Editor's note: opinion released July 6, 2000

SUPREME COURT OF LOUISIANA

No. 99-KA-0606

STATE OF LOUISIANA
versus
MITCHELL SMITH

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

No. 99-KA-2094

STATE OF LOUISIANA
versus
KELLY A. BARON

CALOGERO, C. J., dissenting

La. Rev. Stat. 14:89(A)(1) criminalizes every act of consensual carnal copulation, not including coitus, between parties of the same or opposite sex, married or unmarried, compensated or uncompensated, in public or private. The majority in this case finds the statute constitutional, and in particular, not offensive to the privacy clause of the Louisiana Constitution of 1974. They do so in a case which comes to us after the offense of crime against nature was found as a responsive verdict to a charge of aggravated crime against nature, tried along with simple rape, the latter two crimes as to which the trial judge found Defendant not guilty. Thus, Defendant was never actually charged with simple crime against nature, and in fact, prosecutions for

the crime at issue in this case are extremely rare. I do not recall seeing a charge, much less a conviction, in a case like this one, for simple crime against nature in the 27 years that I have been a member of this Court.

In this case, a majority of this Court has opined that there is nothing constitutionally offensive in prohibiting crime against nature whether or not it is for compensation, even in the privacy of one's own "house." I agree with the majority as to crime against nature for compensation, *i.e.*, the legislature can validly proscribe compensated crime against nature. However, as to uncompensated acts, the majority holds that the right to privacy enumerated in Article I, Section 5, of the Louisiana Constitution does not protect the choice by adult citizens to engage in private, consensual acts of sexual intimacy. It is with respect to this holding that I dissent.

Article I, Section 5 of the Louisiana Constitution, entitled "Right to Privacy," states, in relevant part: "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy." This case presents an issue of first impression as this Court has never determined the parameters of the state constitutional right to privacy in the sexual arena. *See State v. Baxley*, 93-2159 (La. 2/28/94), 633 So. 2d 142, 145 (La. 1994).

As an initial precept, Article I, Section 5 of the Louisiana Constitution provides, as the majority concedes, all Louisiana citizens greater privacy rights than those provided under the federal constitution. *State v. Perry*, 610 So. 2d 746, 755-756 (La. 1992). The Louisiana Constitution expressly contains a "right to privacy," whereas the federal constitution's right to privacy is unenumerated and is believed to be contained in the "penumbra" of related rights guaranteed by the Bill of Rights. *See Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). This Court has

recognized the greater protections afforded by Article I, Section 5, and has continued to endorse this right, stating that "[o]ur state constitution's declaration of the right to privacy contains an affirmative establishment of a *right of privacy*" and that this "is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution." *State v. Hernandez*, 410 So. 2d 1381, 1385 (La. 1982) (emphasis in original); *see also, State v. Moreno*, 619 So. 2d 62, 64-65 (La. 1993); *Moresi v. Dept. of Wildlife & Fisheries*, 567 So. 2d 1081, 1092-1093 (La. 1990); *Hondroulis v. Schuhmacher*, 553 So. 2d 398, 415 (La. 1989); *Parish National Bank v. Lane*, 397 So. 2d 1282, 1283 (La. 1981); *see also Devlin, Privacy and Abortion Rights Under the Louisiana State Constitution*, 51 La. L. Rev. 685 (1991); Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1 (1974).

La. Rev. Stat. 14:89 is a comprehensive crime against nature statute, proscribing both heterosexual and homosexual, private and public, and commercial and non-commercial activity, including activity between married couples. I believe that the sweeping nature of the statute, in its prohibition of consensual, private, non-commercial acts of sexual intimacy, invades that area of protected privacy guaranteed by Article I, Section 5 of our state constitution. Consequently, La. Rev. Stat. 14:89 constitutes a governmental invasion into Defendant's right to privacy, and therefore, the State must provide a compelling interest to justify this intrusion. On the record before this Court, the State has advanced no argument, other than citing *Bowers v. Hardwick* (holding that there is no constitutional right to engage in sodomy), which spoke only of rights *vis a vis* the federal constitution, and presented no evidence tending to demonstrate that there is a compelling state interest involved,

or that La. Rev. Stat. 14:89(A)(1) is a narrowly tailored legislative solution to a legitimate state problem. I am of the opinion that the government has no legitimate interest or compelling reasons for regulating, through criminal statutes, adult, private, non-commercial, consensual acts of sexual intimacy. Thus, I believe that the right to privacy guaranteed by our state constitution protects acts of non-commercial sexual intimacy, such as the sexual act at issue in this case, between adults when done in private.

I am not oblivious to the majority's argument that is it not the province of this Court to legislate social policy or to determine whether the criminal laws enacted by the Legislature are wise or desirable. And surely our legislature is authorized to make public policy determinations and to enact laws to further those policies. However, the legislature cannot validly enact a law that impermissibly infringes upon a constitutional guarantee. Indeed the very reason for elevating certain protections to the level of a constitutional guarantee is to ensure that the state does not infringe upon those protections. And when there is doubt as to the scope of protection afforded by a constitutional guarantee, it is the province, and in fact, the duty of this Court, to interpret the law.

When interpreting our state constitution's privacy clause, it is important to bear in mind that the 1974 constitutional convention delegates added an express privacy protection to our constitution in order to expand the zone of privacy that had already been recognized under the federal constitution. As for determining whether the broad and non-specific term "privacy" includes the sexual acts at issue in this case, a determination within the sole province of this Court, it is of no moment that there was no express mention, at the constitutional debates, of a guarantee to engage in certain sexual acts, for as noted by the Court in *Griswold*, 85 S. Ct. at 1680-81, many of our

most cherished federal constitutional guarantees failed to receive express mention in the Constitution or Bill of Rights.

Accordingly, I dissent from that portion of the majority's opinion finding that the right to engage in adult, private, non-commercial, acts of sexual intimacy between individuals capable of consenting is not protected by our state constitution's privacy guarantee. Thus, I would affirm the court of appeal's ruling that La. Rev. Stat. 14:89(A)(1) is unconstitutional.

Finally, the majority concludes that La. Rev. Stat. 14:89(A)(2), the penalty provision for solicitation for compensation of unnatural carnal copulation, is constitutional. I disagree. As I discussed in my partial dissent in *State v. Baxley*, 94-2982 (La. 5/22/95), 656 So. 2d 973, 981, and for the reasons stated therein, imprisonment, with or without hard labor, for not more than five years is unconstitutionally excessive for a solicitation statute like the one at issue in this case.