing *Christensen, supra*, 266 Ga. 474, the State reminds us that the plurality decision therein held that the proscription against sodomy was a valid exercise of the State's police power in furtherance of the public's moral welfare, and that the Georgia Constitution did not deny the General Assembly the right to prohibit such conduct. "Police power" is the governing authority's ability to legislate for the protection of the citizens' lives, health, and property, and to preserve good order and

public morals. *Hayes v. Howell*, 251 Ga. 580 (2b) (308 S.E.2d 170) (1983);

Ward v. State, 188 Ga. App. 372 (1) (373 S.E.2d 65) (1988). "To justify the State in thus interposing its authority in behalf of the public, it must appear, first that the interests of the public generally ... require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Lawton v. Steele, 152 U.S. 133, 137 (14 S. Ct. 499, 38 L. Ed. 385) (1894).

Stated another way, the legislation must serve a public purpose and the means adopted to achieve the purpose must be reasonably necessary for the accomplishment of the purpose [*18] and not unduly oppressive upon the persons regulated. *Cannon v. Coweta County*, 260 Ga. 56 (2) (389 S.E.2d 329)

(1990). In recent years, legislative bodies in Georgia have exercised the

"police power" to combat the negative effects of the combination of alcohol and nude dancing (*Goldrush v. City of Marietta*, 267 Ga. 683 (482 S.E.2d 347) (1997)); to limit land usage through zoning restrictions (*Cannon v.*

Coweta County, supra, 260 Ga. 56); to regulate the health professions (*Foster v. Ga. Bd. of Chiropractic Exam.*, 257 Ga. 409 (14) (359 S.E.2d 877)

(1987); and to impose reasonable regulations on the establishment and operation of cemeteries. *Arlington Cem. v. Bindig*, 212 Ga. 698 (2) (95 S.E.2d 378) (1956). That the legislative body has determined that it is properly exercising its police powers "is not final or conclusive, but is

subject to the supervision of the courts." *Lawton v. Steele*, supra, 152 U.S. at 137. Thus, the suggestion that OCGA § 16-6-2 is a valid exercise of

the police power requires us to consider whether it benefits the public generally without unduly oppressing the individual. Since, as determined earlier, the only possible purpose for the [*19] statute is to regulate

the private conduct of consenting adults, the public gains no benefit, and

the individual is unduly oppressed by the invasion of the right to privacy.

Consequently, we must conclude that the legislation exceeds the permissible

bounds of the police power. See *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47, 49-50 (Pa. 1980).

The State also maintains that the furtherance of "social morality," giving

"due regard to the collective will of the citizens of Georgia," is a constitutional basis for legislative control of the non-commercial, unforced, private sexual activity of those legally capable of consenting to

such activity. It is well within the power of the legislative branch to establish public policy through legislative enactment. It is also without

dispute that oftentimes the public policy so established and the laws so enacted reflect the will of the majority of Georgians as well as the majority's notion of morality. However, "it does not follow ... that simply because the legislature has enacted as law what may be a moral choice of the majority, the courts are, thereafter, bound to simply acquiesce." *Gryczan v. State*, supra, 942 P.2d at 125 (where the Supreme

[*20] Court of Montana ruled that private consensual, noncommercial sexual conduct is protected by Montana's constitutional right of individual privacy). "Social morality legislation," like any legislative enactment, is subject to the scrutiny of the judicial branch under our tripartite system of "checks and balances." See *Cantrell v. State of Ga.*, 129 Ga. App. 465 (200 S.E.2d 163) (1973).

In undertaking the judiciary's constitutional duty, it is not the prerogative of members of the judiciary to base decisions on their personal notions of morality. Indeed, if we were called upon to pass upon the propriety of the conduct herein involved, we would not condone it. Rather, the judiciary is charged with the task of examining a legislative enactment when it is alleged to impinge upon the freedoms and guarantees contained in the Georgia Bill of Rights and the U.S. Constitution, and scrutinizing the law, the interests it promotes, and the means by which it seeks to achieve those interests, to ensure that the law meets constitutional standards. While many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible, this repugnance alone does not create a

[*21] compelling justification for state regulation of the activity.

Post

v. State, 715 P.2d 1105, 1109 (Okla. Cr. App.) cert. denied 479 U.S. 890 (107 S. Ct. 290, 93 L. Ed. 2d 264) (1986) (where the Oklahoma appellate court held that a statute violated the federal right of privacy when applied to "non-violent consensual activity between adults in private.") See also *Campbell v. Sundquist*, supra, 926 S.W.2d at 266; *Commonwealth v.*

Watson, supra, 842 S.W.2d at 498; *Commonwealth v. Bonadio*, supra, 415 A.2d

at 50 (where appellate courts in Tennessee, Kentucky, and Pennsylvania concluded that "no sufficient state interest justifies legislation of norms

simply because a particular belief is followed by a number of people, or even a majority.") n5 We agree with our fellow jurists that legislative enactments setting "social morality" are not exempt from judicial review testing their constitutional mettle.

- - - - -Footnotes- - - - -
- -
- -

n5 We are reminded of what Justice Oliver Wendell Holmes said in a dissent in *Lochner v. New York*, 198 U.S. 45, 76 (25 S. Ct. 539, 49 L. Ed. 937) (1905): "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution...."

- - - - -End Footnotes- - - - -
- -
- - [*22]

We conclude that OCGA § 16-6-2, insofar as it criminalizes the performance of private, non-commercial acts of sexual intimacy between persons legally able to consent, "manifestly infringes upon a constitutional provision" (Miller v. State, supra, 266 Ga. 850 (2)) which guarantees to the citizens of Georgia the right of privacy. Appellant was convicted for performing an unforced act of sexual intimacy with one legally capable of consenting thereto in the privacy of his home. Accordingly, appellant's conviction for such behavior must be reversed.

Judgment reversed. All the Justices concur, except Carley, J., who dissents.

CONCURRENCE: SEARS

CONCUR: SEARS, Justice, concurring.

In broad terms, the dissent urges that once the legislature criminalizes any activity, courts are forbidden from passing on the "wisdom" of such laws. n6 Otherwise, the dissent foretells that "anarchy" will reign. n7 In

making these statements, the dissent mischaracterizes the majority opinion.

In this opinion, this Court in no way usurps the legislative function of promulgating social policy. Rather, in an inspired opinion, a majority of

this Court today has fulfilled its constitutional responsibility within [*23] the American tripartite system of checks and balances. As well stated in the majority opinion, merely because the legislature has enacted

a law which may impact upon the public's moral choices, courts are not "bound to simply acquiesce." n8 It is the duty of this Court, and all courts, to ensure that, absent a compelling state interest, legislative acts do not impinge upon the inalienable rights guaranteed by our State Constitution. The dissent would default on its constitutional duty to protect these rights, and would defer instead to what it believes to be the

moral choice of a majority. n9 Yet, it is the very definition of a constitutional right that it cannot be made wholly subject to the will of

the majority. n10 Otherwise, the principles that serve as bedrock for our Federal and State Bill of Rights will be reduced to mere rhetoric.

- - - - -Footnotes- - - - -
- -
- -

n6 Dissent at 1998 Ga. LEXIS 1148, *28.

n7 1998 Ga. LEXIS 1148, *22.

n8 1998 Ga. LEXIS 1148, *19.

n9 As once noted by United States Supreme Court Justice Hugo Black, it is a commonly-held misconception that "the Constitution prohibits that which [the majority] thinks should be prohibited, and permits that which they think should be permitted." Newsweek, Dec. 9, 1968, at p. 52. [*24]

n10 West Virginia Board of Education v. Barnette, 319 U.S. 624, 637-38

(63

S. Ct. 1178, 87 L. Ed. 1628) (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials. . . One's rights . . . may not be submitted to vote; they depend on the outcome of no election.").

- - - - -End Footnotes- - - - -
- -
- -

This nation was founded upon a great moral precept -- that all persons are entitled to the free exercise of their liberty, which:

Embraces the right of a [person] to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. . . . All are entitled to liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him his liberty. n11

- - - - -Footnotes- - - - -
- -
- -

n11 Pavesich v. New England Life Ins. Co., 122 Ga. 190, 196 (50 S.E. 68) (1904).

- - - - -End Footnotes- - - - -
- -
- - [*25]

The individual's right to freely exercise his or her liberty is not dependent upon whether the majority believes such exercise to be moral, dishonorable, or wrong. Simply because something is beyond the pale of "majoritarian morality" does not place it beyond the scope of constitutional protection. To allow the moral indignation of a majority (or, even worse, a loud and/or radical minority) to justify criminalizing private consensual conduct would be a strike against freedoms paid for and preserved by our forefathers. Majority opinion should never dictate a free society's willingness to battle for the protection of its citizens' liberties. To allow such a thing would, in and of itself, be an immoral and insulting affront to our constitutional democracy.

There will, of course, be those who will criticize today's decision, and who may even seek to demonize some members of this Court for their legal analysis. This pattern of personally attacking and pillorying individuals who disagree with certain positions, rather than engaging in constructive ideological discourse with them, has regrettably become more and more prevalent in our culture. Those who would make such personal attacks, [*26] however, do not fully appreciate that all of my colleagues, those who agree with the majority as well as those who dissent, are honorable

and
decent jurists who struggle to fulfill their constitutional
responsibilities to the people of this State.

Today, a majority of this Court fulfills its duties with a clearheaded
and
courageous decision. I fully concur with it.

DISSENTBY: Carley

DISSENT: Carley, Justice, dissenting.

"The responsibility of this Court ... is to construe and enforce the
Constitution and laws of the [State] as they are and not to legislate
social policy on the basis of our own personal inclinations." *Evans v.*
Abney, 396 U.S. 435, 447 (90 S. Ct. 628, 24 L. Ed. 2d 634) (1970). The
issue in this case is not whether private and consensual acts of sodomy
should be legal or illegal in Georgia, because that question has already
been resolved by the General Assembly. Under the unambiguous provisions
of

OCCA § 16-6-2 (a), commission of an act of sodomy is against the
criminal

law of this state, and performance of such an act in private between
consenting adults is not exempted from that statutory prohibition.
Therefore, the only issue presented for decision is whether the [*27]
General Assembly has the constitutional authority to prohibit such
conduct.

This Court is not authorized to impede the State's unrestricted
enforcement

of OCCA § 16-6-2 (a) unless that statute manifestly impinges upon a
constitutional right of adults to perform consensual sodomy in private.
See

Bohannon v. State, 269 Ga. 130, 131 (2) (497 S.E.2d 552) (1998).

Clearly,

Powell has no right under the federal constitution to engage in the act
proscribed by OCCA § 16-6-2 (a), since there is no fundamental right
under

the Constitution of the United States to engage in consensual sodomy.

"Sodomy was a criminal offense at common law and was forbidden by the
laws

of the original thirteen States when they ratified the Bill of Rights."
Bowers v. Hardwick, 478 U.S. 186, 192 (106 S. Ct. 2841, 92 L. Ed. 2d
140)

(1986). Today, however, a majority of this Court concludes that our
state

constitution does confer upon the citizens of Georgia a fundamental
right

to engage in a consensual act which the majority itself concedes, as it
must, that many Georgians find "morally reprehensible." I believe that,
in

so holding, the majority not only misconstrues the Constitution of
Georgia,

but that it also [*28] violates the fundamental constitutional
principle

of separation of powers. It is my opinion that there is no state
constitutional impediment to the General Assembly's enactment of OCCA §
16-6-2 (a) and that, by holding otherwise, the Court has exceeded the
limits of its judicial authority and usurped the legislative power "to
enact laws to promote the public health, safety, morals, and welfare of
its

citizens." *Christensen v. State*, 266 Ga. 474, 476 (2) (a) (468 S.E.2d
188)

(1996). Therefore, the only perceptible unconstitutionality in this case
is

that which is evidenced by the majority's determination, acting as

social engineers rather than as jurists, to elevate their notion of individual "liberty" over the collective wisdom of the peoples' elected representatives that a proscription on sodomy, consensual or otherwise, is "in furtherance of the moral welfare of the public." Christensen v. State, supra at 476 (2) (a). Therefore, I respectfully, but vigorously, dissent to the holding that OCGA § 16-6-2 (a) is unconstitutional.

The premise of the majority is that the right of privacy guaranteed by the Georgia Constitution grants to the citizens of this state the right to [*29] engage in private consensual sodomy. Unlike the constitutions of some other states, the Georgia Constitution contains no express recognition of a right to privacy. Compare Gryczan v. State, 283 Mont. 433, 942 P.2d 112, 121 (Mont. 1997). That right stems entirely from this Court's holding in Pavesich v. New England Life Ins. Co., 122 Ga. 190 (50 S.E. 68) (1905). Pavesich does not hold that the citizens of this state have an immutable constitutional right to engage in a private consensual act of sodomy or in any other conduct which constitutes a crime pursuant to an enactment of the General Assembly. It merely defines the right of privacy generally, as an implicit element of the "liberty" guaranteed to Georgia citizens under the Due Process Clause of the state constitution. Pavesich, supra at 197. In accordance with Pavesich, supra at 195, an individual's liberty and, hence, his privacy is not completely unrestricted, but is subject to "'such restraints as are necessary for the common welfare.'" Thus, a citizen of Georgia does not have the right "to violate the valid regulations of the organized government under which he lives." Pavesich, supra at 194. At the time Pavesich [*30] was decided, one such valid regulation was a criminal statute of this state which prohibited a citizen's commission of an act of sodomy, without regard to whether that act was consensual and private. Herring v. State, 119 Ga. 709, 720 (2) (46 S.E. 876) (1904). Indeed, the original statutory law of Georgia made it a crime to engage in an act of sodomy, and the punishment upon conviction was "'imprisonment at labor in the penitentiary for and during the natural life of the person convicted of this detestable crime.'" [Cit.] Warren v. State, 255 Ga. 151, 157 (2) (336 S.E.2d 221) (1985). Moreover, sodomy "'was a felony by the ancient common law.'" Herring v. State, supra at 720 (2). See also Bowers v. Hardwick, supra at 192; Anno., 20 ALR4th 1009, 1014 § 2 [a]. Thus, even assuming that the general constitutional right to privacy recognized by Pavesich was broad enough to encompass participation in certain private consensual sexual acts, it nevertheless is undeniable that sodomy could not have been included among those protected acts, since that sexual practice was expressly made criminal by the statutory law of this state.

Although, as the majority notes, the right [*31] of privacy has a long

history in Georgia dating from Pavesich, until today this Court has never cited that right as authority for the incongruous proposition that a citizen is at liberty to commit an act which has constituted criminal conduct throughout the even longer history of Georgia as a state and, indeed, throughout the entire history of English common law. In its haste to confer upon Powell a constitutionally protected right to engage in private consensual acts of sodomy, the majority simply seizes upon Pavesich's general recognition of the guarantee of "liberty" afforded to Georgia citizens under the state constitution, while choosing to ignore completely Pavesich's equally important recognition of the principle that Georgia citizens also have the responsibility to comply with this state's criminal law. Thus, unlike the majority, I believe that Pavesich is clear-cut authority for the proposition that a violation of the criminal law of this state can never be justified as an element of the "liberty" guaranteed by the Due Process Clause of this state's constitution. In my opinion, freedom to violate the criminal law is simply anarchy and, thus, the antithesis [*32] of an ordered constitutional system.

Subsequent to the decision in Pavesich, this state's criminal statutes have maintained an unrestricted proscription on commission of sodomy, whereas our present constitution still contains a Due Process Clause that does not expressly recognize the right of Georgia citizens to engage in that act even in private and with the consent of the participants. The only factor which has changed since Pavesich was decided is the composition of this Court. Thus, the proper question to be resolved in this case is whether this Court will misconstrue Pavesich and reinterpret our state constitution in such a way as to deprive the General Assembly of its authority to prohibit consensual and private acts of sodomy.

It is an established rule of constitutional construction that, where a provision has received a settled judicial interpretation and is then incorporated into a new constitution, it will be presumed to have been retained with the knowledge of the previous construction and the courts will be bound to adhere thereto. [Cit.]

Atlanta Independent School Sys. v. Lane, 266 Ga. 657, 658 (2) (469 S.E.2d 22) (1996). Because Pavesich clearly [*33] interprets the constitutional right of privacy as subject to compliance with this state's criminal statutes and because there has been no constitutional change which would authorize Georgia citizens to engage in private and consensual sodomy, it is clear that Powell's attack on the constitutionality of OCGA § 16-6-2 (a) is without merit. The Due Process Clause of the Georgia Constitution does not afford the citizens of this state the right to engage in private consensual conduct which has been proscribed by a criminal law enacted by our General Assembly. See State v. Lopes, 660 A.2d 707, 710 (R.I. 1995); State v. Bateman, 113 Ariz. 107, 547 P.2d 6, 10 (V) (Ariz. 1976); Everette v. State, 465 S.W.2d 162 (Tex. Crim. App. 1971); 81 CJS, Sodomy, § 3, p. 648.

This is precisely the issue addressed in Christensen, supra at 476 (2) (a), wherein, less than three years ago, a majority of this Court upheld the constitutionality of the statute, and the plurality opinion held that the proscription against sodomy is a legitimate and valid exercise of state police power in furtherance of the moral welfare of the public. Our constitution does not deny the legislative branch the right to prohibit [*34] such conduct. Accordingly, OCGA § 16-6-2 does not violate the right to privacy under the Georgia Constitution.

See also State v. Bateman, supra at 10 (V). The majority simply dispenses with this holding in Christensen, concluding that, because no third party is harmed by a consensual and private act of sodomy, the General Assembly is without the constitutional authority to proscribe commission of that act. In discounting Christensen, however, the majority appears to be motivated by the erroneous premise that victimless consensual and private acts of sodomy are a realistic target for the State's enforcement of OCGA § 16-6-2 (a). If an act of sodomy is truly consensual and private, it would be impractical to enforce the statute against the participants, since both would be guilty of the crime of sodomy and, consequently, there would be no victim to file charges and initiate a prosecution. See Perryman v. State, 63 Ga. App. 819, 822 (12 S.E.2d 388) (1940); Pruett v. State, 463 S.W.2d 191, 193 (Tex. Crim. App. 1970). If, however, the act takes place in a public place or in the presence of a non-condoning non-participant, it can be subject to prosecution as a non-private [*35] act. Christensen, supra. If the act takes place in private and one of the participants files criminal charges against the other, it can be subject to prosecution as a non-consensual act. The prosecution against Powell certainly was not initiated because he was alleged to have engaged in a private and consensual act of sodomy. To the contrary, he was prosecuted only because the victim alleged that he committed an act of forcible sodomy against her. There is no contention that the evidence at trial would not have authorized a finding that Powell's private act of sodomy was non-consensual. Although the jury found Powell guilty of consensual sodomy, the fact nevertheless remains that the prosecution was initiated and pursued only because one of the participants initially alleged and subsequently testified under oath that she did not consent to the act of sodomy.

More importantly, however, the majority cites no authority as support for its adoption of the novel proposition that the constitutionality of a criminal statute is somehow dependent upon whether anyone other than the actual participants themselves are adversely affected by the proscribed act. Presumably, under this new standard, [*36] the State can no longer enforce laws against consensual incest, fornication, or adultery. See

Bowers v. Hardwick, supra at 195-196. Moreover, the majority does not purport to limit to sexual offenses the application of its new found authority to declare this state's criminal statutes unconstitutional. By equating the general constitutional guarantee of "liberty" to all Georgia citizens with the right of each individual citizen to engage in self-indulgent but self-contained acts of permissiveness, it appears that the majority has now called into constitutional question any criminal statute which proscribes an act that, at least to the satisfaction of a majority of this Court, does not cause sufficient harm to anyone other than the actual participants. Thus, to give but one example, the constitutionality of criminal laws which forbid the possession and use of certain drugs has suddenly become questionable. See Bowers v. Hardwick, supra at 195. Until the majority's advancement of its overly expansive notion of the state constitutional guarantee of "liberty," there has never been any doubt that the General Assembly, in the exercise of the police power, has the authority to define [*37] as crimes the commission of acts which, without regard to the infliction of any other injury, are considered to be immoral. Simply put, commission of what the legislature has determined to be an immoral act, even if consensual and private, is an injury against society itself. "The protection of 'societal order and morality' [is] a 'substantial government interest.'" Christensen, supra at 476 (2) (a), fn. 6. The law "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." Bowers v. Hardwick, supra at 196. See also Christensen v. State, supra at 476 (2) (a); State v. Walsh, 713 S.W.2d 508, 511-512 (Mo. 1986). The only justification given by the majority for concluding that OCGA § 16-6-2 (a) cannot be upheld as a constitutional exercise of the State's police power to proscribe immoral conduct is that, in Georgia, the right to engage in consensual and private sodomy, although legislatively determined to be morally reprehensible, is guaranteed under our constitution. As previously demonstrated, however, this constitutional "right" to engage [*38] in sodomy has been manufactured out of whole cloth by the majority's misconstruction of Pavesich. 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. No reasonable Georgian would consider that the effect of voting to ratify a general constitutional guarantee of "liberty" would be to divest his or her elected legislators of the right to continue the specific statutory proscription against sodomy or any other criminal act. To the contrary, any reasonable citizen of this state would consider that he or she thereby was retaining the liberty to make such determinations for themselves through their elected legislators. The majority, having simply invented the constitutional right to engage in sodomy in the first instance, then relies upon that fictional right as support for its ultimate conclusion that the General Assembly has no constitutional authority to proscribe that

conduct.

A reviewing court should strive "to assure itself and the public that announcing rights not readily identifiable in [a c]onstitution's text involves much more than the imposition [*39] of the Justices' own choice of values." *Bowers v. Hardwick*, supra at 191. Given the utter lack of support for the purported constitutional right to engage in sodomy, I can only conclude that the majority has chosen to substitute its own public policy determination for that of the General Assembly.

In stark and telling contrast to the majority's analysis, Christensen is based firmly upon the bedrock constitutional principle of separation of powers, which principle is "essential to the very foundation of our system

of government" and must "be strictly enforced." *McCutcheon v. Smith*, 199 Ga. 685, 690-691 (2) (35 S.E.2d 144) (1945). "It is the prerogative of the

judiciary to determine what the law is, and the responsibility of the legislature to declare what the law shall be. [Cit.]" *Pearle Optical of Monroeville v. State Bd. of Examiners in Optometry*, 219 Ga. 364, 373 (2) (133 S.E.2d 374) (1963). Thus, this Court's authority extends only to the

correction of errors of law, and we have no legislative powers or functions. *Jacobs v. State of Ga.*, 200 Ga. 440, 445 (37 S.E.2d 187) (1946).

"The legislature, and not the courts, is empowered by the Constitution to

decide [*40] public policy, and to implement that policy by enacting laws; and the courts are bound to follow such laws if constitutional." *Commonwealth Inv. Co. v. Frye*, 219 Ga. 498, 499 (2) (134 S.E.2d 39) (1963).

In exercising the judicial authority to determine the constitutionality of

statutes duly enacted by our General Assembly, it is our solemn duty "not

to pronounce against them, except in a clear case, and to make every intendment possible in favor of their constitutionality." *Gormley v. Taylor*, 44 Ga. 76, 77 (2) (1871).

Legislatures alone determine the wisdom of laws, and courts, despite their

belief that the law is unwise, nevertheless are bound by the Constitution

to confine their considerations of such laws to their constitutionality alone. Courts possess neither the facilities, the experience, nor the wisdom of legislators to qualify them to pass upon the wisdom of laws.

Sims v. State, 221 Ga. 190, 204 (5) (c) (144 S.E.2d 103) (1965), rev'd on

other grounds, 385 U.S. 538 (87 S. Ct. 639, 17 L. Ed. 2d 593) (1967).

According to the majority, OCGA § 16-6-2 (a) is unconstitutional for the entirely erroneous reason that, by ratifying the Constitution of Georgia,

this state's [*41] voters implicitly guaranteed the right of its citizens

to commit an act which its legislators nevertheless have expressly determined should continue to be prohibited. Retaining the long-standing proscription on sodomy may or may not be good public policy, but it is a public policy determination which, as a matter of constitutional law, only

the General Assembly can make. *State v. Bateman*, supra at 10 (V); Note, Doe

and Dronenburg: Sodomy Statutes are Constitutional, 26 Wm. & Mary L. Rev.

645 (1985). Thus, in *Christensen v. State*, supra at 477 (3), we held that "the right to determine what is harmful to health and morals or what is criminal to the public welfare belongs to the people through their elected representatives." *Christensen v. State*, supra at 477 (3). Unfortunately, as of today, that is no longer the law of this state. By holding that the constitutional guarantee of "liberty" precludes the General Assembly from enacting an express ban on the commission of consensual private acts of sodomy, the Court has usurped the legislative authority of the General Assembly to establish the public policy of this state.

The majority promotes itself as a judicial defender of [*42] constitutional rights against the imposition by the General Assembly of those "norms" of "societal morality" held by most Georgia citizens. The majority should be cautioned, however, that the constitution which it now so readily undertakes to amend by judicial fiat can just as easily be rewritten yet again by any future Court which discovers another constitutional right where none ever existed. The Constitution of Georgia is the original law by which the government of this state was established. *Wheeler v. Bd. of Trustees of Fargo Consolidated School Dist.*, 200 Ga. 323, 331 (3) (37 S.E.2d 322) (1946). As such, our constitution should not be subject to judicial amendment so as to express whatever a majority of this Court happens to conclude at any given time is the more enlightened viewpoint on a particular controversial issue. If our constitution can be judicially amended in such a manner, that constitutes government by this Court, rather than government through a constitutional system of which this Court is a separate and equal branch. In accordance with today's opinion, any and all disaffected groups who are unable to obtain legislative redress need only convince a majority of [*43] this court that what they seek is an implicit "right" protected by the general guarantee of "liberty" afforded by the Due Process Clause of the Georgia Constitution. Contrary to this analysis, however, our constitution wisely provides for separation of powers, and authorizes the General Assembly to make the public policy determinations in this state. Under our constitution, therefore, the public policy of Georgia on the practice of sodomy is a matter within the exclusive jurisdiction of the legislature. Accordingly, we should continue to "decline to usurp that which is the power of the legislature." *Christensen v. State*, supra at 477 (3). By this dissent, I am not opining that what the majority has wrought today should or should not be done or can or cannot be done. I am saying simply that this Court should not, and indeed constitutionally cannot, do it.

In the apparent belief that there is safety in numbers, the majority notes that it is not alone in interpreting a state constitutional right of privacy so broadly as to include the right to engage in sodomy. What the

majority fails to acknowledge, however, is that most states in which consensual sodomy is no longer a crime achieved [*44] that result "by legislative repeal of their laws criminalizing sodomy." Christensen v. State, supra at 476-477 (3). See also Recent Case, State Constitutions -

Homosexual Sodomy, &c., 106 Harv. L. Rev. 1370, 1373, fn. 27 (1993).

Thus, the majority should take no comfort in the fact that it has removed Georgia from the rank of those states which have held that the matter is for resolution by the legislature. See, e.g., State v. Bateman, supra at 10 (V); Critchlow v. State, 264 Ind. 458, 346 N.E.2d 591, 596 (Ind. 1976); Carter v. State, 255 Ark. 225, 500 S.W.2d 368, 371 (Ark. 1973); People v. Hurd, 5 Cal. App. 3d 865, 85 Cal. Rptr. 718, 726 (Cal. App. 1970). In the exercise of its police power, the General Assembly has determined that the long-recognized ban on sodomy should remain in place. That ban applies only to acts, not to persons or groups.

It is not a proper function for any court to judicially repeal laws on purely sociological considerations -- [Powell] would do better to address ... the General Assembly for it to determine if modern mores require the alteration or expunction of sodomy statutes.

Griffith v. State, 504 S.W.2d 324, 326 (Mo. App. 1974). Because the majority's discovery of a constitutional [*45] right to engage in sodomy notwithstanding this legislative ban is based upon a serious misinterpretation of the Constitution of Georgia and is completely contrary to the constitutional principle of separation of powers, I dissent.

FOCUS | Save As ECLIPSE More Like This View Printable Page | Deliver Documents <Picture><Picture><Picture: KWIC display format><Picture: FULL display format>
<Picture><Picture>
prev <Picture> Document 1 of 1 <Picture> next

<Picture>

Menu: Georgia Library Source: GA Supreme Court and Court of Appeals
Cases Search Terms: name(powell) and date geq (10/30/1998) Client: michael morrison View: FULL Date/Time: Monday, November 30, 1998 - 12:47 PM EST

<Picture>

Search | Get a Document | Check a Citation
Source Directory | History | ECLIPSE | Options | Feedback | Sign-Off | Help
About LEXIS-NEXIS | Terms and Conditions

<Picture>

<Picture> Copyright © 1998 LEXIS-NEXIS, a division of Reed Elsevier Inc.
All rights reserved.

ADDENDUM C

"Person" means any person, unincorporated association, corporation, partnership or other legal entity.

"Semi-nude" means a state of dress in which opaque clothing covers no more than the nipple and areola of the female breast, and the male or female genitals, pubic region and anus shall be fully covered by an opaque covering no narrower than four inches wide in the front and five inches wide in the back which shall not taper to less than one inch wide at the narrowest point.

"Semi-nude dancing bars" means any business licensed as a Class C private club or Class C tavern, which permits dancing, modeling, or other performance or appearance however characterized, in a state of semi-nudity.

"Sexual encounter center or business" means a business or commercial enterprise that, as one of its primary business purposes offers for any form of consideration:

1. Activities between male and female persons, between persons of the same sex or both when one or more of the persons is in a state of nudity or semi-nude; or

2. Which allows its customers and employees to touch themselves or each other in specified anatomical areas as defined in this chapter.

"Sexually oriented business" means nude entertainment businesses, sexually oriented out call services, adult businesses, semi-nude dancing bars, semi-nude dancing agencies, sexual encounter center or business, as defined by this chapter.

"Sexually oriented business employees" means those employees who work on the premises of the sexually oriented business in activities related to the sexually oriented portion of the business. This includes all managing employees, dancers, escorts, models, and other similar employees whether or not hired as employees, agents or as independent contractors. Employees shall not include individuals whose work is unrelated to the sexually oriented portion of the business, such as janitors, bookkeepers, and similar employees. Sexually oriented business employees shall not include cooks, serving persons, bartenders and similar employees, except where they may be managers or supervisors of the

business. All persons making out call meetings under this chapter including escorts, models, guards, escort runners, drivers, chauffeurs, and other similar employees shall be considered sexually oriented business employees.

"Specified anatomical areas" means the human male or female pubic area, or anus with less than a full opaque covering, or the human female breast with less than full opaque covering.

"Specified sexual activities" means:

1. Acts of, or simulating:
 - a. Masturbation,
 - b. Sexual intercourse,
 - c. Sexual copulation between a person and a beast,
 - d. Fellatio,
 - e. Cunnilingus,
 - f. Bestiality,
 - g. Pederasty,
 - h. Buggery, or
 - i. Any anal copulation between a human male and another human male, human female, or beast;
2. Manipulating, caressing or fondling by any person of:
 - a. The genitals of a human,
 - b. The pubic area of a human,
 - c. The female breast;
3. Flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of the one so clothed.

"Touch" or "touching" means to be or become so close to someone that there is no intervening space. (Ord. 97-23 § 1 (Att. A (part)))

5.56.060 Zoning.

It is unlawful for any sexually oriented business to do business at any location within the city not zoned for such business. Sexually oriented businesses licensed as adult businesses, nude entertainment businesses, semi-nude dancing bars, or sexual encounter center or business, pursuant to this chapter shall only be allowed in areas zoned for their use. Businesses regulated by this chapter shall not be

located closer than six hundred (600) feet to each other and not closer than six hundred (600) feet to residences, churches or schools. (Ord. 97-23 § 1 (Att. A (part)))

5.56.070 Business license required.

It is unlawful for any person to operate a sexually oriented business, as specified below, without first obtaining a sexually oriented business license. The business license shall specify the type of business for which it is obtained.

A. Sexually oriented business licenses will be limited to one for each six thousand (6,000) residents of the city of South Salt Lake.

B. Any available license will be issued on a first come, first served basis. (Ord. 97-23 § 1 (Att. A (part)))

5.56.080 Legitimate artistic modeling.

The city does not intend to unreasonably or improperly prohibit legitimate modeling which may occur in a state of nudity for purposes promoted by the First Amendment or similar state protection. The city does intend to prohibit prostitution and related offenses occurring under the guise of nude modeling. Notwithstanding the provisions of Section 5.56.240, a licensed out call employee may appear in a state of nudity before a customer or patron providing that a written contract for such appearance was entered into between the customer or patron and the employee and signed at least twenty-four (24) hours before the nude appearance. All other applicable provisions of this chapter shall still apply to such nude appearance. (Ord. 97-23 § 1 (Att. A (part)))

5.56.090 Business categories—Single licenses.

A. It is unlawful for any business premises to operate or be licensed for more than one category of sexually oriented business, except that a business may have a license for both out call services and nude entertainment business or nude and semi-nude dancing agency on the same premises.

B. The categories of sexually oriented business are:

1. Out call services;
2. Adult business;
3. Nude entertainment business;
4. Semi-nude dancing bars;
5. Nude and semi-nude dancing agency;
6. Escort services;
7. Sexual encounter center or business. (Ord. 97-23 § 1 (Att. A (part)))

5.56.100 Employee licenses.

It is unlawful for any sexually oriented business to employ, or for any individual to be employed by a sexually oriented business in the capacity of a sexually oriented business employee, unless that employee first obtains a sexually oriented business employee license. (Ord. 97-23 § 1 (Att. A (part)))

5.56.110 State licensing exemption.

The provisions of this chapter shall not apply to any sex therapist or similar individual licensed by the state of Utah to provide bona fide sexual therapy or counseling, a licensed medical practitioner, licensed nurse, psychiatrist, psychologist, nor shall it apply to any educator licensed by the state of Utah for activities in the classroom. (Ord. 97-23 § 1 (Att. A (part)))

5.56.120 License—Application—Disclosure.

Before any applicant may be licensed to operate a sexually oriented business as a sexually oriented business employee pursuant to this chapter, the applicant shall submit, on a form to be supplied by the city license authority, the following:

A. The correct legal name of each applicant corporation, partnership, limited partnership or entity doing business under an assumed name;

B. If the applicant is a corporation, partnership or limited partnership, or individual or entity doing business under an assumed name, the information required below for individual applicants shall be submitted for each partner and each principal of an applicant, and for each officer, director and any shareholder (corporate or personal) of more than ten