

MAY 16, 2000

SUPREME COURT OF LOUISIANA

99-KA-2291

STATE OF LOUISIANA

versus

CHRISTINE D. BRENAN

ON APPEAL FROM THE COURT OF APPEAL, FIRST CIRCUIT,
PARISH OF ST. TAMMANY

TRAYLOR, J. (dissenting)

A constitutional analysis starts with the presumption of a statute's validity. *See State v. Brenner*, 486 So. 2d 101 (La. 1986). The legislation must only bear a rational relationship to a legitimate state interest, such as health, safety or welfare, in order to satisfy the substantive guarantee of due process in the federal and state constitutions. *Theriot v. Terrebonne Parish Police Jury*, 436 So. 2d 515, 520 (La. 1983); *New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976).

The majority concludes that La. R.S. §14:106.1 fails the rational basis test. I disagree because the burden on the state in review of socioeconomic legislation under rational basis scrutiny is minimal at best. The United States Supreme Court in *Heller v. Doe*, 509 U.S. 312 (1993) summarized the appropriate judicial deference as follows:

[rational-basis review does not] authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) (per curiam). . . . courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, *supra*, at 485, quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 55 L. Ed. 369, 31 S. Ct. 337 (1911). "The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific." *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70, 57 L. Ed. 730, 33 S. Ct. 441 (1913).

Heller, 509 U.S. at 319-320.

The statute's ban on the sale of obscene devices is rationally related to its legitimate interest in protecting unconsenting adults and minors. Proscription of all "obscene devices" ensures that those who do not wish to see the devices will not do so, and the fact that consenting adults will have a harder

time procuring obscene devices does not render the statute unconstitutional under a substantive due process analysis. *See Washington v. Glucksburg*, 521 U.S. 702 (1997) (finding that total ban, rather than regulation, was rationally related to state's legitimate interest in preserving life).

The majority reasons that the ban on obscene devices is arbitrary because of the device's potential therapeutic use. Thus, the reasoning goes that the devices are not obscene because they fail the third prong of the *Miller* test. However, the exhibits in the record have labels that warn "Sold as a Novelty Only. This Product is not Intended as a Medical Device." In addition, no evidence was offered to show that devices *designed or marketed* in an obscene matter are necessary to achieve a therapeutic result. In other words, a vibrating device could be recommended by a doctor for sexual dysfunction, and fall outside the statute because it was not designed or marketed in an obscene manner.

Finally, the majority's focus on the device's function, i.e., the stimulation of human genitals, completely avoids the issue of what is objectionable about the devices in the first place. It is the device's packaging or design that offends. Under the statute, for the device to be "*designed or marketed* as useful primarily for stimulation of human genital organs," the packaging, advertising, or labeling of the device must somehow communicate the device's use. This communication, through structural depiction (i.e., an artificial vagina or penis), visual display, or descriptive wording, is the element that offends unconsenting adults and minor children. Because this element of the device is the applicable determination for what is obscene, the *Miller* guidelines are in fact satisfied.

Because the majority correctly determined that no fundamental right was implicated in the sale of obscene devices, the rational basis test is easily met by the state's lawful purpose in by banning the commercial sale of obscene devices to protect unconsenting adults and minors. Accordingly, I respectfully dissent.