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The Legalization of Same-Gender Sexual Intimacy in Maryland

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THE LEGALIZATION OF SAME-GENDER SEXUAL INTIMACY IN MARYLAND

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I. INTRODUCTION

Criminalizing sexual intimacy is an unwarranted invasion of personal liberty. Government simply has no legitimate interest in prohibiting private, non-commercial intimate sexual activity between consenting adults. The Annotated Code of Maryland appears to violate this principle by subjecting those engaged in certain common acts of sexual intimacy to up to ten years in prison. Article 27, section 554 of the Annotated Code of Maryland makes it a crime for a person to "tak[e] into his or her mouth the sexual organ of any other person," or to "plac[e] his or her sexual organ in the mouth of any other person."[1] That section also prohibits "any other unnatural or perverted sexual practice with any other person."[2] Further, Article 27, section 553 outlaws "sodomy,"[3] or anal sex.

If these statutes were to be applied literally, they would criminalize acts that the vast majority of Americans - and, presumably, Marylanders - practice.[4] The Court of Appeals of Maryland's 1990 ruling in *Schochet v. State*,[5] however, exempted private, non-commercial, consensual heterosexual oral sex from the reach of Maryland's criminal law. But that ruling left same-gender couples who practice oral or anal sex vulnerable to prosecution, while also creating uncertainty over the permissibility of prosecuting heterosexual couples who engage in anal sex.

A 1999 ruling by the Circuit Court for Baltimore City has largely corrected *Schochet's* limitations. In the wake of *Williams v. State*,[6] all Marylanders may now engage in private, non-commercial, consensual sexual intimacy without fear of prosecution. The *Williams* decision is in line with a recent trend toward eliminating archaic sex laws, which has left only a minority of states with operable sodomy statutes.[7]

While advancing gay and lesbian rights, as well as signifying a victory for the privacy rights of all Marylanders, the *Williams* ruling stopped short of completely decriminalizing the field of sexual intimacy. *Williams* forecloses prosecution of private, non-commercial,

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[1] MD. ANN. CODE art. 27, § 554 (1996). Violations of this codal section are punishable by a fine of up to $1,000, confinement for up to ten years, or both. *Id.* Oral sex was first made a crime under Maryland law in 1916. *See* Schochet v. State, 320 Md. 714, 733 n.5, 580 A.2d 176, 185 n.5 (1990).

[2] MD. ANN. CODE art. 27, § 554 (1996). This section makes it a crime to "take[ ] into his or her mouth the sexual organ of any other person or animal . . . or . . . . commit[ ] any other unnatural or perverted sexual practice with any other person or animal . . . ." *Id.* A violation of this statute is punishable by a fine of up to $1,000 and/or confinement for up to ten years. *Id.*

[3] MD. ANN. CODE art. 27, § 553 (1996). Sodomy is punishable by confinement for up to ten years. *Id.* This section traces its roots to a 1793 statute. *See* 1793 Md. Laws ch. 57, § 10. At common law, the offense of "crimes against nature" was "narrowly limited to copulation per anum." *See* Rose v. Locke, 423 U.S. 48, 53 (1975). "Most American jurisdictions," however, "have expanded the definition of sodomy to include contact between mouth and genitals." *See* RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 65 (1996). *See generally* Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45 (1991); Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 201-25 (1986).

[4] *See* JUNE M. REINISCH, THE KINSEY INSTITUTE NEW REPORT ON SEX 132 (1990) (noting that a "study reported that more than 90 percent of married couples younger than 25 had engaged in oral sex" while another "study of more than 100 heterosexual couples of all ages reported a similar percentage"); *see also* JAMES PATTERSON & PETER KIM, THE DAY AMERICA TOLD THE TRUTH 81 (1991) (finding that 79 percent of the men and 70 percent of the women surveyed had engaged in oral sex and 40 percent of the men and 34 percent of the women surveyed had engaged in anal sex).

[5] 320 Md. 714, 580 A.2d 176 (1990).

[6] No. 98036031/CC-1059, 1998 Extra LEXIS 260 (Balt. City Cir. Ct. Oct. 15, 1998).

[7] Only eighteen states and Puerto Rico now have operable sodomy statutes, five of which apply only to same-gender partners. American Civil Liberties Union, *Status of U.S. Sodomy Laws* (last modified Jan. 1999) <http://www.aclu.org/issues/gay/sodomy.html>. In one of those eighteen states, Louisiana, a Court of Appeal decision recently struck down the sodomy statute to the extent that it prohibited non-commercial, consensual, private sexual behavior. *See* State v. Smith, No. 97-KA-

consensual sex acts themselves, but leaves open the possibility of prosecuting someone merely for asking another adult to engage in such legal acts. This article will discuss the implications of *Schochet* and *Williams* and suggest approaches for completing the decriminalization of intimate sexual activity in Maryland.

II. *SCHOCHET V. STATE*

Steven Adam Schochet was tried in the Circuit Court for Montgomery County for allegedly forcing a woman to engage in several sex acts with him in her apartment.[8] Schochet admitted to having sex with the woman, including an act of fellatio, but maintained that she had consented.[9] The jury apparently believed Schochet, acquitting him of all of the charged forcible sex acts.[10] The judge, however, had declined the defense's request for an instruction that consent was a defense to the oral sex charge.[11] In light of the judge's instructions and Schochet's own admission that the alleged victim had performed fellatio on him, it is hardly surprising that the jury found him guilty of violating the "unnatural and perverted sexual practices" statute.[12]

Schochet appealed his conviction to the Court of Special Appeals of Maryland, arguing that the United States Constitution prohibits the criminalization of "private and noncommercial sexual acts between consenting heterosexual adults."[13] The court of special appeals affirmed Schochet's conviction by a two-to-one decision. Judge Moylan, joined by Judge Garrity, held that the United States Constitution provides no "protection for sexual activity - orthodox or unorthodox, heterosexual or homosexual - at least outside of marriage."[14] Judge Wilner, in dissent, concluded that both the United States Constitution's Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights[15] protected Schochet from prosecution for engaging in private, consensual, non-commercial, heterosexual fellatio.[16]

The Court of Appeals of Maryland granted Schochet's certiorari petition and, in a majority opinion written by Judge Eldridge, overturned Schochet's conviction without reaching the constitutional issue. Rather than siding with the court of special appeals majority or dissent, the court of appeals narrowly construed the unnatural and perverted sexual practices statute to exclude acts of consensual, private, non-commercial, heterosexual oral sex from its scope.

The court of appeals initially noted that "very strong arguments, based on Supreme Court decisions and language in Supreme Court opinions, can be made on both sides of the constitutional right to privacy issue presented here."[17] These conflicting arguments resulted

1393, 1999 WL 74614 (La. Ct. App. Feb. 9, 1999); *see also* Louisiana Electorate of Gays and Lesbians v. State of Louisiana, No. 94-9260 (Orleans Civ. Dist. Parish Ct. March 17, 1999). Other recent decisions striking down sodomy statutes include *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Gryczan v. Montana*, 942 P.2d 112 (Mont. 1997) (invalidating sodomy statute under state constitutional right to privacy); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996) (invalidating sodomy statute under state constitution); and *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

[8] *See* Schochet v. State, 320 Md. 714, 717-18, 580 A.2d 176, 177-78 (1990). Schochet was charged with rape in the first degree, rape in the second degree, first and second degree sexual offenses for engaging in forcible oral and anal intercourse, sodomy, and unnatural and perverted sexual practices. *Id.*

[9] *See id.* at 720-21, 580 A.2d at 179. Schochet, however, denied engaging in anal intercourse. *Id.* at 721, 580 A.2d at 179.

[10] *See id.* at 723, 580 A.2d at 180. The jury also acquitted him of the sodomy charge. *Id.*

[11] *See id.* at 722 & n.3, 580 A.2d at 180 & n.3.

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

[13] Schochet v. State, 75 Md. App. 314, 315, 317, 541 A.2d 183, 183-84 (1988).

[14] *See id.* at 339, 541 A.2d at 195.

[15] Article 24 of the Maryland Declaration of Rights provides, "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." The Court of Appeals has indicated that Article 24 is coextensive with the U.S. Constitution's Fifth Amendment Due Process Clause. *See* Lodowski v. State, 307 Md. 233, 513 A.2d 299 (1986).

[16] *See* Schochet, 75 Md. App. at 362-63, 541 A.2d at 206-07 (Wilner, J., dissenting).

[17] *See* Schochet, 320 Md. at 726, 580 A.2d at 181.

in a "significant division" among courts "addressing the constitutionality of punishing consensual, heterosexual acts between consenting adults in private...."[18] The Maryland court cited seven cases supporting a constitutional right to engage in such conduct,[19] while citing an additional six cases for the opposite view.[20] The majority concluded that "the approximately even division among appellate courts reinforces our conclusion that the constitutional issue here presented is a very difficult one."[21]

Next, the court analyzed whether the language of Article 27, section 554 could be narrowly construed to avoid the constitutional question. Chief Judge Murphy's dissent argued that the oral sex statute does not permit a limiting construction because its "all-encompassing language was plainly intended to reach those 'unnatural' or 'perverted' sexual practices, therein so vividly described, without exception."[22] The majority, however, rejected this argument, expressly relying on the "very broad and sweeping" language of section 554 to conclude that "[t]he statute's silence concerning the matters of consent, privacy, marriage, etc., creates legitimate questions regarding the reach of the statute."[23]

The court of appeals also surveyed its own case law involving sections 553 and 554,[24] noting that "many cases in this Court involving §§ 554 or 553 have been prosecutions for homosexual activity,"[25] "prosecutions for sexual acts with minors,"[26] and prosecutions for sexual activity "in places which could not be considered 'private.'"[27] But "none has been a prosecution based on consensual, noncommercial, heterosexual activity between adults in the privacy of the home."[28]

Ultimately, the court held that under the circumstances of the case, section 554 did not apply; therefore, the conviction had to be reversed.[29] *Schochet*'s net effect was to legalize heterosexual oral sex and throw into doubt the continued criminalization of heterosexual anal sex, while leaving acts of same-gender oral and anal sex open to prosecution.

III. *WILLIAMS V. STATE*

A. Attacking the Prohibition Against Same-Gender Oral Sex

In the wake of *Schochet*, some Maryland law enforcement agencies continued vigorous application of section 554 to gay men, including arrests for invitations to go to private places to engage in consensual, non-commercial oral sex.[30] Following one such undercover sting operation designed to arrest men for soliciting other men to engage in oral sex, the American Civil Liberties Union filed a challenge to section 554's application to private, non-commercial, consensual, same-gender oral sex.[31] The suit challenged the use of Section 15(e) of Article 27,[32] which prohibits solicitation "for the

[18] *Id.*

[19] *See id.* at 726-27, 580 A.2d at 181-82.

[20] *See id.* at 727, 580 A.2d at 182.

[21] *Id.* at 728, 580 A.2d at 183.

[22] *Id.* at 737, 580 A.2d at 187 (Murphy, C.J., dissenting).

[23] *Id.* at 729, 580 A.2d at 183.

[24] *Id.* at 731-34, 580 A.2d at 184-85.

[25] Schochet, 320 Md. at 731, 580 A.2d at 184.

[26] *Id.* at 731, 580 A.2d at 185.

[27] *Id.*

[28] *Id.* at 734, 580 A.2d at 185.

[29] *See id.* at 735, 580 A.2d at 186.

[30] *See* Plaintiffs' Memorandum in Opposition to State Defendants' Motion to Dismiss, Exhibit A, Williams v. State, No. 98036031/CC-1059, 1998 Extra LEXIS 260 (Balt. City Cir. Ct. Oct. 15, 1998) (statement of probable cause indicating that a defendant was arrested under section 15(e) for inviting an undercover police officer "to come to his house" to engage in oral sex). *See generally* P.J. Shuey, *Dozens Busted for Lewdness at Adult Store*, CAPITAL (Annapolis), Aug. 12, 1997, at B1. The stigmatizing effect of an Anne Arundel County sting operation was heightened by the Capital's publication of the names and addresses of those arrested, including both an elementary school principal and a prominent U.S. Navy officer. *See Navy Chief's Aide Charged in Sex Sting*, CAPITAL (Annapolis), Aug. 13, 1997, at D1.

[31] *See* Williams, at *2.

[32] *See id.*

purpose of . . . lewdness,"[33] to criminalize a request to engage in such a private, non-commercial, consensual sex act.

The plaintiffs in *Williams* included four gay men and a lesbian who wished to engage in private intimate activity and who feared prosecution under Maryland law.[34] One of these such plaintiffs had already been previously arrested for inviting an undercover police officer to engage in a private sex act.[35] The final plaintiff was a taxpayer who objected to the use of her tax dollars to enforce statutes criminalizing same-gender sexual intimacy.[36]

The plaintiffs based their challenge on both privacy and equal protection principles. The privacy arguments advanced called for a reinterpretation of federal privacy law and a more expansive reading of Maryland privacy law.[37] For example, in *Bowers v. Hardwick*,[38] the Supreme Court held that the United States Constitution does not preclude states from criminalizing same-gender sex acts.[39] Through its decision in *Romer v. Evans*,[40] however, the Supreme Court had cast some doubt over *Bowers*' continued vitality.[41] Thus, the *Williams* privacy challenge could have allowed the Supreme Court an opportunity to revisit *Bowers*. The *Williams* case also presented the Maryland Court of Appeals with an opportunity to find that the Maryland Declaration of Rights includes a broad privacy right that protects same-gender sexual activity.

On the other hand, the equal protection claims raised unresolved questions of whether the federal or state constitutions prohibit the criminalization of same-gender intimate activity that is legal for married or unmarried heterosexual couples. The equal protection challenge under the United States Constitution was bolstered by the Supreme Court's holding in *Romer v. Evans*, which adopted a "muscular rational basis"[42] standard to review laws that draw distinctions on the basis of sexual orientation.[43] The complaint also raised a challenge under Article 46 of the Maryland Declaration of Rights (the state Equal Rights Amendment), which provides that "[e]quality of rights under the law shall not be abridged or denied because of sex."[44] At its most basic level, the criminalization of only same-gender oral sex acts appears to violate the equal rights guarantee. For example, imagine two people, A and B, engaged in an act of oral sex. Assume A is a man. Under *Schochet*'s interpretation of section 554, the sex act is legal if B is a woman, but illegal if B is a man. B's gender alone determines the act's legality, thus raising serious equal protection concerns under Article 46.[45]

The defendants in *Williams*, who included both State of Maryland and Anne Arundel County officials, moved to dismiss the complaint. The crux of the defendants' argument was that the plaintiffs did not have standing to challenge section 554's applicability to private, non-commercial consensual same-gender oral sex because the statute was never enforced against

[33] *See* MD. ANN. CODE art. 27, § 15(e) (1996). Section 15 provides, "[i]t shall be unlawful: . . . (e) To procure or to solicit or offer to procure or solicit for the purpose of prostitution, lewdness or assignation." A violation of this statute is punishable by a fine of up to $500 and/or confinement for up to one year. *See id.* at § 17.

[34] *See* Williams, at *2, 3.

[35] *See id.*

[36] *See id.* at *3.

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

[38] 478 U.S. 186 (1986).

[39] *See id.* at 190-91.

[40] 517 U.S. 620 (1996).

[41] *See* Thomas C. Grey, Bowers v. Hardwick *Diminished*, 68 U. COLO. L. REV. 373 (1997). *See also* Nabozny v. Podlesney, 92 F.3d 446, 458 n.12 (7th Cir. 1996) ("Of course Bowers will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer v. Evans*, [517 U.S. 620 (1996)].").

[42] Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Arguments over Gay Rights*, 1996 WIS. L. REV. 893, 966.

[43] *See* Romer, 517 U.S. at 631.

[44] Maryland Declaration of Rights, Art. 46.

[45] *See* Kline v. Ansell, 287 Md. 585, 414 A.2d 929 (1980) (holding that the cause of action for criminal conversation, which was available to a husband whose wife committed adultery, but not to a wife whose husband committed adultery, violated Article 46).

such activity.[46] However, the defendants also offered a fall-back argument that would prove crucial to the case's resolution. The Attorney General's office argued on behalf of the State defendants that if the court determined that the plaintiffs had standing to challenge sections 15[47] and 554, "it should construe those statutes so as not to apply to private, consensual, non-commercial homosexual activity."[48] In *Schochet*, the court of appeals had already narrowed section 554 to exclude "consensual, non-commercial, heterosexual activity between adults in the privacy of the home."[49] In essence, the defendants asked the circuit court to narrow *Schochet*'s construction of section 554 still further "by striking the word heterosexual from the holding."[50]

In light of the defendants' proposed limiting construction, the outcome of the case would depend almost entirely on the standing issue. After receiving briefs and hearing oral arguments, Judge Richard T. Rombro of the Circuit Court for Baltimore City held that the plaintiffs did, indeed, have standing to challenge the statutes.[51] While noting that a criminal statute's mere existence is insufficient to provide standing,[52] the court found that "Plaintiffs' concern goes beyond the mere existence of a criminal statute."[53] Judge Rombro pointed to the possibility that a conviction for violating the challenged statutes could jeopardize the licenses of those plaintiffs who are lawyers, thus threatening their ability to earn a living.[54] The court also noted that a conviction could threaten the plaintiffs' ability to serve as personal representatives of their partners' estates.[55] The court observed that twenty-four separate State's Attorneys had discretion to decide how to enforce the challenged statutes,[56] thus making it impossible to know how each of those officeholders and their successors would choose to enforce those sections.[57] Accordingly, the court found that it could not say that the plaintiffs' subjective fear of prosecution was merely imagined, and that the challenge presented "a justiciable issue, ripe for resolution."[58]

After resolving the question of standing, the court considered the proper scope of section 554. In a ringing endorsement of the principle that individuals should be treated equally regardless of their sexual orientation, Judge Rombro opined, "[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. There is simply no basis for the distinction."[59] Judge Rombro then offered an analogy to support his conclusion: "[o]ne group may drive at 60 miles per hour, but another would be prosecuted for driving at a speed greater than 50 miles per hour. Merely to state such a hypothesis is to show its constitutional infirmity."[60] Thus, "in order to avoid serious constitutional issues,"[61] the court held that section 554 "does not encompass consensual, non-commercial,

[46] *See* Williams, at *8.

[47] *See supra* note 33.

[48] Memorandum in Support of State Defendants' Motion to Dismiss at 5, Williams v. State, No. 98036031/CC-1059, 1998 Extra LEXIS 260 (Balt. City Cir. Ct. Oct. 15, 1998). The defendants maintained that if the court construed the statute in this manner, it should dismiss the suit. *See id.* at 6. While embracing the proposed statutory construction, the plaintiffs countered that the court should adopt the defendants' proffered construction by issuing an injunction and a declaratory judgment. *See* Plaintiffs' Memorandum in Opposition to State Defendants' Motion to Dismiss at 24.

[49] Schochet , 320 Md. 714, 731, 580 A.2d 176, 184 (1990).

[50] Williams, at *21-22.

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

[52] *See id.* at *13 (quoting Hitchock v. Kloman, 196 Md. 351, 356, 76 A.2d 582, 584 (1950)).

[53] *Id.*

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

[55] *See id. See also* LaGrange v. Hinton, 91 Md. App. 294, 603 A.2d 1385 (1992) (holding that a person convicted of violating section 554 is ineligible to serve as an executor or administrator of a will).

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

[57] *See id.* at *14-15.

[58] *Id.*

[59] *Id.* at *22.

[60] *Id.*

[61] *Id.* (quoting Schochet).

heterosexual or homosexual activity between adults in private."[62]

B. Extending the Court's Ruling to the Prohibition Against Anal Sex

Less than nine months after *Williams* was filed, the court ruled that Maryland's criminal law should not make distinctions based on sexual orientation. While that ruling was an enormous step forward, it applied only to section 554, which governs oral sex, and not to section 553, which governs anal sex. In the wake of *Schochet* and the initial *Williams* opinion, section 553's continued applicability to both heterosexual and same-gender private, non-commercial, consensual anal sex was unclear.

To resolve this continued uncertainty as to section 553's scope, the plaintiffs negotiated an agreement under which the defendants consented to the circuit court's extension of its *Williams* ruling to section 553 as well. That extension fit well within the legal framework established by *Schochet* and the initial *Williams* opinion. While the *Schochet* court did not directly construe section 553, because *Schochet* had been acquitted of the sodomy charge,[63] the *Schochet* decision's rationale seems to apply to section 553 as well as to section 554. In finding that section 554's application to private, consensual, non-commercial heterosexual sexual activity would raise constitutional doubt, the court of appeals pointed to seven cases invalidating or limiting other states' statutes criminalizing private sexual activity.[64] Six of those seven statutes prohibited not only oral sex, but also sodomy as defined by section 553. Additionally, since the court of appeals decided *Schochet* in 1990, several other states' sodomy laws had also been judicially invalidated.[65] Thus, the constitutional doubt regarding application of section 554 to private, non-commercial, consensual sexual activity also envelops the application of section 553 to anal sex.

At the request of the parties in *Williams*, the circuit court agreed to extend its initial ruling to include section 553 as well as section 554.[66] Accordingly, the court resolved the *Williams* case by declaring "that Article 27, Sections 553 and 554 of the Annotated Code of Maryland do not apply to consensual, non-commercial, private sexual activities . . . ."[67] The court also enjoined the defendants - including the State of Maryland and its employees - from enforcing those sections in cases of consensual, non-commercial, private sexual activity.[68] This injunction gives the *Williams* ruling statewide effect due to the fact that every prosecutor in Maryland is a state employee.[69]

The importance of the *Williams* ruling lies in two aspects that reach beyond the court of appeals' *Schochet* holding. First, while *Schochet* construed section 554 to exclude acts of private, non-commercial, consensual *heterosexual* oral sex,[70] the *Williams* ruling expands the exception to apply to same-gender oral sex acts as well.[71] Second, the *Schochet* holding, though not necessarily its rationale, was limited to section 554.[72] The *Williams* ruling, however, applies to section

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[62] *Id.*

[63] *See supra* notes 10-11.

[64] Schochet v. State, 320 Md. 714, 726-27, 580 A.2d 176, 181-82 (1990) (citing State v. Pilcher, 242 N.W.2d 348 (Iowa 1976); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980); Post v. State, 715 P.2d 1105 (Okl. Crim. App. 1986), Commonwealth v. Bonadio, 415 A.2d 47 (Penn. 1980); Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968) (concluding that application of Indiana's sodomy statute to marital sexual acts raises substantial constitutional questions), Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), State v. Saunders, 381 A.2d 333 (N.J. 1977)).

[65] *See supra* note 7.

[66] *See* Williams, at *1.

[67] *Id.*

[68] *See id.*

[69] *See* Valle v. Pressman, 229 Md. 591, 600, 185 A.2d 368, 374 (1962) (holding that a State's Attorney is a state, rather than local, official). The Attorney General, another state official, is responsible for handling criminal appeals for the prosecution. *See* Md. Const. art. V, § 3(a)(1).

[70] *See* Schochet, 320 Md. at 734, 580 A.2d at 186.

[71] *See* Williams, at *25

[72] *See* Schochet, 320 Md. at 734, 580 A.2d at 186.

553 as well as section 554.[73] *Williams* thus largely decriminalizes private consensual sexual activity in Maryland.

IV. THE CONTINUED CRIMINALIZATION OF SOLICITATION

Even after *Williams*, Maryland's criminal law still improperly intrudes into one area of personal relationships: requests to engage in intimate activity. The *Williams* plaintiffs had challenged application of Maryland's solicitation statute - Article 27, section 15(e)[74] - to requests to engage in private, non-commercial, consensual sex acts. This challenge was based on the proposition that "once private intimate activity is recognized as legal, a request to engage in that activity cannot be criminal."[75] In rejecting this argument, Judge Rombro reasoned that the court of appeals' "*Schochet* decision held that acts between consenting adults which were conducted in private are not criminal. An unwanted solicitation is neither private nor consensual."[76] The circuit court found that "the varied ramifications of solicitation make it inappropriate for a court to declare such a statute facially unconstitutional."[77] The court contended that legal distinctions arise according to "whether the solicitation occurs in a bar, gay or straight, [or] in a shopping mall. In the latter case, there is involved an element of harassment and nuisance: cases arising from that set of facts usually come about because of merchant complaints that their customers have received unwelcome overtures."[78] That assertion, nevertheless, is open to doubt; in many arrests for solicitation in public places, the "victims" are undercover police officers purposely creating an impression that they desire to be solicited.[79]

Regardless of the accuracy of the court's empirical assessment, not every annoyance is—or should be—subject to criminal prosecution. A man who approaches a woman at a bar, on a street corner, or in a park and suggests that they go to his home to engage in sexual intercourse may be guilty of boorish behavior, but he is not guilty of a crime. If a man approaches another man and suggests that they go to his home to engage in oral or anal sex, he is guilty of a crime. The law then violates the equal protection rationale that was crucial to the *Williams* ruling interpretation of section 554. The circuit court was wrong, then, in maintaining that section 15(e) "prohibits solicitation by either homosexuals or heterosexuals."[80] Contrary to the court's insistence that "one segment of society is not singled out,"[81] gay men appear to be the only targets of prosecution under section 15(e) for asking someone to engage in non-commercial intimacy. Moreover, Judge Rombro's rationale does not address why the state should be permitted to criminalize *any* discussion of private sexual activity between adults, regardless of whether the prohibition targets a specific group or applies across-the-board. Unconstitutional restrictions on free speech are not cured simply by applying them indiscriminately.

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[73] *See* Williams, at *1.

[74] *See supra* note 33.

[75] Williams, at *22-23 (quoting Plaintiffs' Memorandum in Opposition to State, at 22).

[76] *Id.* at *25.

[77] *Id.*

[78] *Id.*

[79] *See generally,* Philip P. Pan, *Pr. George's Judge Is Arrested in Restroom,* WASH. POST, Jan. 16, 1998, at C1; Justice Stanley Mosk, *Project—The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County,* 13 UCLA L. REV. 643, 690-94 (1966) (discussing police sting techniques); Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration,* 45 FLA. L. REV. 755, 778-79 (1992) (noting that "enforcing laws suppressing certain forms of private consensual activity . . . may create more crime than it prevents").

[80] Williams, at *24.

[81] *Id.*

The factor that should govern the legality of a request to engage in non-commercial sexual intimacy is not the location of the request, but rather the proposed location of the act. If an individual solicits an adult to go to a private place to engage in a non-commercial sex act, then the requested act should be legal. Conversely, if an individual solicits an adult to engage in a sex act in a public place, such as a shopping mall restroom, then the requested act may constitute indecent exposure and, if so, may therefore be subject to punishment.[82]

Criminalizing requests -- even requests in public places -- to engage in private sexual activity would present a serious constitutional question. The First Amendment[83] simply does not allow the criminalization of pure speech for the purpose of proposing a legal activity,[84] at least absent a harassment element, which section 15(e) lacks. That principle is consistent with the New York Court of Appeals' decision in *People v. Uplinger*, which considered a statute that criminalized loitering "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature."[85] The New York court invalidated the statute, reasoning that "[i]nasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose."[86]

Therefore, applying section 15(e) to requests to engage in private, non-commercial, consensual sex acts presents a serious constitutional issue that can be avoided simply by construing section 15(e) to exclude requests to engage in such conduct. Indeed, the statutory construction rule of *in pari materia*[87] offers the best interpretation of section 15(e). In applying this concept, section 15(e) prohibits solicitation to commit "lewdness." Section 16, in turn, defines "lewdness" as "any unnatural sexual practice."[88] Section 554's title is "Unnatural or perverted sexual practices." Accordingly, even absent any constitutional difficulties arising from the criminalization of pure speech, the most logical interpretation of section 15(e) is that it prohibits only requests to engage in activities that are illegal under section 554.[89] Under *Williams*, section 554 "do[es] not apply to consensual, non-commercial, private sexual activities."[90] Hence, a request to engage in such activity is not a solicitation of "lewdness" as that term is defined under Maryland law.

V. STATUTORY REVISION

While the *Williams* ruling brings Maryland in line with the majority of states by legalizing private consensual intimate activity, the ruling is in danger of being overlooked. Because the case was resolved at the circuit court level without an appeal, the decision will not appear in Michie's Annotated Code of Maryland. The opinion is available via LEXIS, but only in the GENFED library's EXTRA file. In time, police agencies, state's attorneys, and even judges may become unfamiliar with the *Williams* ruling, thus risking law enforcement activity enjoined by *Williams*.

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[82] *See* MD. ANN. CODE art. 27, § 335A (1996). This section makes "indecent exposure" a crime punishable by a fine of up to $1,000 and/or confinement for up to three years. *Id.*

[83] *See* U.S. CONST. amend. I.

[84] *Id.*

[85] 447 N.E.2d 62, 62 (N.Y. 1983) (quoting PENAL LAW § 240.35, subd. 3).

[86] *Id.* at 63.

[87] *See* 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51 (5th ed. 1992). The rule of *in pari materia* provides that where two statutes deal with the same subject matter, they should be construed together. This rule of statutory construction is well established under Maryland law. See Gargliano v. State, 334 Md. 428, 436, 639 A.2d 675, 679 (1994).

[88] MD. ANN. CODE art. 27, § 16 (1996). This section describes the terms "prostitution," "lewdness," and "assignation" as follows: (1) prostitution - "the offering or receiving of the body for sexual intercourse for hire," (2) lewdness - "any unnatural sexual practice," (3) assignation – "the making of any appointment, or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement."

[89] This proposed construction does not conflict with *In re* Appeal No. 180, 278 Md. 443, 365 A.2d 540 (1976), which broadly construes section 15's use of the word "solicit." Rather than interpreting the word "solicit," this proposed construction limits those acts that constitute "lewdness."

[90] Williams, at *1.

To ensure that Maryland law is applied consistently with the State's own recommended interpretation in *Williams*, the Article 27 Revision Committee[91] should propose either modifying sections 15(e), 553, and 554 to exclude private, non-commercial, consensual sex acts or, in the alternative, abolishing sections 553 and 554 altogether while deleting the word "lewdness" from section 15(e). Maryland law has other provisions that criminalize non-consensual sex acts,[92] public sex acts, [93] and commercial sex acts.[94] These provisions are sufficient to regulate undesirable forms of vaginal intercourse; no reason exists to suspect that they are insufficient to regulate oral and anal sex as well.

VI. CONCLUSION

The decriminalization of consensual sex in Maryland began with the court of appeals decision in *Schochet*. *Williams* has advanced the evolutionary process begun by *Schochet*, but that evolution is not yet complete. Maryland law now presents the anomaly of certain forms of behavior enjoying greater protection than the mere pure speech about those behaviors. This anomaly could be cured by a judicial interpretation of section 15(e) that narrows it to match the *Schochet/ Williams* framework. Alternatively, section 15(e) could be narrowed legislatively in conjunction with a codification of *Schochet* and *Williams*. Only then will the bedrooms of the "Free State" truly be free.

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[91] *See generally* MARYLAND MANUAL 1996-1997 at 135-37 (Diane P. Frese ed.) (1996) (discussing Code Revision Committee and Article 27 Revision Committee).

[92] *See* MD. ANN. CODE art. 27, §§ 462-64C (1996).

[93] *See* MD. ANN. CODE art. 27, § 335A (1996).

[94] *See* MD. ANN. CODE art. 27, § 15 (1996).

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