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Williams v. State: The Constitutionality and Necessity of Sodomy Laws

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WILLIAMS V. STATE: THE CONSTITUTIONALITY AND NECESSITY OF SODOMY LAWS

by Janet M. LaRue and Rory K. Nugent

I. INTRODUCTION

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.[1]

Although Justice White's words of admonition may have been intended for the Supreme Court alone, they succinctly define for all of us the role of the judiciary in a three-branched system of government.[2] The message is clear: state courts, with no inherent powers to create public policy, undermine their viability when they pull jurisprudential rabbits out of hats and fashion new rights from their respective state constitutions. In *Bowers v. Hardwick*, the United States Supreme Court expressed that it had dealt sufficiently with "emanating penumbras" and meticulous historical analysis, and declined to create a federal constitutional right to engage in homosexual sodomy based on such analysis.[3] However, in *Williams v. State*,[4] the Circuit Court for Baltimore City recently delved into issue with dangerous consequences.

Despite the weak legal foundation of the *Williams* case, the circuit court found that a valid law, which served as a necessary means of protecting public health and morality, did not apply to private, consensual, non-commercial sexual activity.[5] It is well recognized that the states have broad powers to legislate with regard to these matters.[6] Sodomy laws prohibit conduct deemed to be immoral by the state and protect the public from disease and infection. These concerns represent legitimate state interests and the judiciary should maintain a high burden of proof for those seeking to overturn the law.

This article will demonstrate how the Maryland courts have ignored precedent and rewritten valid legislation in an attempt to "keep up with the Joneses" during the nationwide frenzy of invalidating state sodomy statutes.[7] The circuit court's decision in *Williams* exemplifies the judicial fiat that now represents legal reasoning in the court system.

II. *WILLIAMS V. STATE*

In *Williams v. State,* six individuals challenged the validity of Article 27, section 554 of the Annotated Code of Maryland.[8] Article 27, section 554 criminalizes sodomy, whether oral or anal, as an unnatural and

[1] Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (finding no constitutional right to engage in homosexual behavior).

[2] *See id.* at 194-95.

[3] *See id.*

[4] No. 98036031/CC-1059, 1998 Extra LEXIS 260 (Balt. City Cir. Ct. Oct. 15, 1998) (holding that Article 27, sections 553 and 554 of the Annotated Code of Maryland do not apply to consensual, non-commercial, private sexual activities).

[5] *See id.*

[6] *See* U.S. CONST. amend. X.

[7] *See* Gryczan v. State of Montana, 283 Mont. 433, 942 P.2d 112 (1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. 1996); Commonwealth v. Wasson, No. 90-SC-588-TG, 842 S.W.2d 487 (Ky. 1992); State v. Morales, No. 3-91-195, 826 S.W. 2d 201 (Tx. Ap. 1992). *But cf.* Miller v. State, No. 91-KA-00057, 636 S.2d. 391 (Miss. 1994); State v. Walsh, No. 67465, 713 S.W.2d 508 (Mo. 1986). The court cites these cases as examples of states that have upheld their laws prohibiting sodomy and similar conduct. One of the cases cited by the court as affirming their anti-sodomy law, Christensen v. State, 266 Ga. 474, 468 S.E.2d 188 (1996), has since been overturned. *See* Powell v. State, 270 Ga. 327, 510 S.E.2d 18 (1998).

[8] MD. ANN. CODE art 27, § 554 (1998). Section 554 reads as follows:

> Every person who is convicted of taking into his or her mouth the sexual organ of any other person or animal, or who shall be convicted of placing his or her sexual organ in the mouth of any other person or animal, or who shall be convicted of committing any other unnatural or perverted sexual practice with any other person or animal, shall be fined not more than one thousand dollars ($1,000.00), or be imprisoned in jail or in the house of correction or in the penitentiary for a period not exceeding ten years, or shall

perverted practice.[9] Four of the plaintiffs, Williams included, were members of the Maryland Bar.[10] Each alleged that the existence of the statute placed them in constant fear of arrest and subsequent prosecution.[11] They argued that as a result of this fear, they had suffered psychological injury and real or potential pecuniary damages.[12] Only one of the plaintiffs, Doe, had been arrested on a related crime of solicitation for attempting to engage in homosexual conduct with an undercover police officer.[13] Doe argued that if section 554 does not prohibit consensual, non-commercial, private homosexual conduct, then solicitation of such conduct should not be illegal.[14] However, the court upheld the solicitation statute, noting that unlike the actual conduct, "an unwanted solicitation is neither private nor consensual."[15]

The sixth plaintiff, who joined only as a taxpayer, asserted that state funds should not have been "wasted" in enforcing the sodomy statute.[16]

The court first noted that in order to seek a declaratory judgment, a justiciable controversy must exist.[17] Ironically, the State argued that there was no justiciable issue since the statute is not enforced as to either heterosexuals or homosexuals as long as the conduct is consensual, noncommercial, and private.[18] The court rejected the argument, observing that present and future State's Attorneys may interpret the statute differently.[19] Therefore, the court concluded that the plaintiffs had a legitimate fear of prosecution and that this fear constituted a justiciable controversy.[20]

III. THE "JUMPING OFF POINT": *SCHOCHET V. STATE*

The *Williams* court analyzed the alleged constitutional issues by first acknowledging that the "jumping off point" for the plaintiffs was *Schochet v. State.*[21] The defendant in *Schochet* was charged with seven counts of rape, as well as fellatio in violation of section 554.[22] The State failed to establish that the sexual activity was non-consensual and a jury subsequently acquitted the defendant of the rape charges.[23] However, the jury returned a guilty verdict on the fellatio charge.[24] The court of special appeals affirmed, holding that there was "no constitutional protection for sexual activity – orthodox or unorthodox, heterosexual or homosexual – at least outside of marriage."[25] The Court of Appeals of Maryland reversed the ruling below after considering two issues: (1) whether Article 27 section 554 encompasses "consensual, noncommercial, heterosexual activity between adults in the privacy of home," and if so, (2) whether it violates either the Constitution of the United States or the Maryland Declaration of Rights.[26]

The *Schochet* court began its opinion by reviewing the canon of construction which demands that "if a legislative act is susceptible of two reasonable interpretations, one of which would not involve a decision as to the constitutionality of the act while the other would, the construction which avoids the determination of

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be both fined and imprisoned within the limits above prescribed in the discretion of the court.

[9] *See id.*

[10] *See* Williams, at *1-2.

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.* at *14.

[15] *See id.* at *15.

[16] *See id.* at *2.

[17] *See id.* at *4.

[18] *See id.* at *5.

[19] *See id.* at *9.

[20] *See id.*

[21] 320 Md. 714, 580 A.2d 176 (1990).

[22] *See id.* at 717, 580 A.2d at 178.

[23] *See id.* at 725, 580 A.2d at 181.

[24] *See id.* at 723, 580 A.2d at 180.

[25] *Id.* (quoting Schochet v. State, 75 Md. App. 314, 339 (1988)). The Court of Special Appeals of Maryland "[r]eject[ed] the argument that Schochet's conviction violated a federal constitutional right to privacy."

[26] *See id.* at 717, 580 A.2d at 177.

constitutionality is to be preferred."[27] In order to avoid an unconstitutional interpretation of the statute, the court of appeals construed the statute narrowly and chose not to include within its scope "noncommercial, heterosexual activity between consenting adults in the privacy of the home,"[28] thereby creating the exception upon which *Williams* was based.[29]

Despite the good intentions of the judiciary, *Schochet*, like *Williams*, is an example of an unbridled court system. As the State argued in *Schochet*, the interpretation that created the exception can hardly be said to be a "reasonable" interpretation of the statute.[30] The legislature in section 554 does not make a distinction between consensual and nonconsensual, public and private, commercial and noncommercial, or most importantly, heterosexual and homosexual activity.[31] Nonetheless, the *Schochet* court held that to give effect to the statute's broad language would raise questions as to its overall constitutionality.[32] In support of this reasoning, the court cited the split amongst the states concerning whether such conduct could be prohibited by legislative enactment.[33]

The court then catalogued all of the Maryland decisions considering section 554.[34] Because no consensual, non commercial, heterosexual conduct had been prosecuted under section 554, the court found that this type of conduct was not within the contemplation of the drafters of section 554, and therefore, was not included within its application.[35] After this lengthy review, the court decided to rewrite the statute, rather than give effect to the intent of the Maryland legislature.

The decision of the court in *Schochet* simply does not follow logical reasoning. The Supreme Court has not yet overruled *Bowers*;[36] therefore, it is inconsequential to Maryland courts how other state tribunals have ruled on similar statues in relation to application of their respective state constitutions.[37] The only issue that need be considered by a Maryland court is the law passed by the Maryland legislature and its applicability to the Maryland constitution. The *Schochet* court, however, fails to mention the Maryland constitution or discuss its application to the issue at bar.[38] Unfortunately, the court in *Williams* follows the same course of ambitious adjudication as demonstrated by the *Schochet* court.[39]

The court of appeals in *Schochet* also rejected the argument forwarded by the State based on the legislative history surrounding section 554.[40] The Maryland General Assembly proposed an amendment to a bill dividing rape into first and second degrees, thus effectively repealing sections 553 and 554.[41] The report from the Maryland Senate Judicial Proceedings Committee commented that sections 553 and 554 should be repealed, as offenses

[27] *Id.* at 725, 580 A.2d at 181 (quoting Heilman Brewing v. Stroh Brewery, 308 Md. 746, 763-764 (1987)).

[28] *Id.* at 731, 580 A.2d at 184.

[29] *See* Williams, at *13. The plaintiffs in *Williams* questioned why consensual, noncommercial, heterosexual activity, excluded by section 554, should apply to homosexual activity in similar circumstances.

[30] *See id.* at 729, at 580 A.2d 183.

[31] *See id.*; *see also*, MD. ANN. CODE art. 27, § 554 (1998).

[32] *See id.* at 731, 580 A.2d at 184.

[33] *See id.* at 726, 580 A.2d at 182. The court looked to *People v. Onofre*, 51 N.Y.2d 476, 488, 415 N.E.2d 936, 940-41, 434 N.Y.S.2d 947, 951 (1980) (holding as unconstitutional the invasion of privacy to attempt to regulate, through use of criminal penalty, consensual oral sex between persons of the opposite sex). The court also cited *Commonwealth v. Balthazaar*, 366 Mass. 298, 318 N.E. 478 (1974) (interpreting statute narrowly so as to avoid constitutional issue as to whether consensual oral sex, in private, between members of the opposite sex, can be proscribed by statute).

[34] *See id.* at 731, 580 A.2d 184-85. The court categorized the cases into three types: (1) those that involved homosexual activity, (2) those that involved minors, and (3) those that involved a violation in a public place. *See id.*

[35] *See id.* at 733, 580 A.2d at 185.

[36] *See* Bowers, 478 U.S. 186.

[37] *See id.* at 194-95.

[38] *See* Schochet, 320 Md. at 714, 580 A.2d at 176.

[39] *See id.* at 714, 580 A.2d 176.

[40] *See id.* at 734, 580 A.2d at 186.

[41] *See id.* at 733, 580 A.2d at 186 (citing Pitcher, *Rape and Other Sexual Offense Law Reform In Maryland*, 7 U. BALT. L. REV 151 (1977)).

under these sections were rarely prosecuted.[42] However, when the bill was finally enacted it had been amended so as not to repeal the statutes at issue.[43] The State, therefore, posited that because these sections were not repealed, the legislature intended sections 553 and 554 to apply to consensual, noncommercial heterosexual activity.[44] The court found this argument "unpersuasive," and declared that the General Assembly "may have decided that consensual homosexual acts should still be prohibited."[45] This statement by the court of appeals appears to indicate that the judiciary anticipated no equal protection problem in applying section 554 to homosexuals but not to heterosexuals. Nevertheless, the *Williams* court disagreed, finding that section 554 violated the equal protection rights of an individual.[46]

It is often said that "hard cases make bad law." In light of *Schochet* and the circuit court's expansion of that case, it may well be said that bad law will only make more hard cases. The reconstruction of section 554[47] by the *Schochet* court has led the *Williams* court to also conduct an ad hoc exercise of judicial will, rather than a consistent and prudent exercise of judicial reasoning. The Court of Appeals of Maryland attempted to avoid a constitutional privacy issue by creating a potential equal protection issue;[48] the *Williams* decision attempted to address the equal protection problem and rendered a legislative enactment meaningless.[49] *Schochet* certainly provides a "jumping off point" on the issue. The concern though, is where we will land.

IV. THE RIGHT TO PRIVACY AND EQUAL PROTECTION

Rather than defend the statute, the State in *Williams* argued before the Circuit Court for Baltimore City that the *Schochet* ruling should not be extended to include consensual, noncommercial, homosexual activity in the privacy of the home.[50] Otherwise, the State claimed, enforcement of section 554 would amount to an unconstitutional invasion of privacy.[51] The circuit court agreed, holding that the statute does not apply to homosexual conduct, just as it does not apply to heterosexual conduct.[52] In a single paragraph, the court provides a scant analysis and announced, "[i]t cannot be doubted, as Defendants concede, that there would be an equal protection violation if acts, considered not criminal when committed by a heterosexual couple, could be prosecuted when practiced by a homosexual couple."[53] In the tradition of *Schochet*, the court then construed the statute so as not to include consensual, noncommercial, homosexual activity between adults in private.[54] Other than the court using *Schochet's* aphorism "in order to avoid serious constitutional issues," the court did not cite any Maryland case law or statute in support of its reasoning.[55]

The opinion in *Williams* suggests that the Equal Protection Clause would be violated because the *Schochet* case recognized a privacy interest in the context of heterosexual conduct. This is false. *Schochet* clearly stated that it was giving section 554 a narrow construction in order to avoid constitutional questions.[56] The unreasonable interpretation that *Schochet* gives to section 554 certainly provides the appearance of clever constitutional adjudication, yet the court of appeals went

[42] *See id.* at 733-34, 580 A.2d at 186 (citing the Senate Judicial Proceedings Committee report on Senate Bill 358).

[43] *See id.* at 734, 580 A.2d at 186.

[44] *See id.*

[45] *Id.* at 735, 580 A.2d at 187.

[46] *See* Williams, at *13-14.

[47] *See* Schochet, 320 Md. at 725-26, 580 A.2d at 181-82.

[48] *See id.*

[49] *See* Williams, at *14.

[50] *See id.* at *13.

[51] *See id.* at *13-14.

[52] *See id.*

[53] *See id.* at *13.

[54] *See id.* at *22.

[55] *Id.*

[56] *See id.* at *10. The question remains, however, how there can be certainty as to the existence of a constitutional issue that has never been before a Maryland court.

to great lengths to indicate that it was avoiding the privacy issue. The *Schochet* decision does not hold that there is a right to privacy when engaging in consensual, noncommercial heterosexual conduct in private, rather, the court in *Schochet* holds that section 554 does not apply in this context.[57] Therefore, the *Williams* court clearly needed to look beyond *Schochet* for support of its ruling.

A. The Uncle No One Talks About: *Neville v. State*

In *Neville v. State*,[58] the Court of Appeals of Maryland provided guidance that the courts largely ignored in both *Schochet* and *Williams*. The court in *Neville* found the defendant guilty of violating section 554 for committing oral sodomy with a woman at an abandoned missile site.[59] The court of appeals upheld the conviction on the grounds that the missile site was a public area and, therefore, the privacy rights of the defendant did not attach.[60] After reviewing several United States Supreme Court opinions, as well as the applicable Maryland cases, the *Neville* court determined that "[i]t is clear from the foregoing review that there is no holding by the Supreme Court that the right of privacy applies to conduct of the type prohibited by Md. Code, Art. 27 §554."[61] If there is no right to privacy for this type of behavior guaranteed under the United States Constitution, then such a privacy right must be found in state law if it is entitled to the protection of the court.

The defendant in *Neville* argued that the statute violated equal protection guarantees because it creates two classes: (1) a class of married people, whose right to privacy shields them from prosecution, and (2) a class of unmarried people, who are subject to prosecution under section 554.[62] The right to privacy under section 554 would, therefore, attach to one class, but not to the other.[63] The court reviewed this argument and held that if a married couple was prosecuted under section 554, the marriage would not be a defense and no other privacy interest associated with marriage would apply.[64] Under this rationale, it is fair to say that the Court of Appeals of Maryland would not find a right to privacy associated with the conduct proscribed by section 554. If this is the case, then the *Williams* court is merely hypothesizing when it says, "[i]t cannot be doubted that there would be an equal protection violation."[65]

Further, the *Neville* court considered whether an intermediate standard of review applies that requires "a fair and substantial relation between the statute under consideration and the legitimate objective of the police power for which it was enacted."[66] According to *Neville*, this standard applies where legislation involves important personal rights that do not merit strict scrutiny review, but are entitled to more protection than the rational relation test would afford.[67] The court rejected the standard, holding that the practices proscribed by section 554 did not qualify as an "important personal right."[68] Instead, the court applied the rational relation test, and held section 554 to be a valid exercise of Maryland's police power in maintaining a decent society and protecting the public morality.[69] In light of this precedent, it is surprising that a trial court could find that the sodomy statute would not survive equal protection analysis.

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[57] *See* Schochet, 320 Md. at 735, 580 A.2d at 186

[58] 290 Md. 364, 430 A.2d 570 (1981).

[59] *See id.* at 367, 430 A.2d at 572.

[60] *See id.* at 377, 430 A.2d at 576-77.

[61] *Id.* at 377, 430 A.2d at 576.

[62] *See id.* at 381-82, 430 A.2d at 579.

[63] *See id.* at 382, 430 A.2d at 579.

[64] *See id.*

[65] Williams, at *13.

[66] *Neville*, 290 Md. at 383, 430 A.2d at 580.

[67] *See id.*

[68] *Id.*

[69] *See id.* at 383-84, 430 A.2d at 580.

V. THE VALIDITY OF SODOMY LAWS

Having suffered defeat several times on the floor of the legislature, individuals seeking repeal of the sodomy laws have sought relief in the courts. Such plaintiffs advance the same policy arguments that failed in the political process, and in a case such as *Williams*, these arguments act as an invaluable tool to supplement weak legal analysis. Nevertheless, the courts are willing to listen, and society is forced to enter an unconstitutional area where the process of judicial legislation occurs.

A. Constitutionality of Sodomy Laws

As noted earlier, the Supreme Court held in *Bowers v. Hardwick*[70] that there is no federal constitutional right to engage in sodomy. This opinion has been the subject of much commentary and criticism as it seemed to contradict a line of cases considering the right to privacy.[71] For example, in *Griswold v. Connecticut*,[72] the court stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[73] The Court in *Bowers*, however, refused to advance *Griswold's* "prenumbras" and "emanations" in the context of state sodomy laws.[74]

The continued existence of *Bowers* was subsequently threatened by the decision of *Romer v. Evans*.[75] In *Romer*, the Supreme Court held that Amendment 2 of the Colorado State Constitution, which precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their homosexual, lesbian or bisexual orientation, conduct, practices or relationships, violated the Equal Protection Clause of the Fourteenth Amendment.[76] *Bowers*, however, remains valid and provides keen insight into the *Griswold* line of cases.[77] In *Bowers*, Justice White meticulously distinguished sodomy from the rights that had been declared implicit in the "right to privacy," asserting that the limits of this right had been discerned by *Carey v. Population Services International*.[78] The Court reviewed a number of privacy cases[79] and concluded that the "right to privacy," as defined by these cases, became relevant only in the contexts of family, marriage, or procreation.[80] Since there is no connection between sodomy and the interests of family, marriage, or procreation, the Court held that the "right to privacy" does not create a right to engage in homosexual sodomy.[81]

Continuing its analysis, the *Bowers* Court held that because sodomy is not protected by the Constitution, it may be validly regulated by the police power of the states.[82] This police power includes the ability of the state to regulate matters between consenting adults in private, and can be

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[70] *See* Bowers, 478 U.S. 186.

[71] *See e.g.*, Michael L. Closen, *Symposium on Health Care Policy: What Lessons Have We Learned From the AIDS Pandemic?*, 61 ALB. L. REV. 897 (1998); Mark John Kappelhoff, Bowers v. Hardwick*: Is There a Right to Privacy?*, 37 AM. U. L. REV. 487 (1988).

[72] 381 U.S. 479 (1965) (holding that the Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy).

[73] *See id.* at 484.

[74] *See* Bowers, 478 U.S. at 197.

[75] 517 U.S. 620 (1996).

[76] *See id.* at 635.

[77] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (dealing with education and the raising of children); Prince v. Massachusetts, 321 U.S. 158 (1944) (concerning familial relationships); Skinner v. Oklahoma *ex rel.* Willamson, 316 U.S. 535 (1942) (dealing with procreation); Loving v Virginia, 388 U.S. 1 (1967) (involving marriage); Griswold v. Connecticut, 381 U.S. at 479 (1965) (concerning contraception); Einsenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973) (discussing abortion).

[78] 431 U.S. 678, 685 (1977) (finding that the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, conception, family relationships, and child rearing and education).

[79] *See* Pierce, 268 U.S. at 510; Meyer, 262 U.S. at 390 (dealing with education and the raising of children); Prince, 321 U.S. at 158 (concerning familial relationships); Skinner, 316 U.S. at 535 (dealing with procreation); Loving, 388 U.S. at 1 (involving marriage); Griswold, 381 U.S. at 479 (concerning contraception); Einsenstadt, 405 U.S. at 438; Roe, 410 U.S. at 113 (discussing abortion).

[80] *See* Bowers, 478 U.S. at 190.

[81] *See id.* at 190.

[82] *See id.* at 195-96. *See also*, Chief Justice Burger's concurring opinion that "[t]his is essentially not a question of personal preferences' but rather of the legislative authority of the State. I find nothing in the

sufficiently founded on the basis of morality.[83] In support of this statement, the Supreme Court noted that, "[t]he law, however, is constantly based on notions of morality, and if all the laws representing moral choices are to be invalidated under the Due Process Clause, the courts would be very busy indeed."[84] Urging caution, *Bowers* provided a reminder that morality is traditionally within the state's police power.[85]

B. Sodomy Laws and "Public Morality"

The Maryland Court of Appeals in *Neville* characterized Article 27, section 554 as a valid exercise of the state's police power in its protection of the public morality.[86] Critics of this justification argue that sodomy laws are outside of the concern for the public morality when it is consensual and private.[87] But are sodomy laws actually "outside the realm of public morality" whenever sexual conduct occurs in private and with mutual consent? The answer should be a resounding no. For example, the following activities are still considered illegal: private, consensual sex between a man and a sixteen-year-old girl;[88] bestiality in the privacy of the Griswoldian bedroom;[89] incestuous affairs between adults;[90] private possession and ingestion of illicit drugs;[91] private possession of child pornography;[92] and private consensual, homosexual and heterosexual prostitution.[93] These illustrations[94] make it clear that "public morality" may, and in fact does, include consensual conduct that occurs in a private setting.

Whenever the state regulates conduct for the sake of public morality, it is a policy-based determination made by the legislature that the conduct in question addresses, thereby affecting, the morality of the citizens of that state. It is perfectly valid for the state to make a legislative decision that reflects a deeper moral choice.[95] Thus, the concern for the public morality is not limited to

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Constitution depriving a State of the power to enact the statute challenged here." *Id.* at 196-97.

[83] *See id.* at 196.

[84] *Id.*

[85] *See id.*

[86] *See* Neville, 290 Md. at 383, 430 A.2d at 580.

[87] *See* Comment, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 636 (1986).

[88] *See* MD. ANN. CODE art. 27, § 463(3) (1998).

[89] This crime, like anal sodomy, is also prohibited by section 554 as an "unnatural and perverted practice." The Humane Society of the United States has recently launched a campaign to make sexual abuse of animals illegal; the group notes that bestiality was previously prosecuted under the sodomy laws that have since been struck down. *See*, Barbara Hagenbaugh, *U.S. Group Campaigns to Outlaw Animal Sex*, RTw (Reuters World Report), March 16, 1999. *See also* <http://www.hsus.org>.

[90] *See* MD. ANN. CODE art. 27, § 335 (1998) (it is a felony in Maryland to have carnal knowledge of another person, being within the degrees of consanguinity within which marriages are prohibited by law).

[91] *See* MD. ANN. CODE art 27, § 286 (1998) (it is unlawful in Maryland to manufacture, distribute, counterfeit, manufacture a controlled dangerous substance or possess certain equipment for the purpose of using controlled dangerous substances).

[92] *See* 18 U.S.C.A. § 2252.

[93] *See* MD. ANN. CODE art. 27, § 15(e) (1998) (it is unlawful in Maryland to procure or to solicit or to offer to procure or solicit for the purpose of prostitution, lewdness or assignation).

[94] The Court in *Bowers* also made use of this illustration and concluded:

> And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road. Bowers, 478 U.S. at 195-96.

In *Paris Adult Theatre I v. Slanton*, 413 U.S. 49, 68 (1973), the Court also rejected the idea that conduct between consenting adults is always beyond state regulation. The Court stated:

> Our Constitution establishes a broad range of conditions on the exercise of power by the states, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults is always beyond state regulation, is a step we are unable to take.

The Court went on to cite examples such as prostitution, duels, bigamy, adultery, and fornication. Paris Adult Theatre *I*, 413 U.S. at 68, n.15.

[95] In *Paris Adult Theatre I*, the Court quoted *Roth v. United States*, 354 U.S. 476, 485 (1957) stating that the state can legitimately act in order to protect "the social interest in order and morality." Paris Adult Theatre, 413 U.S. at 61. The Court further stated that a law should not be invalidated simply because it "reflects unprovable assumptions about what is good for people." *Id.* at 62.

nonconsensual conduct or conduct that occurs in public. "Public morality" should be construed to mean the morality *of* the public, not merely morality *in* public. As noted above, this power to proscribe conduct is only restrained by the federal and state constitutions. Accordingly, unless the conduct is protected by some constitutional right, it may be validly proscribed by the state's police power.

Moreover, the purpose of the sodomy law is to encourage moral behavior[96] (i.e., that which is productive, healthy, or otherwise beneficial for the individual or society) and to discourage immoral behavior. Even if such moral behavior is not practiced in private homes, these laws have the effect of restraining immoral, unhealthy conduct and preventing its normalization.[97] To invalidate a law, not because it is unconstitutional, but merely because it reflects a moral decision on the part of the legislature, is to deprive the states of their constitutional right to regulate the conduct of their citizens.[98] To strip the state of the moral dimension of its police power is to render the state helpless in controlling and confronting conflicts for which its citizens expect a remedy. Arguing that the state has no interest in the public morality beyond the public forum necessarily undermines what has traditionally been delegated to the states.

C. Sodomy Laws and Public Health

The Supreme Court has also recognized that a state may validly exercise its police powers in the interest of public health.[99] This is especially important in the advent of the HIV/AIDS epidemic and the explosion of other sexually transmitted diseases. States are struggling to find a way to reduce the rapid spread of disease, and many experimental measures have been tried.[100] It has been proposed that the HIV/AIDS crisis has a much greater impact on homosexuals and intravenous drug users.[101] As a corollary, those who engage in intravenous drug use and unprotected sex are categorized as "high risk" for contracting the HIV virus.[102] If the tide of this epidemic is to be turned, then such "high risk" behavior must become the focal point of our concern.

The most recent statistics available from the Centers for Disease Control and Prevention highlight the need to control "high-risk" sexual behavior.[103] Homosexual men represent fifty-seven percent of the cumulative total number of AIDS cases through 1998 in the United States, a far larger percentage than any other category.[104] Furthermore, sodomy, whether heterosexual, homosexual, or bisexual, inevitably leads to rectal and prostate damage which may lead to the onset of AIDS, hepatitis B, and other sexually transmitted diseases.[105] Former Surgeon General C. Everett Koop has stated that "anal intercourse, even with a condom, is simply too dangerous a practice."[106]

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[96] *See* Bowers, 478 U.S. at 192.

[97] *See id.*

[98] *See* U.S. CONST. amend. X.

[99] *See* Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) (quoting Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719 (1985) and Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 756 (1985)).

[100] *See* Comment, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U.MIAMI L.REV. at 631-34.

[101] *See* United States Congress, OFFICE OF TECHNOLOGY ASSESSMENT, REVIEW OF THE PUBLIC HEALTH SERVICES RESPONSE TO AIDS 6 (WASH., D.C.) (pub. No. OTA-TM-H-24) (Feb. 1985).

[102] *See id.*

[103] CENTERS FOR DISEASE CONTROL AND PREVENTION, HIV/AIDS SURVEILLANCE REPORT, Midyear Edition, Vol. 10, No. 1 (1998).

[104] *See id.* at 12, Table 5. In contrast, heterosexual males represent only four percent of AIDS cases. *Id.* If the figures are totaled by race or ethnicity, the greatest percentage of AIDS cases is again found among homosexual males. *Id.* at 16, Table 9. Of males between the ages of thirteen and nineteen, homosexuals represent thirty percent of the total number of AIDS cases, while heterosexual males comprise only nine percent. *Id.* at 26, Table 18. Between the ages of twenty and twenty-four, homosexual males represent sixty-three percent, while heterosexual males represent only four percent. *Id.* Even though the Centers report that AIDS incidence is declining in all groups, statistics show that homosexual behavior carries with it a greater risk of infection.

[105] *See The Causes of Male Homosexuality, Why is Homosexuality not a Normal Sexual Variation?*, National Association for Research and Therapy of Homosexuality.

[106] Celia Hooper, *Surgeon General Advises Doctors to Teach Patients about Condoms*, United Press International, Oct. 13, 1987.

Statutes such as section 554 of the Maryland Annotated Code, were enacted to prohibit "unnatural or perverted practices" among all classes of people and serves to curtail risks that arise as a result of such behavior. It is clear that controlling this behavior is within the state's power to regulate conduct for the sake of the public health. In light of the statistics cited, it would be prudent for the state maintain such a statute.

VI. CONCLUSION

It is the duty of a trial court to apply the law as it is written to the set of facts to be decided. Considering the *Williams* ruling, however, this statement is worth repeating. *Williams* relies on the rulings of other state courts that have interpreted their own state constitutions regarding the statutes that had been approved by their state legislatures. *Williams* also relies on *Schochet*, a case that is exceptional for its willful construction of the law and analysis that similarly ignores its own precedent. It should be recognized that a constitutional issue in one state is not necessarily a constitutional issue in every state. A tribunal does not fulfill its duty merely by pronouncing that other courts are divided on the issue, and then arbitrarily deciding whether it is to fall on the "pro" or "con" side.

Lastly, it is well within the state's legislative power to prohibit conduct that is not constitutionally protected. States have always had the ability to criminalize conduct that was considered indecent in order to maintain the morality of the citizenry. The state's power to regulate immoral conduct extends not only to public activities, but to activities engaged within private arenas as well. Additionally, it has been generally held that the state has a compelling interest in promoting public health and safety. Sodomy laws, therefore, come well within the legislative territory of the states. The fact that the critics of these laws have failed to persuade the states otherwise is not an argument against the validity of enacted statutes.

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