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Powell v. State: The Demise of Georgia's Consensual Sodomy Statute

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Powell v. State: The Demise of Georgia's Consensual Sodomy Statute

In *Powell v. State*,[1] the Supreme Court of Georgia held that section 16-6-2 of the Official Code of Georgia Annotated ("O.C.G.A."),[2] which criminalizes sodomy, violates the right to privacy guaranteed by the Georgia Constitution.[3] The court found that the right to engage in private, unforced, consensual, noncommercial sexual acts is included within the meaning of the Due Process Clause of the Georgia Constitution.[4]

I. FACTUAL BACKGROUND

The Gwinnett County District Attorney, Daniel J. Porter, charged Anthony San Juan Powell in an indictment with rape and aggravated sodomy. Powell was accused of having sexual intercourse with and engaging in cunnilingus with his wife's seventeen-year-old niece without her consent and against her will. Powell admitted committing these acts; however, he contended that the sexual acts were consensual. Because of his testimony admitting the sexual acts, the Gwinnett Superior Court instructed the jury on the law of sodomy. The jury acquitted Powell of rape and aggravated sodomy but found him guilty of sodomy.[5]

Powell appealed his conviction on two grounds. First, he contended that the trial court erred when it instructed the jury on the law of sodomy sua sponte because that allowed the jury to consider sodomy, which he was not charged with in the indictment. Second, he contended that the statute criminalizing sodomy committed in private by consent-

1. 270 Ga. 327, 510 S.E.2d 18 (1998).

2. This statute provides, "A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." O.C.G.A. § 16-6-2(a) (1999). Aggravated sodomy is defined as sodomy committed "with force and against the will of the other person." *Id.*

3. 270 Ga. at 336, 510 S.E.2d at 26.

4. *Id.*

5. *Id.* at 327, 510 S.E.2d at 20.

ing adults was unconstitutional because it violated his right to privacy guaranteed by the Georgia Constitution.[6]

II. LEGAL BACKGROUND

In 1784 Georgia adopted the common law of England as the law of Georgia.[7] Until 1816 sodomy was a crime only in the common law.[8] Georgia's first sodomy statute was codified in the Penal Code of 1816.[9] In the 1845 Code, the General Assembly defined sodomy as "the carnal knowledge and connexion against the order of nature by man with man, or in the same unnatural manner with woman."[10] This statute, with the exception of the spelling of "connexion," remained in force until 1968.[11] This statute produced a plethora of surprising judicial decisions.

Herring v. State[12] was the first of many decisions interpreting the sodomy statute. The supreme court held that "there is no limitation as to the means by which this crime may be committed."[13] Thus, the court found that "the abominable crime not fit to be named among Christians" could be committed either *per anum* (by means of the anus), *per os* (by means of the mouth), or by any similar means.[14] The supreme court reaffirmed *Herring* in *White v. State*.[15] In *Jones v. State*,[16] the Georgia Court of Appeals reaffirmed *Herring* and stated that it was "'unwilling to soil the pages of our reports with lengthened discussion of

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6. *Id.*

7. *See* Bowers v. Hardwick, 478 U.S. 186, 192 n.5 (1986). After the ecclesiastical courts merged with the King's Courts, Parliament passed a statute criminalizing sodomy. *See* 478 U.S. at 197 (Burger, C.J., concurring). For a detailed history of the law of sodomy from biblical times through the middle of the twentieth century, see Barton v. State, 79 Ga. App. 380, 381-86, 53 S.E.2d 707, 708-11 (1949).

8. *See Bowers*, 478 U.S. at 192 n.5.

9. *See id.* The statute read: "Sodomy and bestiality, shall be punished by imprisonment at hard labour, in the penitentiary, during the natural life or lives of the person or persons convicted of these detestable crimes." A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA 571 (Lucius Q.C. Lamar ed., Augusta, T. S. Hannon 1821).

10. A CODIFICATION OF THE STATUTE LAW OF GEORGIA, INCLUDING THE ENGLISH STATUES OF FORCE 709 (William A. Hotchkiss ed., Augusta, Charles E. Greenville 2d ed. 1848).

11. *See* GA. CODE § 26-5901 (1933) ("Sodomy is the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman.").

12. 119 Ga. 709, 46 S.E. 876 (1904).

13. *Id.* at 721, 46 S.E. at 881.

14. *Id.*, 46 S.E. at 882 (internal quotation marks omitted).

15. 136 Ga. 158, 158, 71 S.E. 135, 135 (1911).

16. 17 Ga. App. 825, 88 S.E. 712 (1916).

the loathsome subject.'"[17] The court also extended the definition of sodomy to include deviate sexual acts, whether or not supported expressly by the statute (in this case, male to male fellatio).[18] These decisions were unusual because they uncharacteristically read a criminal statute broadly rather than narrowly.[19]

The next case of note concerning the sodomy statute was *Comer v. State*.[20] *Comer* involved cunnilingus, which defendant argued was not encompassed by the sodomy statute.[21] The court of appeals reaffirmed *Herring*, *White*, and *Jones* and stated that "it follows, as a reasonable, logical, and unescapable deduction," that the sodomy statute should be read broadly to include cunnilingus.[22] In dissent Judge Bloodworth stated that the statute, being a criminal statute, must be construed strictly.[23] Though he conceded that sodomy may be committed *per anum* or *per os*, he concluded that the statue required penetration of "either end of the alimentary canal" by the male's penis.[24] Thus, he found that cunnilingus was not a crime under the statute and that sodomy cannot be "committed under our statute without use of the virile organ of the man."[25] Judge Bloodworth suggested that the legislature should amend the statute if it wished cunnilingus to be a crime.[26] The legislature did not heed Judge Bloodworth's counsel until 1968.

Though the court of appeals did not overrule *Comer*, it re-evaluated the position it took in that case in *Wharton v. State*.[27] Relying on Texas authority, the court stated that penetration by the male sex organ was required for a conviction of sodomy.[28] The court thus read the statute narrowly. The effect of the decision was to acknowledge that Judge Bloodworth's dissent in *Comer* was a correct assessment, but the court did not mention *Comer* in its decision.

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17. *Id.* at 827, 88 S.E. at 713 (quoting Means v. State, 104 N.W. 815, 815 (Wis. 1905)).

18. *Id.*

19. *See* Vines v. State, 269 Ga. 438, 438-39, 499 S.E.2d 630, 631-32 (1998) (holding that criminal statutes must be strictly construed against the state and in favor of the defendant); Glustom v. State, 206 Ga. 734, 738, 58 S.E.2d 534, 536-37 (1950) (same); Johnson v. State, 1 Ga. App. 195, 195, 58 S.E. 265, 265 (1907) (same).

20. 21 Ga. App. 306, 94 S.E. 314 (1917).

21. *Id.* at 307, 94 S.E. at 314.

22. *Id.* at 306-07, 94 S.E. at 314.

23. *Id.* at 307, 94 S.E. at 314 (Bloodworth, J., dissenting).

24. *Id.* at 308-09, 94 S.E. at 315.

25. *Id.* at 309, 94 S.E. at 315.

26. *Id.*

27. 58 Ga. App. 439, 198 S.E. 823 (1938).

28. *Id.* at 439, 198 S.E. at 823 (citing Green v. State, 79 S.W. 304, 304 (Tex. Crim. App. 1904)).

The next year, in *Thompson v. Aldredge*,[29] the supreme court was faced with a case involving two women who were convicted of cunnilingus.[30] The court found that cunnilingus between two women was not criminalized by the statute: "That the act here alleged to have been committed is just as loathsome when participated in by two women does not justify us in reading into the definition of the crime something which the lawmakers omitted."[31] The supreme court, following the lead of the court of appeals in *Wharton*, narrowly interpreted the statute.[32] Thus, the court affirmed that sodomy requires the participation of a man.[33]

In 1949 the General Assembly revisited the sodomy statute. It reduced the punishment from life in prison to imprisonment from one to ten years (for sodomy committed on a person over sixteen years old) but did not substantively change the definition of the crime.[34]

In the same year, the court of appeals again addressed the issue of *per anum* and *per os* sodomy in *Barton v. State*.[35] Defendant was indicted for "carnal knowledge and connection, against the order of nature, and in an unlawful manner" with another man.[36] Defendant demurred on the ground that the indictment did not state in what way and manner defendant had carnal knowledge.[37] The court upheld the demurrer.[38] The court explained that the history of sodomy laws included only acts committed *per anum* but that *Herring* extended that definition to include acts committed *per os*; therefore, an indictment must specifically describe how the defendant committed the crime.[39] In essence the court stated that sodomy has been judicially extended and that the common law crime of sodomy did not include acts committed *per os*.

In 1963 the supreme court overruled *Comer*. In *Riley v. Garrett*,[40] the court found that a man cannot be punished for a crime that a woman could not be punished for also.[41] Thus, the court found that cunnilingus was not a crime under the sodomy statute.[42] The court

29. 187 Ga. 467, 200 S.E. 799 (1939).
30. *Id.* at 467, 200 S.E. at 800.
31. *Id.*
32. *Id.*
33. *Id.*
34. 1949 Ga. Laws 275, 276.
35. 79 Ga. App. 380, 53 S.E.2d 707 (1949).
36. *Id.* at 381, 53 S.E.2d at 708 (internal quotation marks omitted).
37. *Id.*
38. *Id.* at 386-87, 53 S.E.2d at 711.
39. *Id.*
40. 219 Ga. 345, 133 S.E.2d 367 (1963).
41. *Id.* at 346-47, 133 S.E.2d at 369-70.
42. *Id.* at 347-48, 133 S.E.2d at 370.

reconciled the seemingly conflicting decisions in *Comer* and *Thompson* by expressly adopting Judge Bloodworth's dissent in *Comer* and holding that the statute must be construed strictly and that sodomy requires penetration by the male sex organ either *per anum* or *per os*.[43]

Following *Riley*, the General Assembly revised the sodomy statute to read: "A person commits sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."[44] The legislature also changed the punishment for sodomy to "imprisonment for not less than one nor more than 20 years."[45]

In *Carter v. State*,[46] the court of appeals again addressed the issue of penetration in a case involving cunnilingus. The court conceded that prior cases required penetration by the male sex organ *per anum* or *per os* for a sodomy conviction.[47] However, the court held that the new statute, by its text and plain meaning, did not require penetration.[48] The court stated, "It does not appear that a jury of reasonable intelligence could construe a sexual act 'involving' the mouth of one person and the sex organs of another as anything other than actual contact."[49] Thus, cunnilingus was (again?) illegal in Georgia.

The argument that the sodomy statute violates an individual's right to privacy appears to have been raised first in *Stover v. State*.[50] In *Stover* defendant was in a public place when the act of sodomy occurred.[51] Therefore, the court held that defendant did not have standing to raise an issue regarding privacy.[52]

The privacy argument was again raised in *Gordon v. State*.[53] Defendant contended that the statute did not "differentiate between the sex or marital status of the possible offenders and, therefore, applies equally to homosexual and heterosexual intimate relationships."[54] The court found that the validity of the statute as applied to the private sexual relations of a married heterosexual couple need not be decided

43. *Id.* at 347, 133 S.E.2d at 370.
44. 1968 Ga. Laws 1249, 1299.
45. *Id.*
46. 122 Ga. App. 21, 176 S.E.2d 238 (1970).
47. *Id.* at 23, 176 S.E.2d at 240.
48. *Id.* at 22-23, 176 S.E.2d at 240.
49. *Id.* at 23, 176 S.E.2d at 240.
50. 256 Ga. 515, 350 S.E.2d 577 (1986).
51. *Id.* at 516, 350 S.E.2d at 578.
52. *Id.*
53. 257 Ga. 439, 360 S.E.2d 253 (1987).
54. *Id.* at 439, 360 S.E.2d at 254.

because defendant "failed to show that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."[55]

In *Christensen v. State*,[56] the supreme court finally addressed the privacy issue involved with the sodomy statute. Defendant was convicted of solicitation of sodomy.[57] Defendant argued that the essential component of solicitation of sodomy was the crime of sodomy and that such crime "infringe[d] upon the privacy rights . . . of adult citizens."[58] The court observed that Georgia "has long recognized a right of privacy inherent in the due process clause of the Georgia Constitution."[59]

The court in *Christensen* addressed the privacy issue by stating, "When a privacy interest is implicated, the state must show that the legislation has a 'reasonable relation to a legitimate state purpose.'"[60] The court stated that the police power of the state includes the power to "enact laws to promote the public health, safety, morals, and welfare of its citizens."[61] The court held that the proscription of sodomy is a legitimate state interest and is in compliance with the police power of the state as upholding the moral welfare of the public.[62] The court acknowledged that many states have abandoned their sodomy statutes, but in Georgia that would be the responsibility of the people via the legislature.[63]

Justice Sears delivered a seething dissent in *Christensen*. She stated that "when the right to privacy is implicated by a state statute, . . . the State is required to produce nothing less than a compelling interest in that statute in order to override the privacy rights implicated."[64] Justice Sears demanded that the constitutional standard of strict scrutiny or the compelling interest standard must be used in this case.[65] She found that the State's arguments did not meet strict

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55. *Id.* at 439-40, 360 S.E.2d at 254 (internal quotation marks omitted). For examples of other cases in which the supreme court refused to address the privacy issue, see *Phagan v. State*, 268 Ga. 272, 273-74, 486 S.E.2d 876, 879 (1997); *King v. State*, 265 Ga. 440, 441, 458 S.E.2d 98, 99 (1995); *Smashum v. State*, 261 Ga. 248, 249, 403 S.E.2d 797, 798 (1991).

56. 266 Ga. 474, 468 S.E.2d 188 (1996).

57. *Id.* at 474-75, 468 S.E.2d at 189.

58. *Id.* at 475, 468 S.E.2d at 189.

59. *Id.* The court also observed that the "Georgia Constitution confer[s] greater rights and benefits than the federal constitution." *Id.*

60. *Id.* at 476, 468 S.E.2d at 190 (quoting Blincoe v. State, 231 Ga. 886, 887, 204 S.E.2d 597, 598 (1974)).

61. *Id.*

62. *Id.*

63. *Id.* at 476-77, 468 S.E.2d at 190.

64. *Id.* at 482, 468 S.E.2d at 194 (Sears, J., dissenting).

65. *Id.*

scrutiny and that the conviction of Christensen, as well as the statute, should be overturned as unconstitutional.[66] Justice Hunstein, while not completely agreeing with Justice Sears's opinion, also stated that strict scrutiny should be the standard to determine whether a statute violates a person's right to privacy, not the rational basis, or low scrutiny, test used by the majority.[67]

Powell v. State was the next case in which the supreme court addressed sodomy and its relation to the right to privacy guaranteed by the state constitution. In *Powell* the majority agreed with Justices Sears and Hunstein that strict scrutiny should be applied.[68]

III. RATIONALE OF THE COURT

The court in *Powell* found that "OCGA § 16-6-2, insofar as it criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent, 'manifestly infringes upon a constitutional provision' which guarantees to the citizens of Georgia the right of privacy."[69] The court extensively quoted and relied on *Pavesich v. New England Life Insurance Co.*[70] to establish that Georgia was a "pioneer" in recognizing the right of privacy and that citizens have "the right to be let alone so long as [one] was not interfering with rights of other individuals or of the public."[71]

The court addressed the question of the constitutionality of the sodomy statute in two parts. The first issue was "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."[72] The second issue

66. *Id.* at 484-85, 468 S.E.2d at 195-96.

67. *Id.* at 489, 468 S.E.2d at 199 (Hunstein, J., dissenting).

68. 270 Ga. at 333 & n.5, 510 S.E.2d at 24 & n.5. In *Phagan v. State*, 268 Ga. 272, 486 S.E.2d 876 (1997), the supreme court addressed which level of scrutiny should be used in determining whether a statute implicates privacy concerns. The court agreed that although *Christensen* used the rational basis test, when an individual invokes the fundamental right to privacy, strict scrutiny should be used in evaluating the statute that implicates the right. *Id.* at 274, 486 S.E.2d at 879. The court found that low scrutiny may be used when legislation "'does not discriminate on racial grounds or against a suspect class.'" *Id.* at 274-75, 486 S.E.2d at 879-80 (quoting Fleming v. Zant, 259 Ga. 687, 688, 386 S.E.2d 339, 340 (1989)).

69. 270 Ga. at 336, 510 S.E.2d at 26 (quoting Miller v. State, 266 Ga. 850, 852, 472 S.E.2d 74, 77 (1996)).

70. 122 Ga. 190, 50 S.E. 68 (1905).

71. 270 Ga. at 329-30, 510 S.E.2d at 21-22 (internal quotation marks omitted) (alteration by court).

72. *Id.* at 332, 510 S.E.2d at 23-24.

was "whether the government's infringement upon that right is constitutionally sanctioned."[73]

In addressing the first issue, the court answered in the affirmative.[74] The court held that "such activity is at the heart of the Georgia Constitution's protection of the right of privacy."[75] The court stated that *Pavesich* did not expressly hold that sexual activity is within the realm of the right of privacy, but that it is clear that such activity is within that realm: "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity."[76]

Having decided that Powell's activity was within the realm of the right of privacy, the court then addressed the question of "whether the government's infringement upon that right is constitutionally sanctioned."[77] In contrast to *Christensen,* the court stated that the government must have a compelling interest to infringe on the fundamental right of privacy and that any intrusion into that right must be made by the least intrusive means possible to meet the state's compelling interest.[78]

The court noted that the state had compelling interests in "shielding the public from inadvertent exposure to the intimacies of others, in protecting minors and other legally incapable of consent from sexual abuse, and in preventing people from being forced to submit to sex acts against their will."[79] These compelling interests are served, according to the court, by narrowly tailored statutes designed to prohibit conduct that is inimical to the state's interests and by vigorously prosecuting violators of these statutes.[80] The court reasoned, "In light of the

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73. *Id.* at 332-33, 510 S.E.2d at 24.
74. *Id.* at 332, 510 S.E.2d at 24.
75. *Id.*
76. *Id.*
77. *Id.* at 332-33, 510 S.E.2d at 24.
78. *Id.* at 333, 510 S.E.2d at 24.
79. *Id.*
80. *Id.* The court listed the following statutes meant to serve the state's compelling interests in "preventing sexual assaults and shielding and protecting the public from sexual acts by the enactment of criminal statutes such conduct: OCGA § 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 indecent 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 to -12 (prostitution, pimping, pandering); § 16-6-15 (solicitation of sodomy); § 16-6-16 (masturbation for hire); § 16-6-22 (incest); §§ 16-6-22.1 and 16-6-22.2 (sexual battery and aggravated sexual battery)." 270 Ga. at 333, 510 S.E.2d at 24.

existence of these statutes, the sodomy statute's raison d'etre can only be to regulate the private sexual conduct of consenting adults."[81] As such, it was beyond the scope of any compelling state interest and, thus, beyond the limits of permissible state regulation.[82]

The court also addressed the holding in *Christensen* that sodomy regulation is within the police power of the state to regulate public welfare and morals.[83] The court did not expressly overrule *Christensen*, but it admitted that the regulation of private, consensual, adult activity was beyond the police power of the state because the statute does not benefit the public, but it unduly burdens individuals.[84]

Justice Sears delivered a concurring opinion in which she found that the court correctly applied the strict scrutiny standard to the sodomy statute.[85] The remainder of her opinion lambasted the dissenting opinion of Justice Carley.

Justice Carley delivered the sole dissent to the opinion of the court. He believed that the court overstepped the boundaries of its authority: "[T]he Court has usurped the legislative authority of the General Assembly to establish the public policy of this state."[86] Justice Carley found that the revocation of the sodomy statute, as applied to private, consensual sexual activity, is a decision that should be made by the people of Georgia via the legislature.[87] He stated that it is not the proper role of the court to change the law of the state whenever "a majority of this Court happens to conclude" that its opinion is the "more enlightened viewpoint on a particular controversial issue."[88] To allow the court to change what it feels is not an "enlightened" law, regardless of the will of the legislature, "constitutes government by this Court, rather than government through a constitutional system."[89] Justice Carley did not express an opinion on whether the sodomy statute "should or should not" be repealed, but he stated that "this Court should not, and indeed constitutionally cannot, do it."[90] Justice Carley, relying on *Christensen*, also stated that the sodomy statute is within the police power of the state to enact.[91] He found that by invalidating the

81. 270 Ga. at 334, 510 S.E.2d at 24-25.
82. *Id.*, 510 S.E.2d at 25.
83. *Id.*
84. *Id.*
85. *Id.* at 336, 510 S.E.2d at 26 (Sears, J., concurring).
86. *Id.* at 344, 510 S.E.2d at 31 (Carley, J., dissenting).
87. *Id.* at 345-46, 510 S.E.2d at 32.
88. *Id.* at 344-45, 510 S.E.2d at 32.
89. *Id.* at 345, 510 S.E.2d at 32.
90. *Id.*
91. *Id.* at 338, 510 S.E.2d at 28.

criminal statute, the court "violates the fundamental constitutional principle of separation of powers."[92] He claimed that by recognizing this right to privacy, the court was allowing the criminal law to be violated.[93] "In my opinion, freedom to violate the criminal law is simply anarchy and, thus, the antithesis of an ordered constitutional system."[94]

Notwithstanding Justice Carley's arguments, the majority found that noncommercial, private, consensual sexual acts between two adults is within the realm of the right of privacy and that the state has no compelling interest in regulating such activity.[95] The court declared that Georgia's sodomy statute was unconstitutional to the extent that it proscribed such activity.[96] Therefore, the court reversed Powell's conviction for performing an act of consensual cunnilingus.[97]

IV. IMPLICATIONS

The implications of *Powell* are probably more illusory than tangible. In Georgia case law, especially since *Bowers v. Hardwick*,[98] there is little, if any, evidence of persons being arrested for noncommercial, private, consensual sexual acts.

In two cases in which the holding in *Powell* has been tested, the court of appeals found *Powell* to be inapplicable because the criminal activity went beyond simple sodomy. In *Johnson v. State*,[99] a jury convicted defendant of aggravated sodomy and aggravated child molestation.[100] Defendant argued that *Powell* abrogated the crime of sodomy. The court stated that *Powell* only held the statute unconstitutional to the extent that it criminalized noncommercial, private, consensual sexual acts between adults.[101] In *McBee v. State*,[102] the jury convicted defendant of rape, aggravated sodomy, and sodomy. After consolidating the sodomy count with the aggravated sodomy count, the trial court entered judgment against defendant for rape and aggravated sodomy. Defendant argued that *Powell* voided his convictions for sodomy and aggravated

92. *Id.*
93. *Id.* at 339-40, 510 S.E.2d at 28-29.
94. *Id.* at 340, 510 S.E.2d at 29.
95. 270 Ga. at 334, 510 S.E.2d at 25.
96. *Id.* at 336, 510 S.E.2d at 26.
97. *Id.*
98. 478 U.S. 186 (1986).
99. 236 Ga. App. 764, 513 S.E.2d 291 (1999).
100. *Id.* at 764, 513 S.E.2d at 292.
101. *Id.* at 766, 513 S.E.2d at 294.
102. 239 Ga. App. 314, 521 S.E.2d 209 (1999).

sodomy.[103] The court again stated that *Powell* only held the sodomy statute unconstitutional to the extent that it criminalized noncommercial, private, consensual sexual acts between adults.[104] The court also stated that *Powell* did not address aggravated sodomy.[105] Because defendant was not sentenced on the sodomy conviction, the court found his argument to be a nullity.[106]

In three other recent cases, the court of appeals upheld sodomy convictions because the acts occurred in public places. In *Parks v. State*,[107] defendant was convicted of sodomy. Defendant appealed his conviction based on *Powell*.[108] However, the court affirmed his conviction because he performed the acts in a public place.[109] In *Gagnon v. State*,[110] defendant was convicted of sodomy and appealed his conviction based on *Powell*.[111] The court affirmed the conviction because the sodomy occurred in a lingerie modeling shop.[112] The court stated, "The conviction of [defendant] of sodomy for a sex act in a public, commercial place is not prohibited by *Powell*."[113] In *Mauk v. State*,[114] defendant appealed his conviction for sodomy based on *Powell*.[115] Again, the court affirmed the conviction because the acts occurred in a public place (in this case, adjacent to a road).[116]

In one case, *Brewer v. State*,[117] the supreme court reversed a sodomy conviction based on *Powell*. In *Brewer* defendant was charged with aggravated sodomy and aggravated child molestation for an alleged single act of sodomy with his eleven-year-old stepdaughter.[118] Defendant was convicted of both counts. The trial court merged the aggravated child molestation conviction into the aggravated sodomy conviction and sentenced defendant only on aggravated sodomy.[119] The supreme court reiterated that since *Powell*, "consensual sodomy is no longer a

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103. *Id.* at 314, 521 S.E.2d at 209.
104. *Id.* at 315, 521 S.E.2d at 210.
105. *Id.*
106. *Id.*
107. 241 Ga. App. 381, ___ S.E.2d ___(1999).
108. *Id.* at 381-82, ___ S.E.2d at ___.
109. *Id.* at 383, ___ S.E.2d at ___.
110. 240 Ga. App. 754, 525 S.E.2d 127 (1999).
111. *Id.* at 754-55, 756, 525 S.E.2d at 128, 129.
112. *Id.* at 756, 525 S.E.2d at 129.
113. *Id.*
114. 2000 WL 122162 (Ga. App. Feb. 2, 2000).
115. *Id.* at *1.
116. *Id.*
117. 271 Ga. 605, 523 S.E.2d 18 (1999).
118. *Id.* at 607-08, 523 S.E.2d at 20.
119. *Id.* at 605-06, 523 S.E.2d at 19.

crime" in Georgia.[120] The court reversed defendant's conviction for aggravated sodomy because there was no proof that defendant acted with force in committing the sodomy, leaving only a charge of sodomy (which was committed in a private, noncommercial, consensual manner).[121] The court remanded the case to the trial court with instructions to charge and sentence defendant with aggravated child molestation, a crime that needs no proof of force.[122]

There are no published cases that test *Powell* and that do not involve other crimes. In fact, except the arrest in *Hardwick*, there have been very few cases involving a person arrested solely for sodomy in many years. The police and courts simply have not enforced the statute against persons engaged in noncommercial, private, consensual sexual acts. Therefore, the tangible effects of *Powell* will probably be minimal. However, in the recent cases that have tested *Powell*, the courts have strictly construed that decision.

The illusory effects, however, are potentially great. The sodomy statute has long been seen by many as specifically curtailing homosexual acts (though the statute does not state that as an objective). After *Powell* the argument that the state was simply trying to criminalize homosexuality vanishes. The court implicitly gave homosexual sex the protection of the state constitution. However, the court also protected heterosexual sodomy in *Powell*.

Moreover, *Powell* guarantees Georgians the right to be secure in their noncommercial, private, consensual sexual acts. Though it is very improbable that the statute ever really deterred noncommercial, private, consensual sexual acts of sodomy, *Powell* tells the state that, in almost all circumstances, it does not have a compelling interest to enter a person's bedroom.

GREGORY K. SMITH

120. *Id.* at 607, 523 S.E.2d at 20.
121. *Id.* at 608, 523 S.E.2d at 20.
122. *Id.*