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RACIAL DISCRIMINATION

The primary harm of racial discrimination is the stigmatic injury that results from considering all members of a class as inferior, disregarding individual merit. A common occurrence of this harm is the exclusion of racial minorities from participation as full citizens in government and civil affairs. Though modern cases focus on denial of the right to vote, as early as 1879, Strauder v. West Virginia prohibited the statutory exclusion of blacks from juries. The notion then, as now, is that a purposeful exclusion of blacks from jury service is the result of considering them as inferior—as not educated enough, as not fair enough, as lacking enough commitment to the civic community to make proper decisions of guilt or innocence in criminal proceedings.

Given these concerns, it would be simple to conclude that state action intentionally excluding blacks from grand and petit juries is prohibited by the state and federal constitutions. In this context it is the excluded jurors who are primarily hurt. If one is concerned with the use of peremptory challenges by the state to exclude blacks from petit jury service, the most direct victims of that discrimination are the potential jurors who are challenged. It is they whom the state thinks unworthy to serve. Injunctive relief and damages would appear to be appropriate remedies on their behalf. The practical problem, of course, is that of proving discriminatory motivation and of proving damages. Experience also indicates that few suits of this kind will be brought. Instead, it is the minority defendant who usually will raise the issue.

A pure equal protection analysis becomes more difficult when one considers the harm done to a defendant who is tried (and perhaps convicted) by a jury from which blacks are excluded. The stigmatic harm reflecting unworthiness to participate in the civic process is in a general way shared by all blacks, including this defendant, but the stigmatic harm is not as direct as that caused the

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2. 100 U.S. 303 (1879). See also Virginia v. Rives, 100 U.S. 313 (1879).
excluded juror. Even if the defendant somehow shares in the stigmatic harm, it is difficult logically to require a reversal of his conviction as a means of remedying that harm. Indeed, he suffers that harm whether he is convicted or acquitted. The *Strauder* rationale provided the constitutional basis for a statute to remove criminal cases to federal court in such an instance of exclusion. Modern cases have gone further and provide that reversal of the conviction is the proper remedy; *State v. Washington* so provides. Though notions and policies of equality are certainly important in analyzing these cases, a straight equal protection analysis does not support the remedy that is granted.

Another approach to the problem is to emphasize sixth amendment jury trial values and the traditional view that a jury ought to be a reasonable representation of the community of which the defendant is a part. The historical importance of juries in reflecting community values is implemented only if the jury displays a rough approximation of the policies and viewpoints of the community. This notion certainly seems to be at the heart of the grand jury cases and the cases which deal with selection of venires. A consistent application of this policy would enable any person to claim unfair treatment if the jury excluded certain groups, whether the defendant was a member of that group or not. It would also follow that relief should be granted whether the exclusion of minority groups was intentional or not; but that has not been the development of the cases. One has to conclude that the representation-of-the-community rationale does not explain these cases; yet, running through them are some influences of this rationale.

3. 375 So. 2d 1162 (1979) (reversal was summary upon a showing of prosecutorial discrimination).

4. The preeminent case in this area is *Smith v. Texas*, 311 U.S. 128 (1940). Using an equal protection analysis, the Court in *Smith* reversed the conviction of a young black defendant upon a showing that blacks had been systematically excluded from his grand jury. Speaking for a unanimous court, Justice Black stated:

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.

*Id.* at 130.


6. *Cf.* Glasser v. United States, 315 U.S. 60 (1942) (all-male grand jury found not illegally constituted because no opportunity to select women).
Indeed, a rigorous application of that rationale would require total elimination of the peremptory challenge system. To the extent that the jury selection system depends upon random selection to provide a representative sample, the peremptory challenge system works to defeat the random selection process. Yet, the cases seem in no way inclined to do away with peremptory challenge. Another anomaly thus enters the analysis, requiring us to (1) allow for non-rational elimination of prospective jurors by both sides in criminal cases, (2) while at the same time somehow providing some reasonable mirror of the community and (3) also prohibiting stigmatic exclusion of minority groups by the state.

The accomodation of these conflicting concerns and the explanation of the seemingly conflicting case developments lead to a more flexible due process analysis reflecting both equal protection and cross section values, but incorporating neither analysis in totality. Under this approach, it would seem that the key harm is the risk that a jury from which blacks have been intentionally excluded will render an unfair verdict because there would be lacking in the jury persons who reflect and understand the defendant's upbringing, emotions, motivations, intentions, and environment. Such a jury would be less likely to empathize with the defendant, less likely to give him the reasonable doubt than would one more understanding of his total personality—or at least there is the risk that such a jury would do so. In other words, one wants to give the minority defendant at least an equal chance at a representative jury, and intentional exclusion by the state of minority group members creates a risk of skewing that equal opportunity.

It would seem that this harm could be said to exist whenever blacks are missing from the jury, whether because of intentional discrimination or as the result of accident. Indeed, the early cases seem to have gone in this direction; but Washington v. Davis' has apparently reinterpreted these cases to require racial motivation, with the de facto disparity being used to support inferences of intentional exclusion of blacks. Perhaps the explanation can be that de facto exclusion does not give rise to the inference that the community is so structured as to result in juries that would not empathize with blacks. On the other hand, purposeful exclusion of blacks is more likely to involve the kind of community, the kind of case, and the kind of prosecutorial approach which exclude those persons who would be more empathetic and more reflective of the black milieu.

Under this approach, it also appears that the often-stated requirement that the exclusion of blacks be a long-standing occurrence within a court or on the part of one prosecutor is not truly an element of the substantive right involved. If the risk of unfairness is the heart of the injury, the right ought to exist whenever the risk exists—and on that issue, the fact that other trials have been similarly tainted would be irrelevant. Perhaps the long-standing nature of the exclusion might be used to support inferences that the exclusion is purposeful and not accidental. A history of systematic exclusions would thus have a role to play as a matter of evidence and presumption, but it would not logically be part of the substantive right.

Under this view, proof of purposeful motivation may be difficult, but when the proof is there, the right should be available. And, when the systematic exclusion is shown, that should be adequate basis to put the burden on the prosecution to establish that the exclusion was not racially motivated.

One might argue that an unstated reason for the reversal of convictions is to provide a means of deterring (punishing?) prosecutors for having excluded blacks. The concern would not be with the fairness of the jury or the result, but would be to try to fashion a remedy to prevent future discrimination by a prosecutor. It is hardly a well-tailored remedy that closely fits the evil; and it would also hardly explain the requirement in the cases that the exclusion be systematic over a long period of time.

The argument has been advanced that some importance, even decisive importance, ought to be placed on the fact that most prosecutors rationally believe, based on their experience, that blacks on juries are less likely to convict than whites. That may well be true

8. This requirement was set forth by the Supreme Court in Swain v. Alabama, 380 U.S. 202 (1965). The Swain approach was followed in the most recent term of the Louisiana Supreme Court. See State v. Manning, 380 So. 2d 54 (La. 1980); State v. Allen, 380 So. 2d 28 (La. 1980); State v. Prejean, 379 So. 2d 240 (La. 1979). Even State v. Washington, 375 So. 2d 1162 (La. 1979), which reversed the conviction of a black defendant by a jury from which all blacks had been excluded, but did so only after the Swain test purportedly was met.

But see The Work of the Louisiana Appellate Courts for the 1978-79 Term—Criminal Law & Procedure, 40 LA. L. REV. 635, 650 (1980) (suggesting that the Louisiana results are not required by Swain; "[t]he court has apparently twisted the Swain test into something akin to the Eames concurrence").

In United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974), Judge Alvin Rubin felt obligated to follow Swain since defendants failed to prove systematic exclusion of blacks by use of peremptory challenges; however, he exercised his powers under Rule 33 of the Federal Rules of Criminal Procedure to order a new trial.

9. Such was the belief of the prosecutor in Washington. Explaining his disproportionate use of peremptory challenges against blacks, he stated:
in some types of cases in some communities. Even so, it is of no im-
portance. The question is not whether race-dependent decisions are
rational or not; the question is whether they are unfair. Indeed,
many racial classifications are rational. Since blacks tend to be
poorer than whites, for example, racial classifications are a rational
proxy for choosing between the rich and the poor. This is just as ra-
tional as hiring only persons with normal weight as airline pilots
because overweight people are more prone to heart attacks. The es-
sence of the equal protection concern here, though, is that the racial
classification is unfair; it is hurtful; it stigmatizes the individual
because of his group membership. Because of this, it is disallowed,
even if it is rational.

In any event, if any conclusions can be drawn in this uncertain
area, it would seem that both the federal and state approach is off
the mark in indicating that long-standing, systematic discrimination
in exclusion is needed to trigger the remedy. That notion is but a
matter of procedure and proof to support the inference of purposeful
discrimination; but if intent and purpose can be shown by other evi-
dence, that should be sufficient for relief. One can also probably
safely conclude that while there is some basis to require purposeful
discrimination to qualify for relief, the basis is weak enough to sup-
port the approach that de facto exclusion warrants inferences of
purposeful exclusion and to support putting the burden on the state
to show that the exclusion was not based on race.

SEXUAL DISCRIMINATION

The Louisiana Supreme Court has been reluctant to follow the
trends established by the United States Supreme Court in sexual
discrimination cases; while it refused to invalidate the state’s
Orr* and felt “compelled to declare La. Civ. Code art. 160 un-
constitutional as violative of the equal protection clauses of the
state and federal constitutions . . . .” The impact of *Lovell* is

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I have found through experience, some twenty-three years in the District At-
torney’s office, that blacks, where you have a black defendant, will generally vote
not guilty, in spite of the strength of the state’s case . . . . I find, not without
justification, particularly young blacks, they are very resentful of the white
establishment.

375 So. 2d at 1163.
11. 378 So. 2d 418 (La. 1979).
13. 378 So. 2d at 420-21. In so ruling, the court overruled *Loyacano v. Loyacano,*
358 So. 2d 304 (La. 1978), which upheld the constitutionality of article 160 even though
minimal, since the federal cases already provide an overriding solution to the problem, and since article 160 was amended effective June 29, 1979, to be gender-neutral. The case, however, does pose a continuing problem of remedy.

In *Lovell* a former husband sought to be relieved from paying alimony because article 160 was allegedly unconstitutional. The majority, without discussion, apparently assumed this requested remedy to be the correct one, and then concluded that *Lovell* will be applied prospectively only. Thus, the husband was granted no relief. Even if one accepts the principle of prospective-only application of a decision construing the state constitution, it seems improper not to grant the relief in the first case in which the principle is established. This is certainly a different prospective-only theory from that which has been adopted by the United States Supreme Court.

More to the point, however, is the fact that what is involved is not the prospective or retroactive application of a state court construction of a state constitution, but rather the prospective or retroactive application of the United States Supreme Court decision in *Orr v. Orr*. Though *Lovell* seems to indicate that it is applying both federal and state constitutional provisions, it clearly states it is "compelled" to follow *Orr*. The crucial date of *Orr* is March 5, 1979. Even if the decision is applied prospectively only, it will be applied in all cases arising after March 5, 1979. The result is that alimony judgments rendered between March 5 and June 29, 1979, the effective date of the amendment to article 160, are in jeopardy. This result is not only messy, but unnecessary.

A proper solution would be to avoid the question of retroactive or prospective application and simply say the proper remedy, as in

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it provided alimony for needy wives who had not been at fault, but not for similarly situated husbands. In *Loyacano v. Leblanc*, 440 U.S. 952 (1979), the decision was vacated and remanded for reconsideration in light of *Orr*. The issue of article 160's constitutionality was pretermitted, however, when Dr. Loyacano abandoned his attack in light of the supreme court decision.


15. A prospective-only rule would nonetheless benefit the litigants in the case that does establish the new rule. In *Stovall v. Denno*, 388 U.S. 293, 301 (1967), the Supreme Court wrote:

> We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies ... that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions.
most equal protection cases, is to extend the benefit in question to the excluded class. All that equal protection demands is equality; this could mean alimony to needy spouses of either sex, or alimony to no one. The court need not have assumed that the second alternative was the proper one, but should have discussed the state's basic policy as to whether alimony ought to be continued or not. Most states, in a similar inquiry, have decided that the proper relief is to grant alimony to both spouses, and thus not to absolve husbands from paying alimony to wives.

Once it is decided that the state has no adequate basis for denying alimony after divorce to needy ex-husbands, it follows that state criminal statutes making nonsupport of wives by husbands an offense, but not nonsupport of husbands by wives, are equally without rational basis. While one might argue a legitimate state interest in alleviating the effects of past discrimination against women, the means of fulfilling that interest by a blanket classification denying the benefit to needy men is not necessary. State v. Fuller adopts this analysis and holds that article 74 of the Louisiana Criminal Code, defining criminal neglect of family, is unconstitutional. Fuller overrules State v. Barton, which held otherwise, and which was criticized for doing so. Article 74 has since been amended to be gender-neutral.

The same court that decided Barton also decided State v. Devall in 1974 and held that it was not a denial of equal protection for a prostitution statute to penalize only females who offer sexual services for sale. That case was also criticized, and a subsequent

18. 377 So. 2d 335 (La. 1979).
20. 315 So. 2d 289 (La. 1975).
23. 302 So. 2d 909 (La. 1974). Chief Justice Sanders and Justice Barham dissented; Justice Calogero dissented from the denial of a rehearing.
24. 1974-75 Term, supra note 21, at 535.
legislative amendment25 of the prostitution statute which made it gender-neutral presumably reflects state policy that no adequate basis existed to support such distinctions. In any event, it seems questionable to use Devall as authority to support the decision in State v. Hollins,26 in which the court found no denial of equal protection in a statute making it a crime to entice female minors, but not male minors, into prostitution. Since the legislature also has amended article 86 of the Criminal Code to make the enticing of minors into prostitution a gender-neutral crime,7 the impact of Hollins will be minimal. Still, the case is questionable and should be considered a maverick without precedential authority. The court's alternative rationale in Hollins suggests that enticing minor males into prostitution simply does not present a social problem, whereas enticement of minor females does present such a problem. This may be so, but it does not address the basic question of the legislative basis for excluding minor males from this protection.

However, the main rationale of the case presents even more difficulty. In Hollins, the equal protection defense was raised to contest a conviction of a male who argued the statute's unconstitutionality. Justice Summers' opinion for the court suggests that the defendant had no standing to challenge the classification:

In the case at bar defendants are over twenty-one years of age and therefore bear no relationship to unprotected minor males other than as potential panderers. Failure to allow the defendants to assert the equal protection rights of this class would result in no harm, as the legislature has heretofore amended the statute in question. Therefore defendants lack the requisite standing to assert the invalidity of the classification.28

This analysis would never allow any person to contest the invalidity of such a statute. The suggestion that a minor male who had been enticed might be the proper person to contest the statute fails, for in criminal statutes, the court is under due process constraints and cannot expand the statute to cover minor males. Indeed, if this rationale were to be taken seriously, it should have been invoked in Lovell v. Lovell, and that case disposed of solely on that ground. Perhaps the point of the Hollins analysis that would come closer to jus tertii principles relates to the fact that the legislature has changed the statute, and thus no harm will be caused other persons by the failure of the court to address the problem. But this is not at

28. 375 So. 2d at 923.
all a standing issue, and the defendant in the case is certainly harmed by virtue of his conviction.

_Hollins_ does not discuss what possible rational bases there might be to make it a crime to entice female, but not male, minors into prostitution. Presumably, the possible psychological harm that could result would be the same for males and females. The possible estrangement from parents, introduction into a drug culture, and dependence on pimps would also seem to be the same whether the minor is male or female, and whether the minor is to engage in heterosexual or homosexual activities. Perhaps an argument can be fashioned relating to the possibility of pregnancy or damage to the reproductive system of young females. However, when one is engaged in prostitution, appropriate measures normally are taken to prevent pregnancy, and the asserted justification probably will not meet the high level of scrutiny that is required in sexual discrimination cases.

A more closely fought issue appears in cases like _State v. Bell_, dealing with statutory rape or carnal knowledge statutes which make it an offense for a male to have heterosexual intercourse with a minor female, but not for a female to have heterosexual intercourse with a minor male. In _Bell_, the court sustained the statute, saying: "We share the view that protection of young females from pregnancy, from possible injury to their reproductive systems as well as the possibility of lingering mental impairment, is a legitimate area of state concern justifying the sex classification involved in subject statutes." _Bell_ is in accord with most jurisdictions in the United States which have faced this question or similar statutory rape questions. At least, those cases would take the same view with respect to a statute that simply made consensual intercourse with a young female an offense when committed by a male.

29. 377 So. 2d 303 (La. 1979).
30. Id. at 306.

But the trend appears to be the contrary; see Navedo v. Preisser, 630 F.2d 636 (8th Cir. 1980); United States v. Hicks, 625 F.2d 216 (9th Cir. 1980).
The possibility of pregnancy argument has some appeal and would certainly seem to be a strong argument in the case of unconsented-to intercourse. However, Bell involved what is by definition consensual intercourse, in which presumably the dangers of unwanted pregnancy can be handled by the parties. The statute's justification then has to go to a less solid level, being based on the notion that the minor girl does not appreciate the possibility of pregnancy and may not take the appropriate precautions. Maybe such an argument would support a statute subject only to a low level of scrutiny, but it is hard to find this a basis to withstand a higher level of scrutiny.

The argument emphasizing the danger to the reproductive system of young females also has much stronger force when one is dealing with unconsented-to intercourse. It would be hard to sustain the possibility of serious damage to the female's reproductive system when the intercourse is consensual. The concern with psychological damage would seem to be a concern which would apply equally to young males as well as to young females. The argument that there are few male victims fails to face the essential question of whether there is a rational basis for not protecting those males who would be victims.

The Bell statute raises more complications, however, for it involved not the simple heterosexual intercourse type of statute. As a result of a series of amendments, articles 80 and 81 of the Criminal Code produces a scheme in which a ten-year prison sentence can result if any person, male or female, has anal or oral intercourse with any underage person, male or female; if the intercourse is vaginal the older male is again subject to the ten-year penalty, but the older female having vaginal intercourse with a minor male is subject only to a five-year penalty. The complications of protecting young males from anal or oral intercourse by older men or women, but not protecting them as much from heterosexual intercourse seems to have virtually no rational basis. The only apparent justification is a greater prohibition of "unnatural" sex on the part of young males. Indeed, it is almost impossible to find any rational basis for the present anomalous approach of article 80, which, practically speaking, is but the result of hit and miss amendment over several years, without an overall, overriding, rational policy to support the legislation.

OTHER CLASSIFICATIONS

As the federal equal protection guarantee has developed, racial classifications receive the highest scrutiny; it is virtually impossible to conceive of any basis that would support racial classifications that are harmful to a disadvantaged minority. Article I, section 3 of the Louisiana Constitution imposes a similarly high standard of justification on discrimination based on race, as well as on that based on religious ideas, beliefs, or affiliations. Sexual discrimination is subject to a less demanding, but still quite high, level of scrutiny under both constitutions. In Article I, section 3, the prohibition is against "arbitrary, capricious, or unreasonable" discrimination because of "birth, age, sex, culture, physical condition, or political ideas or affiliations." Numeric legislative classifications, other than on the bases mentioned, result in differing treatment of persons, and these will be subject to more or less scrutiny, depending on the extent of harm caused by the classification. The analysis here has been to start with racial discrimination, the prototype and most historically significant form of discrimination, and to try to extrapolate from the harms there discerned a more general theory that supports a stricter scrutiny for some classifications. Special judicial solicitude for the disadvantaged minority is justified by a long-established, historical pattern of discrimination, similar to racial discrimination, and by exclusion of the disadvantaged group from the political process. Unalterable traits, as race, which are beyond the power of an individual to change, are more suspect bases of classification than are traits within the power of individuals to change. Pervasive discrimination sanctioned and encouraged by law leads to cumulative harms that are more serious than discriminations that may randomly balance each other off. Sexual discrimination, for example, meets some of these tests—unalterable traits, history of discrimination—but not, perhaps, the cumulative harms test of racial discrimination. Also, the class of women has never been a "discrete and insular minority" like blacks have been. On the other hand, legislative classifications based on financial condition, age, intelligence, state of residence, etc., have been thought of as failing to

35. La. Const. art. I, § 3.
meet these requirements which merit greater scrutiny. A number of Louisiana cases this year reflect this approach, finding no impermissible classifications in a number of instances.

In *State v. Nettles*, the supreme court approved a legislative classification which provides for expungement of records of arrests for ordinances and misdemeanors, but not for felonies. The felony-misdemeanor distinction, a classification that distinguishes between serious and less serious offenses, does not result from some intrinsic characteristic or unalterable trait and does not reach an insular and discrete minority; so a high level of scrutiny does not seem appropriate. Adequate rational basis for distinguishing between felony arrests and arrests for misdemeanors was seen by the court in that, for the most serious offenses, arrest records are useful in uncovering criminal conduct, in setting bond, and in facilitating the work of correctional institutions. Though *Nettles* could be criticized on the basis of statutory construction, as dissenting Justice Tate did, the equal protection question does not present serious problems. It is conceivable that classifying as a felony conduct which, according to fundamental values, is not serious might result in a classification scheme without rational basis. But absent that circumstance, the constitutional issue of arrest records expungement would seem to be more a matter of due process than one of equal protection. The inquiry would be whether one has some fundamental right to privacy that would prohibit dissemination of information about one’s arrest when one is in fact innocent of any wrongdoing.

In *Kirsch v. Parker*, the supreme court held that a statute making access to adoption records by adopted children more difficult than under prior law could be applied to adoptions completed before the passage of the act. An equal protection argument was not necessary for decision, and the case presents essentially a due process-right to privacy problem. However, the Fourth Circuit Court of Appeal, in holding that the statute could not be applied to adoptions completed before the passage of the act, raised an intriguing reverse equal protection argument. Applying the statute to all adopted persons would seem to involve no classification at all, for everyone is being treated the same. However, Judge Redmann suggested that it was a denial of equal protection to fail to make a

38. 375 So. 2d 1339 (La. 1979).
39. 383 So. 2d 384 (La. 1980).
distinction between adoptions completed under the old law, where there was no expectation of complete privacy, and adoptions taking place under the new law. He concluded, “the legitimate legislative purposes of promoting adoption and dissuading abortion today did not justify discriminating against a class that includes children who were adopted many years ago and who were several years old when adopted.” This is certainly a novel approach, for the equal protection analysis normally is concerned more with the propriety of classifications than with the failure to make classifications. It would be more straightforward to analyze this problem in terms of the expectations of privacy and confidentiality. Under this theory, these rights may in fact be taken without due process by a statute that would change the requirement for access to adoption records.

*Acorn v. City of New Orleans* was concerned with the power of a local governmental subdivision to impose a $100 annual charge on each parcel of immovable property. An equal protection attack suggested it was improper to levy this charge on each “parcel” of property listed in the tax assessments of the city “without regard to the value, use, size or location, whether tax exempt or not, and regardless of the assessed valuation of the property.” Certainly it was an unusual fund raising scheme under which:

It is also shown that a particular apartment complex containing 22 acres located on five city squares, on which are situated 794 rental units, and which is assessed at $10,000,000.00, is assessed as one parcel and will be taxed for $100.00 under the ordinance. At the same time, a single family residence, in the same subdivision, having an assessment of $75,000.00 will also be taxed $100.00. The testimony further reveals that a single family residence situated on two lots may be taxed $200.00 because each lot is assessed separately.

The attack on such a system would be a similar reverse equal protection attack—failure to make classifications and differentiations based on the value and/or size of the property involved. In any event, since the kind of classification (or failure to classify) was not a suspect classification, little judicial scrutiny would be involved. Administrative convenience presumably would be adequate reason for proceeding as the city did. Indeed, if the attack were to have succeeded here, why not a similar attack on the three-dollar license fee

42. 377 So. 2d 1206 (La. 1979).
43. 377 So. 2d at 1208 (Summers, C.J., dissenting).
44. 377 So. 2d at 1211 (Landry, J., dissenting).
for all automobiles regardless of value or age, a flat license fee which is required under the state constitution? The ultimate disposition of the case here reflects the general view that classifications based on wealth will not be given great scrutiny and that the government is given substantial leeway in financial, business regulation, and taxation matters.

*State v. Scallon* takes a traditional approach and finds no denial of equal protection under a Sunday closing law which exempts the sale of some kinds of products but not others. Indeed, in a one-page opinion, Justice Tate does not discuss the equal protection argument at length, being content to cite *City of New Orleans v. Dukes* to support a very low level of scrutiny in such classifications. The case is consistent with the majority view in the country, but the result is still somewhat disquieting. Even if one accepts the traditional view coming from *McGowan v. Maryland* that there is no impermissible establishment of religion in requiring businesses to close on Sunday, subsequent cases have indicated dissatisfaction with that rule. It at least ought to be an area where one is quite sensitive to the application of these laws because they do touch upon some religious groups' scruples.

Even accepting, however, that a uniform day of rest is an important social value regardless of its connection (or lack of connection) with religious observances, and agreeing that it seems rational to make some exception for necessities being sold on that uniform day of rest, the classification system that has been adopted seems hardly related to the necessities concept. Additions to and changes in the list of the exceptions over the years have produced a patchwork, crazy-quilt pattern of exempt activities whose rationality seems virtually impossible to fathom. It is difficult to understand how such a classification can sustain even the inquiry of a low level of scrutiny.

For example, it is prohibited to sell new or used automobiles, lumber, or building supply material. However, it is permissible to sell real property or mobile homes or appliances. While it is generally not possible to sell clothing or furniture on Sunday, those items can be sold in the Vieux Carré section of New Orleans. Even more
inconsistent and less rational are the numerous municipal ordinances which under the authority of state law suspend, or otherwise delimit or exempt, provisions of the state law requiring Sunday closings.

An attempt in the 1980 legislature to bring some rationality into this scheme and to allow more activities on Sunday was not successful. The debate clearly showed that a large number of opponents of the liberalization measure were motivated by religious considerations.55

Considering the establishment of religion overtones involved in these legislative choices, and considering the lack of a rational basis for the kinds of exemptions that do exist, cases such as Scallon ought to be reexamined. That indeed appears to be the growing trend.56

SUPREME COURT INHERENT AUTHORITY

The supreme court has reaffirmed its inherent authority to control the practice of law, choosing to apply its own standard regulating out-of-state law firm partnerships instead of a more restrictive

53. For example, Baton Rouge City Code Title 9, section 39(a)(2)(a) provides: "Retail dealers, licensed under the provisions of this ordinance, who realize at least sixty (60) per cent of their monthly revenues from the sale of merchandise other than alcoholic beverages may sell beer between 12:30 p.m. Sunday and 12:00 midnight Sunday."


55. New Orleans Times Picayune, May 22, 1980, at 26, col. 1-6 (Unenforceable Blue Law Survives Repeal Try); May 28, 1980, at 6, col. 6 (Blue Law Repeal Defeated); Baton Rouge Morning Advocate, May 22, 1980, at 11, col. 1-6 (Senate Panel Rejects Bill Seeking Repeal of Blue Law); May 28, 1980, at 5, col. 4-5 (Closing Law Bill Apparently Dead).

56. See, e.g., Dodge Town, Inc. v. Romney, 480 P.2d 461 (Utah 1971) (Statute prohibiting new and used automobile dealers from selling on Sunday is unconstitutional. It does not protect against theft or fraudulent sales since sales on other days when offices of record are closed are permitted. It discriminates against licensed dealers because other persons may sell autos); Hughes v. Reynolds, 157 S.E.2d 746 (Ga. 1967) (Act which allowed the sale of otherwise prohibited items on Sunday if those sales were less than 50% of total sales was unconstitutional); Milliken v. Jensen, 281 N.E.2d 401 (Ill. 1972) (Held, an ordinance which prohibits public dances on Sunday, but not other kinds of business was an irrational classification and therefore invalid); Moore v. Thompson, 126 So. 2d 543 (Fla. 1960) (Sunday closing statute which operated only against certain classes of businesses, rather than generally upon all, was unconstitutional); Rutledge v. Gaylord's Inc., 213 S.E.2d 626 (Ga. 1975) (The Common Day of Rest Act which prohibited certain sales by certain businesses, but not others, was patently discriminatory); Twin Fair Distributor's Corp. v. Cosgrove, 380 N.Y.S.2d 933 (N.Y. 1976) (Sunday Closing Statute allowing for selective and discriminatory enforcement, and creating myriad exceptions without reason, denied equal protection).
statute prohibiting such partnerships.\textsuperscript{57} The court is on traditional, established ground in asserting its inherent authority to control the bar, and while there is some uncertainty as to the extent of these inherent powers, prior cases clearly establish that these powers extend to control of the practice of law.\textsuperscript{58}

The 1974 constitution did not restrict this intrinsic power. It continues, in Article II, the doctrine of separation of powers which supports inherent authority. Article V, section 5, is an enlargement of supreme court authority rather than a restriction, in its recognition of power to “establish procedural and administrative rules not in conflict with the law.” The debate indicated a desire to expand court power by recognizing additional rulemaking authority subject to legislative control. However, there was no intent to change the traditional inherent powers of the court which are not subject to legislative control.\textsuperscript{59}

**DUE PROCESS—VAGUENESS**

In *State v. Dousay*,\textsuperscript{60} the supreme court held unconstitutionally vague a provision of the sanitary code making it a crime to fail “to take all usual and all reasonable measures and precautions to secure and ensure the proper operation and maintenance fo [sic] a sewage treatment plant or sewage disposal system.”\textsuperscript{61} In an opinion by Justice Dixon, the court applied the traditional requirement that an individual must be given a reasonable adequate notice that certain conduct is proscribed. It may be ironic that “reasonable measures and precautions” is not definite enough to inform a “reasonable man” of what is prohibited, but the case seems to be correctly decided. In any case, the void for vagueness doctrine is a slippery one, and one in which great flexibility exists. In searching for predictability, the most certainty comes from a comparison of word formulas in various cases and an attempt to make comparisons from which to develop some trend of decision. The instant case, for example, seems to be quite close to *Scott v. District Attorney*,\textsuperscript{62} in which the defendant’s conviction for loitering “without being able to ac-

\textsuperscript{57} Singer Hutner Levine Seeman & Stuart v. Louisiana State Bar Association, 378 So. 2d 423 (La. 1979).

\textsuperscript{58} Saucier v. Hayes Dairy Prod., Inc., 373 So. 2d 102 (La. 1979); Louisiana State Bar Association v. Edwins, 329 So. 2d 437 (La. 1976); Louisiana State Bar Association v. Connolly, 201 La. 342, 9 So. 2d 582 (1942).


\textsuperscript{60} 378 So. 2d 414 (La. 1979).

\textsuperscript{61} *Id.* at 415.

count for his lawful presence” was overturned for vagueness. Unlike Wainwright v. Stone, here there exists no common law definition to clarify the vagueness of the word formula, nor are there prior decisions, as in State v. Lindsey, defining an unclear statutory formula. Also, since this involves criminal law, a higher standard of certainty is expected. While the highest requirements of specificity applicable to statutes that conflict with first amendment concerns may not be applicable here, a comparison with City of Baton Rouge v. Ewing suggests that the statute is equally vague with the word formula in Ewing: “indecent, vile, and profane language.” The case presents an interesting counterpoint to State v. Gisclair, in which on motion to quash, a 4-3 supreme court upheld a statute making it an offense to pay a governmental employee for services “grossly inadequate” for such payment or compensation. Chief Justice Dixon dissented in Gisclair along with Justices Dennis and Calogero, but Douay is a unanimous decision reflecting the unconstitutionality of the provisions of the sanitary code in question. Perhaps Gisclair is explainable because it was decided on the motion to quash, where there was still the opportunity for a factual inquiry to determine the conduct and pay in question, and the possibility that under the facts there was adequate notice.

Another element that comes into play in this vagueness analysis is whether there exists a reasonable alternative means of articulating the standard of conduct involved. In dealing with sewage disposal, when objective testing and measurement is available, it would be relatively easy for a board to establish certain technical requirements for operation of such plants. It may well be that in a Gisclair-type situation, it is virtually impossible to be much more definite in terms of overpaying public employees who do not do an adequate amount of work. Also, while the matter is less than clear, the public payroll fraud provision of article 138 of the Criminal Code seems to require a type of mental element, implying the necessity for a corrupt motive before one can be found guilty under that article. On the other hand, Douay involves an absolute liability provi-

63. Id. R.S. 14:107(7) & (8) were thus found unconstitutional because “they stigmatize as criminal conduct that it is impossible to define concretely or that is so universal as to be beyond the reach of the criminal law under our Constitution.” Id. at 839.
64. Wainwright v. Stone, 414 U.S. 21 (1973) (a Florida statute proscribing the “abominable and detestable crime against nature, either with mankind or beast” was held not unconstitutionally vague in light of the state supreme court’s longstanding construction of the article).
65. 310 So. 2d 89 (La. 1975).
66. 308 So. 2d 776 (La. 1975).
67. 363 So. 2d 696 (La. 1978).
sion without a mental element and the application of criminal liability for failing to act, rather than for acting. Similarly, *State v. Newton* found Article 119, defining bribery of voters, to be constitutional despite some vague language, by reading a corrupt intent requirement into the statute.

The decision in *Dousay* seems quite correct, for it is almost an entirely ex post facto inquiry to determine whether particular non-action was reasonable or unreasonable under the circumstances. A person in good faith attempting in advance to regulate his conduct as society requires would have to wait until after a decision was made by a fact-finder before being able to act as required. What is troublesome is trying to reconcile the analysis in *Dousay* with the cases which suggest that the negligent homicide provisions of the Criminal Code are not unconstitutionally vague. There, the statute penalizes killings caused by criminal negligence, which is defined as a gross deviation from the standard of care of a reasonable person under similar circumstances.

In light of *Dousay*, it seems difficult to avoid the conclusion that this "reasonable person" standard is just as unclear as the "failing to take reasonable measures" word formula. Perhaps the additional requirement of a "gross" deviation helps to make the statute more precise—but not much. Perhaps, in the typical traffic death case, the reference to other traffic laws and speeding laws and driving while intoxicated laws adds an element of certainty as to what is prohibited—but what if no such laws exist? Absent such other provisions adding some certainty to the word formula, it would seem that a person is left without advance guidance as to what he can or cannot do, and must wait until after a jury has determined reasonableness to know whether his conduct is permissible or not. Indeed, this fact has no doubt troubled the supreme court and is important in explaining why the court has been willing to overturn fact-finding decisions of juries concerning guilt of negligent homicide for conduct that one could not reasonably anticipate would be unconstitutional.

Post-hoc appellate review to overturn jury verdicts finding gross deviations from the standard of care of a reasonable man are understandable and perhaps necessary to assure uniformity and a correct application of this very flexible standard. But it is a secondary solution. It would be preferable to require adequate definitions in advance and to spare citizens the expense and the trouble of hav-

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68. 328 So. 2d 110 (La. 1976).
70. LA. R.S. 14:12 (1950).
71. See, e.g., State v. Jones, 298 So. 2d 774 (La. 1974).
ing to go through a trial. Perhaps the explanation for the negligent homicide decisions is that there is very little alternative to the gross deviations statutory formula. But if one depends on other traffic rules and other statutes to establish the basic duty in the first place, would it not be just as easy to establish a statutory formula that would refer to these certain statutes, instead of leaving the open-ended statute that currently exists?

In an area where easy alternatives exist, the court in Dousay did not look to the facts of a particular case but found the statute unconstitutional on its face. A bill of information was quashed in the decision, and there were no factual findings as to whether a particular defendant should have known that the particular conduct in question was prohibited, even if the statute might have some unconstitutional applications.

**DUE PROCESS—RIGHT TO SUE**

*Flynn v. Devore*\(^7\) held that a mother of a major son could not recover for wrongful death against her son's employer under Civil Code article 2315; she was restricted to a workers' compensation remedy. The case is a traditional application of the notion that there is no fundamental institutional right to sue for damages caused by a defendant. This is consistent with federal developments and developments in other states\(^7\) and is also supported by a prior Louisiana decision.\(^7\) It was argued that Article I, section 22 of the Louisiana Constitution added additional rights in its statement that: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights." The legislative history of this section indicates that it was not to be an extension of rights to recover for injury, but was the continuation of a prior article which had not been given substantial interpretation.\(^7\) The key to understanding this section is the reference to "due process of law and justice," and the flexibility inherent in that concept. Certainly it would be unwise to freeze into constitutional law the vagaries and the policies that accompany the tort doctrines as they develop and are modified by statute.

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72. 373 So. 2d 580 (La. App. 3d Cir. 1979).
75. Hargrave, *supra* note 34, at 65.