

**SUPREME COURT OF LOUISIANA**

*No. 99-KA-0606*

STATE OF LOUISIANA

Versus

MITCHELL SMITH ET AL.

*c/w*

*No. 99-KA-2015*

STATE OF LOUISIANA

Versus

LISA M. GARRETT

*c/w*

*No. 99-KA-2019*

STATE OF LOUISIANA

Versus

MELANIE VARNADO

*c/w*

STATE OF LOUISIANA

Versus

KELLY A. BARON

LEMMON, J., Concurring in Part and Dissenting in Part

I agree that the power to make laws is constitutionally vested in the legislative, not the judicial, branch of government. However, the power to determine whether the laws enacted by the legislative branch violate the Louisiana Constitution is vested in the judicial branch. This court does not fulfill its constitutional duty by simply stamping approval on every act passed by the Louisiana Legislature, and thorough constitutional analysis is mandated whenever a legislative act is challenged, even an act that existed at the time of the adoption of the 1974 Constitution.

As to the cases involving the constitutionality of La. Rev. Stat. 14:89B, this court in the present case simply follows State v. Baxley, 656 So. 2d 973 (La. 1995), a decision to which I subscribed, and I concur as to the decision in those cases.

As to the Smith case involving the constitutionality of La. Rev. Stat. 14:89A, I believe that this court, while continually pronouncing deference to the legislative branch, performs an inadequate analysis, under its constitutionally vested judicial function, of whether Section 89A violates the protection guaranteed to individuals by La. Const. art. I, §5 to be “secure in his . . . house.”<sup>1</sup>

This court today upholds a law that tells Mitchell Smith that he can be

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<sup>1</sup>La. Const. Art. I, §5 provides in part:

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. (emphasis added).

imprisoned for five years<sup>2</sup> for engaging in consensual, non-commercial oral sex with a consenting adult woman (apparently even his wife) when the two are alone in his own home. Notably, this law is one whose violation probably would never have been prosecuted except for the extremely unusual manner in which the case developed -- a responsive verdict to a forcible rape charge in which the trial court accepted Smith's assertion that the sex was consensual. There will probably never be a direct prosecution charging a violation of Section 89A because the prohibited conduct either is never reported or is universally ignored.<sup>3</sup>

The law this court enforces does not protect persons against unwanted exposure to public sexual behavior, but rather enforces a personal moral fiat that extends by its terms into one's own home. Whether or not one agrees with the moral or religious views of heterosexual oral sex held by the legislators who voted to enact Section 89A is irrelevant to the constitutional analysis. The critical issue is whether those legislators can constitutionally impose those views on a citizen whose non-public conduct, in his own home with a person capable of consenting and without force, coercion or intimidation, does not involve use of contraband and does not cause injury to any other person or to the community. In other words, can the Legislature interfere with an individual's right to be left alone in the security of his or her home, as long as the person is not interfering with the rights of other individuals or of the public in

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<sup>2</sup>Smith was sentenced to three years imprisonment, but the sentence was suspended.

<sup>3</sup>One wonders if the prosecuting witness in the present case will also be charged or if Smith would have been prosecuted at all if the bedroom police or some intruding neighbor had discovered him engaging in the same conduct with his wife in their home. With today's technology, a snooper could possibly monitor a person's bedroom activities in the person's home and report a crime in order to embarrass the snooper's social or political enemy. Aside from the issue of whether such a report should form the basis of a prosecution, the critical issue is whether the conduct may be legislatively criminalized within constitutional limits.

general?

In the present case, this court upholds the prohibition of conduct in one's own home that does not involve contraband<sup>4</sup> and does not involve minors, public sexual exhibition, commercial sex or unwanted sex. The only apparent purpose of the prohibition is to dictate the type of sex that is acceptable to legislators. While this purpose arguably is an appropriate legislative concern when the sexual conduct involves injury or unwanted contact with another, or exposure to the public, or minors or other persons without legal capacity, or commercial activity, this purpose does not justify an intrusion, in the absence of one of these circumstances, into the constitutionally guaranteed security of one's home. Two married persons should be able to choose how they conduct their non-public voluntary sexual relations in the security of their own home; a law that takes that choice away from them is an intrusion by the legislative branch that is constitutionally intolerable. There simply is no legislative interest in the public's health, safety or welfare that warrants such an intrusion.

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<sup>4</sup>The majority points out that a person can be prosecuted for the private use of illegal drugs in his or her own home. Of course, illegal drugs are contraband.