

# NLGLA WRITING COMPETITION

## Will Maryland Enter the Twenty-First Century in the Right Direction by Rescinding Its Ancient Sodomy Statutes?

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I.	INTRODUCTION .....	672
II.	HISTORICAL ANALYSIS .....	673
	A. <i>The Origin of Sodomy Laws</i> .....	673
	B. <i>The Origin of Maryland's Sodomy Statute</i> .....	674
III.	ATTITUDE TOWARD SODOMY BEFORE THE LANDMARK CASE .....	675
	A. <i>Key State and Federal Court Decisions Across the         Nation</i> .....	675
	B. <i>Maryland Refused to Touch Their Sodomy Statute</i> .....	676
IV.	<i>BOWERS V. HARDWICK</i> .....	678
	A. <i>Intriguing Facts and Procedural History</i> .....	678
	B. <i>The Decision and Its Impact</i> .....	679
V.	THE AFTERMATH OF <i>BOWERS V. HARDWICK</i> .....	682
	A. <i>National Perspective</i> .....	682
	B. <i>Maryland's Reaction.</i> .....	685
	C. <i>Arguments Offered in Defense of Sodomy Statutes</i> .....	686
VI.	ARGUMENTS TO PURSUE IN MARYLAND .....	688
	A. <i>Statute Violates State Constitutional Guarantee of Right         To Privacy</i> .....	688
	B. <i>Statute Violates State Constitutional Guarantee of         Equal Protection</i> .....	689
	C. <i>Statute Violates the Reach of Police Power</i> .....	690
	D. <i>Statute Causes Harm Beyond Present Prosecution</i> .....	691
	E. <i>Statute Violates the Eighth Amendment</i> .....	693
	F. <i>Maryland's Statute Is in Violation of International Law</i> .....	695
VII.	GOOD NEWS EMANATES FROM THE <i>ROMER</i> DECISION.....	695
VIII.	CONCLUSION .....	696

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This Paper is About:  
“the most comprehensive of rights  
and the right most valued by civilized men . . .  
the right to be let alone.”<sup>1</sup>

## I. INTRODUCTION

As Maryland prepares to enter the 21st century, the state should reflect back on where it was as it started the 20th century. Maryland, like America, was still a land where women could not vote or run for office, and where only a few could attend a university or enter a profession.<sup>2</sup> Discrimination against other Americans because of their religion, or their nationality, or their skin color was an everyday fact of life, accepted by all except the most radical of reformers. But incessantly, change came. And change will continue to come.

The history of America is an epic tale of the expansion of justice and human liberty, with each generation of Americans writing a new chapter in the long-running story. It has always been a story of politics, and of interest groups battling for control over the direction of our country. Our nation's strength has always been its diversity, and its willingness to embrace change.

At every turn, there have been those in our country who have opposed the expansion of civil rights. These opponents have argued against such issues as ending slavery, giving women the vote, and guaranteeing equal opportunity to religious minorities. Some Americans have argued that women should not be able to practice law.<sup>3</sup> There were those who told the Irish that they need not apply for jobs and that Jews were not welcomed to join their clubs.<sup>4</sup>

Those arguments fell in the face of America's ongoing belief in the expansion of human rights. Similarly, arguments echoing throughout the nation in support of sodomy laws will also fall to a whisper. Maryland, as well, will have to stop clinging to the safe past and decide to step forward and embrace change. Maryland needs to have the courage to be a leader and advocate for an individual's right to privacy and the right to be left alone. Maryland can and should rid

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1. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part by* *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967).

2. See GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 43-46 (3d ed. 1994).

3. See *id.* at 46.

4. Telephone Interview with Samuel Kaplan, Regional Director, B'Nai B'Rith (Mar. 10, 1998).

itself of these ancient sodomy statutes by way of legislative action or judicial activism.

## II. HISTORICAL ANALYSIS

### A. *The Origin of Sodomy Laws*

One must go back to biblical times to find the origin of the word *sodomy*. The term comes from the biblical city of Sodom, which was destroyed by God because of its' citizens evil practices.<sup>5</sup> Sodomy was considered a religious offense during the Middle Ages where the ecclesiastic courts had control over the religious beliefs of both clergy and laity.<sup>6</sup> Henry VIII made sodomy a crime in England, punishable by "burning at the stake, hanging, drowning, or being buried alive."<sup>7</sup> The prohibition of sodomy arrived in America as the colonies came into existence.<sup>8</sup> The first sodomy case took place in the Massachusetts Bay Colony in the winter of 1641-1642 and involved three men who were discovered to have had sexual contact with two female children.<sup>9</sup> Unsure as to what charge to bring against these men, the Governor asked jurists and church leaders, "whether the defendant's behavior constituted a 'sodomitical act,' punishable by death."<sup>10</sup> Thus, initially, sodomy was not solely associated with homosexual activity.

Yet, for many people today, sodomy is only a reference used towards homosexual relationships. Senator Strom Thurmond asserted during congressional hearings on the military's policy of excluding gays that "heterosexuals don't practice sodomy."<sup>11</sup> Courts have also followed suit, as evidenced in *Padula v. Webster*, by calling sodomy the "behavior that defines the class" of homosexuals.<sup>12</sup> However,

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5. See Pauline G. Feist, Note, *State v. Baxley: A Disappointing Louisiana Supreme Court Decision*, 21 S.U. L. REV. 129, 132 n.21 (1994) (referring to Genesis 9:5). "God sends an angel, disguised as travelers to find one just man. They come upon the house of Lot. When the Sodomites learn of the presence of the visitors, they demand, 'Where are the men, which came into thee this night? Bring them out unto us, that we may know them.' The central key to the injunction against homosexuality is found in the final five words of the Sodomites demand. The words 'that [they] may know them.' To know is assumed to mean carnal knowledge . . . the acts of the sodomites is where the term 'sodomy' is derived from." *Id.*

6. See *id.* at 133.

7. *Id.*

8. See *id.*

9. See Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 533 (1992).

10. *Id.* at 534.

11. Teresa M. Bruce, Note, *Doing the Nasty: An Argument For Bringing Same-Sex Erotic Conduct Back Into The Courtroom*, 81 CORNELL L. REV. 1135, 1151 (1996) (citing *Senators Loudly Debate Gay Ban*, N.Y. TIMES, May 8, 1993, at A9).

12. 822 F.2d 97, 103 (D.C. Cir. 1987).

dictionaries such as Webster's do not limit the definition of sodomy to just homosexuals.<sup>13</sup> The term is defined as: "1. copulation with a member of the same sex or with an animal. 2. noncoital and esp. anal or oral copulation with a member of the opposite sex."<sup>14</sup> Sodomy is also defined differently from state to state, which is highlighted by Black's Law Dictionary: "While variously defined in state criminal statutes, is generally oral or anal copulation between humans, or between humans and animals."<sup>15</sup>

### B. *The Origin of Maryland's Sodomy Statute*

Today, states may wrestle with the meaning of sodomy but that was not the case back in the 1800s. In *Davis v. State*, Justice Earle claimed that "[t]he crime of sodomy is too well known to be misunderstood, and too disgusting to be defined, farther than by merely naming it."<sup>16</sup> *Davis* involved a prosecution for homosexual activity under an earlier sodomy statute, Ch. 57 of the Acts of 1793.<sup>17</sup> The present sodomy statute, Article 27 section 554<sup>18</sup> was initially enacted by Ch. 616 of the Acts of 1916.<sup>19</sup> Subsequent history shows that the Senate Judicial Proceedings Committee passed Senate Bill 358 as originally introduced which became Ch. 573 of the Acts of 1976 calling for repeal of Article 27 sections 553 and 554.<sup>20</sup> However, "before final enactment, Senate Bill 358 was amended so as not to repeal sections 553 and 554. Those sections were left intact."<sup>21</sup> These sodomy statutes are still intact as of today despite several challenges.<sup>22</sup>

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13. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1120 (9th ed. 1985).

14. *Id.*

15. BLACK'S LAW DICTIONARY 1391 (6th ed. 1990).

16. 3 H. & J. 154, 157 (1810).

17. *See id.*

18. MD. CODE ANN., [unnatural or perverted sexual practices] § 554 (1997). Section 554 provides in part:

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), or be imprisoned . . . for a period not exceeding ten years, or shall be both fined and imprisoned within the limits above prescribed in the discretion of the court.

*Id.*

19. *See Schochet v. State*, 580 A.2d 176, 185 n.5 (Md. 1990).

20. *See id.* at 186.

21. *Id.*

22. *See infra* notes 150-193 and accompanying text.

## III. ATTITUDE TOWARD SODOMY BEFORE THE LANDMARK CASE

Statutes criminalizing consensual homosexual activity existed in all fifty states<sup>23</sup> until 1961.<sup>24</sup> In 1955, the American Law Institute (ALI) decided that the Model Penal Code would not include sodomy laws.<sup>25</sup> Illinois became the first state to follow the ALI's recommendation and decriminalized all consensual, adult, private sexual relations in 1961.<sup>26</sup> Twenty-two state legislatures followed Illinois and decriminalized sodomy with Wisconsin in 1982 being the last state to do so before *Bowers v. Hardwick* (*Hardwick I*) was decided in 1986.<sup>27</sup> Additionally, prior to *Hardwick I*, New York and Pennsylvania were the only states to have their highest state courts declare their sodomy statute unconstitutional.<sup>28</sup>

A. *Key State and Federal Court Decisions Across the Nation*

Before *Hardwick* was decided, most states, when arguing to retain their sodomy statutes on the books, cited the decision of *Doe v. Commonwealth of Virginia*.<sup>29</sup> In *Doe*, the District Court for the Eastern District of Virginia held that "since [sodomy] is obviously no portion of marriage, home or family life," the state could punish sodomy in the promotion of morality and decency.<sup>30</sup> The United States Supreme Court rejected petitioners claim that Virginia's sodomy statute was unconstitutional as applied to adult male consensual conduct when it affirmed this decision in a Memorandum Opinion.<sup>31</sup>

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23. See *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986) (listing statutory prohibitions on sodomy for all fifty states).

24. See Feist, *supra* note 5, at 146.

25. See Paula A. Brantner, Note, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HAST. CONST. L.Q. 495, 498 (1992).

26. See *id.*

27. See *id.*

28. See *People v. Onofre*, 415 N.E.2d 936, 943 (N.Y. 1980); *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980); Feist, *supra* note 5, at 146.

29. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

30. *Id.* at 1202.

31. See *id.*; see also *Kelly v. State*, 412 A.2d 1274, 1275 (Md. Ct. Spec. App. 1980) *aff'd sub nom.* *Neville v. State*, 430 A.2d 570 (Md. 1981) (stating that "[i]nsofar as a Memorandum Opinion is authority, it appears . . . privacy does not protect the perverted sex practice of which appellant was convicted.").

*B. Maryland Refused to Touch Their Sodomy Statute*

The first recorded prosecution of sodomy in Maryland occurred in 1810.<sup>32</sup> In describing the first count, the trial court stated that:

Davis, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil . . . with force and arms at . . . in and upon one WC, a youth of the age of 19 years, in the peace of God . . . then and there being, did make an assault, and . . . there did beat, wound, and ill treat, with an intent that most horrid and detestable crime, (among christians not to be named, called Sodomy, with him the said WC and against the order of nature . . . to the great displeasure of the Almighty God.<sup>33</sup>

The Court not only sentenced Davis to prison but also fined him \$500 and ordered that he “stand in the pillory on the third Saturday of January . . . for the space of fifteen minutes, between the hours of 12 and 1 o’clock.”<sup>34</sup>

Howard Kelly wasn’t ordered to stand in the pillory but was convicted of perverted sexual practices in 1978 by a jury in the Circuit Court for Anne Arundel County.<sup>35</sup> Kelly and a friend, Ronald Holden, were tried together for allegedly abducting a sixteen year old female at knife point in a mall parking lot and driving her to an abandoned missile site.<sup>36</sup> There, according to the female, “she was assaulted, raped, and forced to engage in fellatio” before being abandoned at the missile site.<sup>37</sup> However, Kelly and Holden testified she had performed fellatio on them several times at her urging and her initiative.<sup>38</sup> They testified that she consented to the variety of sexual conduct which took place.<sup>39</sup> The jury acquitted Kelly “on all counts of the indictment in which force or threat of force was an element, but found him guilty” of committing an unnatural and perverted sexual practice in violation of MD. CODE ANN. [unnatural or perverted sexual practices] § 554.<sup>40</sup>

Kelly argued that his constitutional rights were violated.<sup>41</sup> However, the Court of Special Appeals held that: (1) The right of privacy does not provide a right to engage in fellatio and

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32. See *Davis v. State*, 3 H. & J. 154 (1810).

33. *Id.*

34. *Id.* at 155.

35. See *Kelly*, 412 A.2d at 1274-75.

36. See *id.* at 1274.

37. *Id.*

38. See *id.* at 1275.

39. See *id.*

40. *Id.*

41. See *id.* at 1274.

(2) imposition of any penalty for sodomy was not in itself cruel and unusual punishment.<sup>42</sup> Similar to the trial court in *Davis*, the Court of Special Appeals made several references to the Bible: “We are especially reluctant to invalidate a crime of such ancient vintage. Sodomy was prohibited by Acts of 1793, Chapter 57, § 10. See also Exodus 22:19, Leviticus 18:22-23, and Deuteronomy 23:17.”<sup>43</sup> Regardless of what weight Kelly’s arguments may have had, this Court was not going to act to strike a law that has been in place since the turn of the century without “clear authority from higher courts.”<sup>44</sup> People did not have to fear judicial activism by Maryland’s Court of Special Appeals.

On appeal, Kelly’s case was consolidated with Gary Neville’s, who was found guilty of perverted practices in Carroll County Circuit Court after which he sought certiorari.<sup>45</sup> Unlike *Kelly*, the facts were not in dispute in Neville’s case. A patrolman visually observed a woman performing fellatio on Neville in a wooded area along the railroad tracks during the middle of the afternoon, after which the officer arrested both.<sup>46</sup> Neville was fined ten dollars and obligated to pay court costs after being found guilty of the perverted practices charge. Prior to consideration by the Court of Special Appeals, the Court of Appeals granted certiorari.<sup>47</sup>

The question presented on appeal by Neville was simply whether section 554 is unconstitutional as applied to consenting adults of the opposite sex acting in private.<sup>48</sup> Kelly, on the other hand, left out any reference to opposite sex and kept the question presented in a broader sense by asking about criminal liability for private consensual sexual conduct.<sup>49</sup> The arguments presented were limited to challenges upon the Constitution of the United States and not based on the Constitution or Declaration of Rights of Maryland.<sup>50</sup> With regard to constitutional rights, the Court of Appeals looked to guidance from a higher authority and found that there was “no holding by the Supreme Court that the right of privacy applies to conduct of the type prohibited by Md.Code, Art. 27, [section] 554.”<sup>51</sup>

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42. *See id.* at 1275-77.

43. *Id.* at 1277.

44. *See id.*

45. *See Neville v. State*, 430 A.2d 570, 571, 573 (Md. 1981).

46. *See id.* at 573.

47. *See id.*

48. *See id.* at 572 n.3.

49. *See id.* at 572.

50. *See id.* at 574 n.5.

51. *Id.* at 576.

Kelly emphasized that the consent of the parties involved is a critical element in absolving them of any criminal liability.<sup>52</sup> Disagreeing, the Court felt that since “[section] 554 makes it a violation of the criminal law of Maryland to place one’s sexual organ in the mouth of any other person, whether the act is voluntary or involuntary is immaterial at the statutory level of analysis.”<sup>53</sup>

The next argument introduced was an equal protection challenge. Kelly claimed that the statute violated married persons privacy rights and substantiated this claim by listing a number of courts that have held, or implied, that the prohibition of an oral sodomy or perverted practices statute cannot be applied to consenting married persons acting in private.<sup>54</sup> Therefore, in essence, he claimed that the statute creates two classes of persons, “married persons who may not be prosecuted, and unmarried persons who are subject to” criminal liability.<sup>55</sup> However, the Court of Appeals did not feel that people were treated differently under the statute.<sup>56</sup> In fact, married people would not be able to use their married status as a defense to a prosecution for engaging in perverted sex practices in a public place.<sup>57</sup> The Court held that “[t]here is no deprivation of equal protection of the law if ‘all persons who are in like circumstances or affected alike are treated under the laws the same’.”<sup>58</sup> The *Neville* decision remained as the law of the land for the remainder of the century.

#### IV. *BOWERS V. HARDWICK*

##### A. *Intriguing Facts and Procedural History*

August 3, 1982 will be a day that Michael Hardwick will never forget. That morning, Atlanta police officer K.R. Torick arrived at his home with an arrest warrant for failure to appear in court.<sup>59</sup> Having entered the house through an open door, Officer Torick was allowed

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52. See *id.* at 578.

53. *Id.* (quoting *Gooch v. State*, 367 A.2d 90 (Md. Ct. Spec. App. 1976)).

54. See *id.* at 382.

55. *Id.*

56. See *id.*

57. See *id.*

58. *Id.* (quoting *Salisbury Beauty Schools v. State Board of Cosmetologists*, 300 A.2d 367, 383 (Md. 1973)).

59. See Brantner, *supra* note 25, at 503; Bruce, *supra* note 11, at 1135-36, 1135 n.3 (citing Patricia A. Cain, *Litigating for Lesbians and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1612 (1993)). Hardwick was ticketed for drinking in public three weeks earlier. See Brantner, *supra* note 25, at 503. However, he missed his court appearance “due to a discrepancy in the dates listed on the ticket.” *Id.* He promptly paid the ticket. See *id.* Meanwhile, the Atlanta police had obtained an arrest warrant. See *id.* Yet, police did not serve the warrant until three weeks had passed from when he paid the ticket. See *id.* at 503-04.

to enter the inside by a half-asleep houseguest on the couch who did not know that Hardwick and his companion were together in Hardwick's bedroom.<sup>60</sup> The bedroom door was partially open allowing Torick to observe and/or hear Hardwick and another man engaging in mutual fellatio.<sup>61</sup> The activity was enough for Torick to enter the bedroom and arrest both individuals for violating Georgia's sodomy statute.<sup>62</sup> Hardwick was entitled to bail one hour after arriving at the station but instead was held in jail for twelve hours and became the victim of harassment "by other prisoners who were told the nature of his arrest."<sup>63</sup>

Since Hardwick's case was not presented to a grand jury, his lawyers went to federal court seeking a declaratory judgment on the constitutionality of Georgia's sodomy statute.<sup>64</sup> A married heterosexual couple had joined in the suit arguing that the statute "chilled and deterred" their desire to engage in sodomy.<sup>65</sup> The district court dismissed their suit stating that the couple did not have "proper standing to maintain the action."<sup>66</sup> The district court ruled against Hardwick but the decision was later overturned by a two judge majority of the Eleventh Circuit Court of Appeals who felt that Hardwick's actions were constitutionally protected.<sup>67</sup> Bowers, the Attorney General for Georgia, filed an appeal to the Supreme Court on behalf of the State.<sup>68</sup>

### B. *The Decision and Its Impact*

Professor Laurence Tribe, a renowned constitutional scholar from Harvard, argued Michael Hardwick's case before the Supreme Court not in terms of "same-sex behavior, but in terms of 'how every adult, married or unmarried, in every bedroom in Georgia will behave in the closest and most intimate personal association with another adult.'"<sup>69</sup> The Court, however, narrowed the issue to whether homosexuals have a fundamental right to engage in sodomy.<sup>70</sup> In a 5-4 decision, the Court held that the constitutional right to privacy does

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60. See Bruce, *supra* note 25, at 1135 n.3.

61. See *id.* at 1135.

62. See *id.*

63. Brantner, *supra* note 25, at 503-04.

64. See *id.*

65. See *Bowers v. Hardwick*, 478 U.S. 186, 188 n. 2 (1986) [hereinafter *Hardwick I*].

66. *Id.* at 188.

67. See *Hardwick v. Bowers*, 760 F.2d 1202, 1211 (11th Cir. 1985).

68. *Hardwick I*, 478 U.S. at 189.

69. Brantner, *supra* note 25, at 504.

70. See *id.* at 504-05

not include a fundamental right for homosexuals to engage in consensual sodomy.<sup>71</sup> The Court indicated that morality, presumably the belief of a majority that such conduct is immoral and unacceptable, was a rational enough basis for the law to stand.<sup>72</sup>

An exorbitant amount of the majority opinion was spent on a historical analysis of the immorality of homosexuality.<sup>73</sup> “Commentators have roundly criticized this analysis as ‘bad scholarship,’ both for its over reliance on a single law review article, and for its substantive inaccuracy.”<sup>74</sup> Chief Justice Burger’s concurring opinion was similar to the 1810 decision written by a Maryland Judge in *Davis*. Burger found that condemnation of sodomy is “firmly rooted in Judeo-Christian moral and ethical standards.”<sup>75</sup> Burger continued by stating “[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”<sup>76</sup> Along this line of thinking was the State’s rational basis for the law: homosexual sodomy is simply immoral and that the conduct prohibited interferes with the State’s right to maintain a decent society.<sup>77</sup>

In attacking the suggestion of a threat against society, Justice Blackmun eloquently exclaimed:

[D]epriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do.<sup>78</sup>

In rejecting the Court’s historical analysis, Justice Blackmun quoted former Justice Oliver Wendell Holmes in saying: “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”<sup>79</sup> The dissent also stated that simply because some (not all) “religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry.”<sup>80</sup> That sentiment heightens a concern for the fine line between separation of church and state.

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71. *See id.* at 505.

72. *See id.*

73. *See* Bruce, *supra* note 11, at 1142.

74. *Id.* (citing Yao Apasu-Gobstu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986)).

75. *Hardwick I*, 478 U.S. at 196.

76. *Id.* at 197.

77. *See* Bruce, *supra* note 11, 1142-44.

78. *Hardwick I*, 478 U.S. at 214.

79. *Id.* at 199.

80. *Id.* at 211 (Blackmun, J. dissenting).

The dissent also spent time focusing on the privacy implications that the majority discounted. Justice Stevens stated that previous Supreme Court decisions regarding privacy had extended rights to not only married persons concerning intimacies of their physical relationships but also to decisions by unmarried persons as well.<sup>81</sup> The Supreme Court found that the First, Third, Fourth, Fifth, and Ninth Amendments created a constitutionally protected zone of privacy in *Griswold v. Connecticut*.<sup>82</sup> *Griswold* held that married couple's use of contraceptives was protected by the right to privacy.<sup>83</sup> The zone of privacy was opened further seven years later in *Eisenstadt v. Baird*, where the Court established that unmarried adults could use contraceptives.<sup>84</sup> The privacy zone was extended to the home in *Stanley v. Georgia*, where the Supreme Court upheld the right of individuals to possess pornography in their own homes.<sup>85</sup> However, the majority in *Hardwick I* found these prior privacy cases inapplicable as precedents because “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.”<sup>86</sup>

The majority further erred when they took a sodomy statute that did not include the word homosexual in it and nevertheless strictly applied it to homosexuals.<sup>87</sup> The Maryland Court of Appeals had used an opposite analysis five years earlier in *Neville*.<sup>88</sup> There, the court held that a similar statute applied to both heterosexuals and homosexuals, married or single.<sup>89</sup> Yet, Georgia was selectively applying the law only to homosexuals.<sup>90</sup> Justice Stevens stated, “[a] policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group.”<sup>91</sup> Whereas a broad interpretation of the Constitution would enable one to find that all individuals have a fundamental interest “in controlling the nature

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81. *See id.* at 214-16 (Stevens, J. dissenting).

82. 381 U.S. 479, 484-86 (1965).

83. *See id.* at 485.

84. 405 U.S. 438, 454-55 (1972).

85. 394 U.S. 557, 568 (1969).

86. *Hardwick I*, 478 U.S. at 191.

87. *See id.* at 200-01 (Blackmun, J. dissenting).

88. 43 A.2d 570, 579 (Md. 1981).

89. *See id.*

90. *See Hardwick I*, 478 U.S. at 219 (Stevens, J. dissenting).

91. *Id.* (Stevens, J. dissenting).

of their intimate associations with others,”<sup>92</sup> the majority instead defined fundamental rights narrowly in this opinion.<sup>93</sup>

The *Hardwick* decision had major implications throughout the next decade. Various forms of gay rights legislation were defeated thanks in part to the Supreme Court decision.<sup>94</sup> Specifically, gay rights litigation was defeated in the courts with citations to *Hardwick*.<sup>95</sup> This decision proved to be a big hurdle for activists in trying to enact protection for homosexuals.<sup>96</sup> The *Hardwick* decision “foreclos[ed] the application of strict scrutiny in the substantive due process arena (and forced) advocates of gay rights to avoid privacy claims in challenges to anti-gay laws.”<sup>97</sup> The Supreme Court has yet to revisit the sodomy issue to this day despite opportunities.

## V. THE AFTERMATH OF *BOWERS V. HARDWICK*

### A. *National Perspective*

In the wake of *Hardwick*, state courts became the battleground over the constitutional challenge of sodomy statutes.<sup>98</sup> In the majority opinion, the Court stated that its decision didn’t affect “state-court decisions invalidating those laws on state constitutional grounds.”<sup>99</sup> Hence, sodomy reform proponents seeking change on two fronts, the legislatures and the state courts, made some positive gains by ignoring the federal constitution and fighting state by state.<sup>100</sup>

Lower courts in Texas, Michigan, and Louisiana each struck down their respective sodomy statutes.<sup>101</sup> A trial court in Wayne County, Michigan ruled Michigan’s sodomy law unconstitutional under the state constitution in 1990.<sup>102</sup> The State did not appeal and thus the Attorney General, who was a party to the case, is “bound by this decision not to prosecute private, consensual ‘sodomy’ between

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92. Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedroom, Shouldn't the Courts Go in After Them?: An Update on the Fight Against "Sodomy" Laws*, 21 *FORDHAM URB. L.J.* 997, 1000 (1994).

93. See *Hardwick I*, 478 U.S. at 206.

94. See Bruce, *supra* note 11, at 1152.

95. See *id.* at 1153.

96. See *id.* at 1152-53.

97. Bruce, *supra* note 11, at 1152.

98. See Wolfson & Mower, *supra* note 92, at 1001.

99. *Hardwick I*, 478 U.S. at 190.

100. See Wolfson & Mower, *supra* note 92, at 1001.

101. See *id.* at 1001; *City of Dallas v. England*, 846 S.W.2d 957 (Tex. Ct. App. 1993); *Texas v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992); *Michigan Organization for Human Rights (MOHR) v. Kelley*, No. 88-815820 C2 (Mich. Cir. Ct. July 9, 1990); *Louisiana v. Baxley*, No. 356-945, Section E (La. Crim. Dist. Ct. 1993).

102. See MOHR, No. 88 - 815820 CZ; Wolfson & Mower, *supra* note 92, at 997 n.27.

adults.”<sup>103</sup> In Texas, a plaintiff challenged the anti-gay hiring policy of the Dallas police department when the sodomy statute was expressly used as a basis for denying her employment.<sup>104</sup> In determining the validity of the hiring policy, the Texas Court of Appeals considered “the constitutionality of the sodomy statute on which the policy was based” and held that both the policy and the statute were unconstitutional.<sup>105</sup>

Texas was not the only southern state to show signs of promise. Kentucky dealt social conservatives a blow when their Supreme Court became the highest state court to strike down a sodomy statute in *Commonwealth v. Wasson*.<sup>106</sup> Conducting an undercover operation in a downtown Lexington park, police in plain clothes taped conversations with persons passing by, such as the defendant, Wasson.<sup>107</sup> Toward the end of the twenty to twenty-five minute conversation, Wasson invited the officer to come home with him. The officer pushed Wasson for more details, resulting in Wasson suggesting sexual activities that violated Kentucky’s sodomy statute and ultimately ended in his arrest.<sup>108</sup> The District Court dismissed the charge holding that the statute violated his right to privacy while the Circuit Court, in affirming the lower court’s decision, held that the statute infringed upon equal protection guarantees.<sup>109</sup> The heart of the Commonwealth’s arguments, like every other state in the Union, was that homosexuality is immoral and that homosexual sodomy was punished as an offense at common law.<sup>110</sup> Those arguments were not even considered legitimate by the Circuit Court.<sup>111</sup> In concluding that the statute violated rights of equal protection and the right of privacy as guaranteed by the Kentucky Constitution, the Court emphasized that “[w]e need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.”<sup>112</sup> Recognizing that Kentucky was not alone, the Court exclaimed “rather than being

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103. Wolfson & Mower, *supra* note 92, at 1001-02 n.27 (citing MOHR, No. 88-815820 CZ (Mich. Cir. Ct. July 9, 1990)).

104. *See England*, 826 S.W.2d at 958; Wolfson & Mower, *supra* note 92, at 1007.

105. Wolfson & Mower, *supra* note 92, at 1007 (quoting *City of Dallas v. England*, 846 S.W.2d 957 (Tex. Ct. App. 1993)).

106. 842 S.W.2d 487 (Ky. 1992).

107. *See id.* at 489.

108. *See id.*

109. *See id.* at 488-89.

110. *See id.* at 490.

111. *See id.* at 501.

112. *Id.* at 490.

the leading edge of change," the *Wasson* decision, "is but a part of the moving stream."<sup>113</sup>

This momentum of change continued in Nevada and the District of Columbia, where sodomy statutes were struck down as well.<sup>114</sup> One judge claimed "that state courts . . . can and have defined state's privacy guarantees more broadly than the Court in [*Hardwick I*]."<sup>115</sup> The progressive movement continued in Montana, where a judge invalidated the deviate sex ban in 1996.<sup>116</sup> The Montana court noted that the statute "'fostered harassment, discrimination, and violence from society."<sup>117</sup> The Montana statute caused the plaintiffs "'to alter the manner in which they would normally conduct their lives'" and because the statute labeled them as felons, it could be used in third party contexts to deny or restrict their rights.<sup>118</sup> However, in Georgia, the state Supreme Court bucked the national trend by declining another opportunity to invalidate the state's sodomy statute.<sup>119</sup> "The court held, 5-2, that the prohibition of sodomy is a legitimate and valid exercise of state power in furtherance of the moral welfare of the public. Thus it does not violate the right to privacy under the Georgia Constitution."<sup>120</sup>

Other states, such as Oklahoma, have decided that *Hardwick I* allowed them to carve out an anti-gay niche in the sodomy statutes. In *Post v. State*, the Oklahoma Criminal Appellate Court held that the state's gender-neutral sodomy law could not be constitutionally enforced against partners of the opposite sex.<sup>121</sup> As one commentator noted, "[t]he Oklahoma decision and the United States Supreme Court's silence suggested that *Hardwick I* somehow drew a constitutionally tolerable line between the rights of gay people and

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113. *Id.* at 498.

114. See 1993 Nev. Stat. 236; D.C. CODE ANN. §§ 10 - 23 (1994); Wolfson & Mower, *supra* note 92, at 1001-02.

115. Brantner, *supra* note 25, at 510 (quoting MOHR, No. 88-815820 CZ (Mich. Cir. Ct. July 9, 1990)).

116. See Gryczan v. Montana, No. BDV-93-1869, slip op. (1<sup>st</sup> Dist. June 28, 1994); Stephanie Stone, *Georgia Supreme Court Says Sodomy Law Stands*, West's Legal News, Mar. 14, 1996, available in 1996 WL 259078.

117. Wolfson & Mower, *supra* note 92, at 1010 (quoting Gryczan v. Montana, No. BVD-93-1869, slip op. at 11 (1<sup>st</sup> Dist. June 28, 1994)).

118. *Id.*

119. See *id.* Editor's Note: This essay was received in October 1998. Since that time, the Georgia Supreme Court has struck down its felony sodomy law, holding that it is in violation of the Georgia constitutional right of privacy. See *Powell v. State*, No. SA98A0755, 1998 WL 804568, at \*4-\*7 (Ga. Nov. 23, 1998).

120. *Id.*

121. 715 P.2d 1105 (Okla. Crim. App. 1986), cert. denied, 479 U.S. 890 (1986).

those of non-gay people, even under a law that on its face ostensibly applied to both conduct by different-sex and same-sex partners.”<sup>122</sup>

*B. Maryland's Reaction.*

By contrast, the Court of Appeals of Maryland rejected that proposition, but ended with essentially the same result in that consensual sexual activity in private between heterosexual adults is not a violation of the sodomy statutes.<sup>123</sup> Nearly ten years after deciding that sections 553 and 554 of article 27 of the Maryland Code applied to all individuals and that marriage was not a defense in *Neville v. State*, the court decided to alter course.<sup>124</sup> In doing so, the court focused on statutory construction rather than deciding the right to privacy issue.<sup>125</sup> Under the “principle that a statute will be construed so as to avoid a serious constitutional question,” the court concluded in *Schochet v. State* that “[section] 554 does not encompass consensual, noncommercial, heterosexual activity between adults in the privacy of the home.”<sup>126</sup>

In *Schochet*, Steven Schochet was charged with rape and various sex offenses, including sodomy in violation of section 553, and engaging in an act of fellatio in violation of section 554.<sup>127</sup> Two conflicting “versions of the incident giving rise to the charges were presented to the jury” who believed Schochet in the end when they acquitted him on everything but engaging in fellatio.<sup>128</sup> Schochet argued that section 554 “is unconstitutional as applied to private and noncommercial sexual acts between consenting heterosexual adults” and that it violated the Eighth Amendment to the United States Constitution.<sup>129</sup> A divided Special Court of Appeals affirmed his conviction, holding that no constitutional protection for sexual activity existed outside of marriage.<sup>130</sup> The Court of Appeals accepted certiorari. Because the Court of Special Appeals was divided and there was a significant division throughout the nation’s courts regarding “the constitutionality of punishing consensual, heterosexual

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122. Wolfson & Mower, *supra* note 92, at 1000.

123. *See generally* Schochet v. State, 580 A.2d 176 (Md. 1990) (deciding sodomy law could be enforced against gays only).

124. *See id.*; *Neville v. State*, 430 A.2d 570 (Md. 1981).

125. *See Schochet*, 580 A.2d at 184.

126. *Id.*

127. *See id.* at 177-78.

128. *Id.* at 180.

129. *Id.*

130. *See id.*

acts between consenting adults in private,” the court felt that the following principle of statutory construction was applicable:

[I]f 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 constitutionality is to be preferred.<sup>131</sup>

The State argued that what the Court essentially held in *Neville* was that the provision applies to every person and that the statute should be interpreted by a plain reading of the language.<sup>132</sup> But, the court asserted that *Neville* stood for the prohibition of consensual acts in non-private places and that those acts should remain criminal.<sup>133</sup> In addition, the court felt that the lack of prosecutions “based on consensual, noncommercial, heterosexual activity between adults in the privacy of the home” was a “strong indication that such conduct is not within the contemplation of [section] 554.”<sup>134</sup> As a result of the Court’s statutory construction analysis, Schochet’s conviction for engaging in fellatio with a woman was overturned.<sup>135</sup>

### C. Arguments Offered in Defense of Sodomy Statutes

The majority opinion in *Hardwick* created a framework for states to follow when defending their sodomy statutes against constitutional challenges. A state will argue first that a right to engage in sodomy is not a fundamental right. Fundamental rights are limited to those either “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty.”<sup>136</sup> Chief Justice Burger in his concurrence stated that “to hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”<sup>137</sup> As support, Justice Burger noted that “[h]omosexual sodomy was a capital crime under Roman law. During the English Reformation when powers of the ecclesiastical courts were transferred to the King’s Courts, the first English statute criminalizing sodomy was passed.”<sup>138</sup>

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131. *Id.* at 181 (citing *Heileman Brewing v. Stroh Brewery*, 521 A.2d 1225 (Md. 1987), quoting *Maryland State Bd. of Barber Exam’rs v. Kuhn*, 312 A.2d 216, 221 (Md. 1973)).

132. *See id.* at 183.

133. *See id.*

134. *Id.* at 185.

135. *See id.* at 186.

136. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

137. *Id.* at 196-97 (Burger, C.J. concurring).

138. *Id.* (citations omitted).

Secondly, the *Hardwick* decision is dispositive of the right to privacy issue. States usually argue that the state constitutions did not confer any greater right to privacy than that afforded by the United States Constitution.<sup>139</sup> In addition, state constitutions do not guarantee unlimited privacy.<sup>140</sup> A state has “a rightful concern for the moral welfare of all its citizens and a correct commitment to examining criminal activities wherever they may be committed whether concealed in the home or elsewhere.”<sup>141</sup> Kelly Shackelford, state director of the Rutherford Institute, which promotes family values, stated that “[i]f the right to privacy means the ability to do what one pleases in one’s own bedroom, then prostitution and drug use could be protected activities.”<sup>142</sup> Shackelford is not the only one that shares that view. The argument that the “government may not interfere with those acts done in private that do not adversely affect others” cannot be applied consistently, stated Justice Wintersheimer of the Kentucky Supreme Court.<sup>143</sup> He noted that adhering to a protection of privacy theory “could result in constitutional protection being claimed for the private use of cocaine, consensual incest, suicide and prostitution.”<sup>144</sup> In addition, overturning sodomy laws based on a new found right to privacy would “generate a tremendous amount of litigation in other criminal areas and would call into question the validity of existing statutes and case law dealing with search and seizure questions.”<sup>145</sup>

Another argument that is popular pertains to the status/conduct dichotomy. Maryland’s Court of Appeals stated in *Neville* that the State did not attempt to punish “*mere status*” by prohibiting sodomy, but “imposed a sanction for behavior it deems harmful or offensive to the sensibilities of a large segment of the community.”<sup>146</sup> Sodomy statutes “clearly [punish] conduct and not a class of people. Obviously, it is an individual’s conduct that is the subject of the legislation, and it is the individuals who break the law who are specifically punished” one may argue.<sup>147</sup>

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139. See *State v. Gray*, 413 N.W.2d 107, 113-14 (Minn. 1987); *Christensen v. State*, 468 S.E.2d 188, 189-90 (Ga. 1996).

140. See *Gary*, 413 N.W.2d at 113-14; *Christensen*, 468 S.E.2d at 189-90.

141. *Commonwealth v. Wasson* 842 S.W.2d 487, 515 (Ky. 1992) (Wintersheimer, J., dissenting).

142. Mark Curridan, *Sodomy Law Challenged: Gay Activists Find Successes in Some State Courts, Legislatures*, 79-JUL A.B.A. J. 38 (1993).

143. *Wasson*, 842 S.W.2d at 514 (Wintersheimer, J., dissenting).

144. *Id.* (Wintersheimer, J., dissenting).

145. *Id.* at 510-11 (Wintersheimer, J., dissenting).

146. *Neville v. State*, 430 A.2d 570, 581 (Md. 1981) (emphasis added).

147. *Wasson*, 842 S.W.2d at 511 (Wintersheimer, J., dissenting).

To counter equal protection challenges and withstand constitutional muster, states further argue that their sodomy statutes are rationally related to a legitimate governmental objective. The protection of the public's health, safety, and morality is at the cornerstone of the defense of sodomy statutes. Normally, justification for legal prohibitions "against such conduct is that, even though it does not injure any identifiable victim, it contributes to moral deterioration of society."<sup>148</sup> Justice Lambert of the Kentucky Supreme Court noted that: the objective of public health "found new vitality with the emergence of the AIDS epidemic which indisputably originated in this country in the homosexual community."<sup>149</sup> Lastly, with regard to morality, United States Supreme Court Justice Antonin Scalia commented that "our society prohibits certain activities, not because they harm others but because they are considered in the traditional phrase, *contra bonos mores*, that is immoral."<sup>150</sup> He notes that in American society such prohibitions have included sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution and sodomy."<sup>151</sup>

## VI. ARGUMENTS TO PURSUE IN MARYLAND

### A. *Statute Violates State Constitutional Guarantee of Right To Privacy*

Since *Hardwick I* forecloses the many arguments that one may pose regarding the right to privacy on federal constitutional grounds, those will not be addressed. However, Maryland is not bound by decisions of the United States Supreme Court when deciding whether a state statute impermissibly infringes upon individual rights guaranteed in its State Constitution so long as state constitutional protection meets the minimum protection under the United States Constitution.<sup>152</sup>

Maryland's own Court of Appeals has recognized that the constitutionally protected right to privacy includes intimate

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148. *Id.* at 498 (quoting MODEL PENAL CODE AND COMMENTARIES: PART II, 371-72 (1980)).

149. *Id.* at 509 (Lambert, J., dissenting).

150. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (citing *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

151. *Wasson*, 842 S.W.2d at 515-16 (Wintersheimer, J., dissenting) (paraphrasing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991)).

152. *See generally Oregon v. Hass*, 420 U.S. 714, 719 (1975) (reiterating the ability of state law to provide greater protection to the individual than the United States Constitution).

relationships.<sup>153</sup> Judge Wilner of Maryland's Court of Special Appeals maintained in his *Schochet* dissent, which was later adopted by Judge Chasnow of the Court of Appeals in a concurring opinion, that the conduct that was punished was constitutionally protected by Article 24 of the Maryland Declaration of Rights.<sup>154</sup> Judge Wilner and Judge Chasnow are on the right track but Justice Combs hit the mark when he wrote in a concurring opinion in *Commonwealth v. Wasson*, that "given the nature, the purpose, the promise of our Constitution, and its institution of a government charged as the conservator of individual freedom, I suggest that the appropriate question is not 'Whence comes the right to privacy?' but rather, 'Whence comes the right to deny it?'"<sup>155</sup>

*B. Statute Violates State Constitutional Guarantee of Equal Protection*

Unlike the Due Process Clause analysis utilized in *Hardwick I*, "equal protection analysis does not turn on whether the law [(sections 553 and 554)] transgresses 'liberties that are "deeply rooted in this Nation's history and tradition.'"<sup>156</sup> Whereas, "[T]he Equal Protection Clause, by contrast . . . protect[s] disadvantaged groups from discriminatory practices, however deeply ingrained and long-standing."<sup>157</sup> The *Schochet* decision, unlike the *Neville* decision that applied the sodomy statute to all people, opened the door for stronger equal protection challenges. The enforcement of sections 553 and 554 against only those engaged for the most part in same-sex behavior

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153. See *Neville v. State*, 430 A.2d 570, 584 (Md. 1981) (Davidson, J. dissenting); *Montgomery County v. Walsh*, 336 A.2d 97, 105 (Md. 1975); *Doe v. Commander, Wheaton Police Dep't.*, 329 A.2d 35, 40 (Md. 1974) ("Government . . . conduct . . . that clearly invades individual privacy . . . cannot be permitted unless a compelling public necessity has been clearly shown.").

154. See *Schochet v. State*, 541 A.2d 183, 204, 207 (Md. Ct. Spec. App. 1988) (Wilner, J. dissenting); *Schochet v. State*, 580 A.2d 176, 187-88 (Md. 1990) (Chasnow, J. concurring). Judge Wilner advocated the following theory in *Schochet*,

(1) that there is a Constitutionally protected zone of privacy, ill-defined perhaps but nonetheless existing, that shields certain fundamental personal conduct and expression from substantial governmental interference; (2) that the conduct at issue here, when engaged in under the circumstances noted, falls within that zone of privacy; (3) that, although inclusion within this zone does not necessarily endow an activity with total immunity from governmental interference, it does require that the government show a strong and compelling justification for the interference; and (4) that no such showing ha[d] been made here."

541 A.2d at 204.

155. *Wasson*, 842 S.W.2d at 503 (Combs, J. concurring) (emphasis added).

156. *Id.* at 499 (citing *Hardwick I*, 478 U.S. 186, 191-92 (1986)).

157. *Id.* (citing *Watkins v. U.S. Army*, 875 F.2d 699, 718 (9th Cir. 1989)).

constitutes gender-based discrimination. Men are not prosecuted when they engage in consensual, noncommercial, sexual activity in the privacy of their home with women, but are prosecuted for the same activity with members of the same sex. This concept violates the fundamental principle of equal protection that was laid out in the historical case of *Yick Wo v. Hopkins*:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with ... an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.<sup>158</sup>

When analyzing whether a statute holds constitutional muster, generally a rational basis test is applied.<sup>159</sup> Under that test, the challenged statute must be rationally related to a legitimate government interest.<sup>160</sup> One objective of a sodomy statute, noted by the court in *Neville*, is the protection of public morality.<sup>161</sup> Additional factors that the State has suggested include “protecting the institution of marriage, upholding public morality by preventing illicit sex, preventing venereal disease, and preventing physical harm have been rejected as a sufficient basis for state regulation.”<sup>162</sup> Additionally, the American Law Institute Model Penal Code adopted the view that “private, consensual, sexual activity should not ordinarily be subject to criminal sanction.”<sup>163</sup> The State has a difficult time coming up with a compelling, let alone legitimate, interest in retaining this statute and without such it should be invalidated as a violation of equal protection.

### C. *Statute Violates the Reach of Police Power*

Protecting its citizens from unnecessary harm is a key function of the states provided by the Tenth Amendment.<sup>164</sup> This protection is accomplished by regulating one’s activities through state constitutions and statutes.<sup>165</sup> This protection is referred to as *police power*.<sup>166</sup>

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158. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

159. *See Hardwick I*, 478 U.S. 186, 189-96 (1986); *Romer v. Evans*, 517 U.S. 620, 631-636 (1996).

160. *See Evans*, 517 U.S. at 631.

161. *See Neville v. State*, 430 A.2d 570, 580 (Md. 1981).

162. *Id.* at 585.

163. *Id.* at 586 (citing Model Penal Code § 213.2 (Proposed Official Draft 1962)).

164. *See* U.S. CONST. amend. X; Feist, *supra* note 5, at 129.

165. *See* Feist, *supra* note 5, at 129.

However, when a state creates or enforces a law that affords more protection to one group of citizens while infringing upon the rights of another, then the law is deemed worthy of attack under the auspices of the Tenth Amendment's authority of police power.<sup>167</sup> Maryland's sodomy statute does just that by providing protection solely to heterosexuals who may engage in consensual, noncommercial, sex in the privacy of their home, but does not extend this same protection to homosexuals. Although sodomy laws are rarely enforced against heterosexuals, that is not the case against homosexuals. As the majority confirmed in *Schochet*, "many cases in this Court involving [sections] 554 or 553 have been prosecutions for homosexual activity."<sup>168</sup> When discussing the role of police power, Maryland should follow the lead of both the Pennsylvania and Kentucky Supreme Courts who examined the Model Penal Code, Sec. 207.5 Sodomy and Related Offenses Comment and determined that :

With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct *does not harm others*. 'No harm to the secular interest of the community is involved in atypical sex practice in private between consenting adult partners.' . . . Many issues that are considered to be matters of morals are subject to debate, and no significant state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority . . . . Enactment of the voluntary deviate sexual intercourse statute, despite that it provides punishment for what many believe to be abhorrent crimes against nature and perceived sins against God, is not proper in the realm of the temporal police power.<sup>169</sup>

#### D. *Statute Causes Harm Beyond Present Prosecution*

Sodomy laws may rarely be enforced at all, but simply having the laws on the books causes harm beyond prosecution. As one of America's most famous jurists, "Judge Learned Hand, stated: [c]riminal law which is not enforced practically is much worse than if it was not on the books at all. I think homosexuality is a matter of

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166. See BLACK'S LAW DICTIONARY 1156 (6th ed. 1990) (defining "police power" as "the power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals.").

167. See Feist, *supra* note 5, at 129.

168. *Schochet v. State*, 580 A.2d 176, 183 (Md. 1990).

169. *Commonwealth v. Wasson*, 842 S.W.2d 487, 498 (Ky. 1992) (quoting *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Ky. 1992)).

morals, a matter very largely of taste, and is not a matter that people should be put in prison about.”<sup>170</sup>

Harms caused by a sodomy statute include the possible denial of child custody and visitation rights. A Henrico County, Virginia trial court relied on the state’s sodomy statute as the key factor in deciding to deny custody to a lesbian mother.<sup>171</sup> The trial court decided that as a sexually active woman in a committed relationship with another woman, she presumptively violated the state’s sodomy statute and thus was an unfit parent as a matter of law.<sup>172</sup>

Sodomy statutes have also led to the denial of jobs and security clearances. In Georgia, Attorney General Michael Bowers, (yes, the same Bowers that litigated against Michael Hardwick nearly ten years earlier), cited Georgia’s sodomy law as a basis for his refusal to hire a qualified lesbian.<sup>173</sup> In Florida, a deputy was fired by the Orange County Sheriff when it was discovered that he was gay.<sup>174</sup> The existence of sodomy laws is cited as a justification.<sup>175</sup> This discrimination was not restricted to the state level. A lawsuit was filed against the FBI for anti-gay discrimination in which the L.A. Times wrote: “the bureau has said homosexual conduct poses concerns about the potential for “unlawful” activities—several states have anti-sodomy laws—and security lapses.”<sup>176</sup> Security clearances have been denied to gay employees based upon their “lack of regard for the laws of society.”<sup>177</sup> Numerous examples could follow but the resounding theme is that sodomy statutes are used as tools to foster further discrimination.

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170. Feist, *supra* note 5, at 138.

171. *Bottoms v. Bottoms*, No. CH93JA0517-00, (Va. Cir. Ct. Henrico County Sept. 7, 1993).

172. *See id.* The Virginia Court of Appeals reversed the trial court and declared that the sodomy law could not be used per se to deny a lesbian the custody of her son. *See Bottoms v. Bottoms*, 444 S.E.2d 276, 281-83 (Va. App. 1994), *rev’d*, 457 S.E.2d 102 (Va. 1995).

173. *Shahar v. Bowers*, 63 Fair Empl. Prac. Cas. (BNA) 109 (N.D. Ga. 1993), *aff’d*, 114 F.3d 1097 (11th Cir. 1997), *cert. denied*, 118 S.Ct. 693 (1998). Shahar worked as a summer clerk at the Attorney General’s office. *See id.* at 111. She had accepted a permanent position at the Attorney General’s office, which was scheduled to begin after her graduation from law school. *See id.* The Attorney General withdrew the offer for permanent employment after learning that Shahar was going to marry another woman. *See id.*

174. *See Woodward v. Gallagher*, No. 59-5776 (Orange Co., Fla. Cir. Ct. 1992); *Wolfson & Mower*, *supra* note 5, at 1035.

175. *See Woodward*, No. S9-5776.

176. *Wolfson & Mower*, *supra* note 92, at 1004 (quoting *FBI Policy on Homosexuals at Issue in Ex-Agent’s Suit*, L.A. TIMES, Nov 26, 1993, at A1.) *See Buttino v. F.B.I.*, No. C-90-1639-SBA, 1992 U.S. Dist. LEXIS 4659, at \*17 (N.D. Cal. Feb 11, 1992).

177. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1365 (N.D. Cal. 1987), *rev’d*, 895 F.2d 563 (9th Cir. 1990) (citing U.S. Dept. of Defense Reg. 5200.2-R, II-1-II-3, 32 C.F.R. § 154.7 (1987)).

Maryland's sodomy statute can also foster hostility and violence towards homosexuals, by branding and marking homosexuals as less than equal. A statute that invokes prejudice and discrimination towards a certain group will also encourage, or at least serve as a vehicle for, ignorance and attacks.

The very nature of the statute causes individuals to suffer psychological harm. Scientific, demographic, and clinical "knowledge demonstrates that the intimate sexual conduct prohibited by the 'crime against nature' statute is healthy and often important to the mental health and happiness of individuals and their deepest relationships, and is engaged in often by many, if not most, Americans."<sup>178</sup> Sex is a central part of having a healthy relationship between two adults.<sup>179</sup> Rather than promoting health, as the State argues is one of the statute's purpose, the statute is actually endangering one's mental health. The "enforced repression of desire for such [sexual] expression is associated with dysfunction and pathology, particularly where accompanied by stigma and discrimination."<sup>180</sup> Additionally, "in an era where dissemination of safe-sex information is crucial to prevent the transmission of AIDS, state officials in Arkansas, Georgia, and North Carolina censored educational materials because the officials believed the materials encouraged 'lawlessness.'"<sup>181</sup> Maryland's sodomy statutes certainly have an adverse effect without even the hand of enforcement playing a role.

#### *E. Statute Violates the Eighth Amendment*

Conservatives may argue that sodomy is rarely enforced, yet people have been incarcerated for violating Maryland's sodomy statutes. In fact, section 553 states that "every person convicted of the crime of sodomy shall be sentenced to the penitentiary for not more than ten years."<sup>182</sup> Despite challenges, prison sentences have been upheld.<sup>183</sup> Sodomy statutes are enforced in a variety of other ways as well. For instance,

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178. Wolfson & Mower, *supra* note 92, at 1027.

179. *See id.* at 1030-31.

180. *Id.* at 1030 (citing WILLIAM H. MASTERS & VIRGINIA JOHNSON, HUMAN SEXUAL INADEQUACY (1st ed. 1970)).

181. Brantner, *supra* note 25, at 501 (citing *National Day of Mourning Information Packet*, NATIONAL GAY AND LESBIAN TASK FORCE (NGLTF Privacy Project, Washington, D.C.), June 30, 1989, at 9).

182. MD. ANN. CODE, [sodomy generally] § 553 (1997).

183. *See Neville v. State*, 430 A.2d 570, 581 (Md. 1981).

Prosecutors have used sodomy laws as a plea-bargaining tool in situations where the sodomy offense was accompanied by other violations such as public solicitation, aggravated assault, or statutory rape. If prosecutors are unable to demonstrate lack of consent in a rape case, they may ask for a sodomy conviction instead, because lack of consent is not an element of the sodomy offense.<sup>184</sup>

Maryland's Court of Appeals rejected the argument that section 554 violated the Eighth Amendment's prohibition against cruel and unusual punishment in *Kelly v. State*.<sup>185</sup> The Court in *Kelly* cited *Robinson v. California*,<sup>186</sup> contending that the "amendment's substantive limitations on what may be made criminal forbid punishing private sexual expression."<sup>187</sup> The Court however stated that "this prong of the Eighth Amendment is one to be applied sparingly."<sup>188</sup> The court also stated that "in *Kelly*'s case the actual punishment imposed was well below the statutory maximum and affords no basis for relief."<sup>189</sup>

What *Kelly* may not have been able to do, but a future litigant would, is to argue that section 554 punishes status alone absent criminal conduct. The holding in *Robinson* essentially prohibits punishment of only mere status.<sup>190</sup> Sexual orientation, and not the act committed, determines criminality, and is being punished in Maryland. Difficult as it may be for some individuals to comprehend, simply because an individual is gay does not mean that the individual engages in sodomy.

However, the status/conduct distinction has failed to protect homosexual service members from such discrimination. For example, courts have upheld the government's exclusion of homosexuals from the armed services even though it penalizes one's orientation and not one's conduct.<sup>191</sup> The Uniform Code of Military Justice (UCMJ), enacted in 1951, defines sodomy as a criminal act punishable by court-martial.<sup>192</sup>

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184. Brantner, *supra* note 25, at 499.

185. 412 A.2d 1274, 1277 (Md. Ct. Spec. App. 1980).

186. 370 U.S. 660, 666-67 (1962) The Supreme Court held that a statute which made it a crime to be addicted to the use of narcotics inflicted cruel and unusual punishment. *See id.*

187. *Neville*, 430 A.2d at 581.

188. *Id.*

189. *Id.*

190. *See Robinson*, 370 U.S. at 666.

191. *See Thomasson v. Perry*, 80 F.3d 915, 934 (4th Cir. 1996) (en banc), *cert. denied*, 519 U.S. 948 (1996); *Steffan v. Perry*, 41 F.3d 677, 686-92 (D.C. Cir. 1994) (en banc); *Selland v. Perry*, 905 F. Supp. 260, 265-67 (D. Md. 1995), *aff'd mem.*, 100 F.3d 950 (4th Cir. 1996) (unpublished), *cert. denied*, 520 U.S. 1210 (1997).

192. *See* UNIFORM CODE OF MILITARY JUSTICE, art. 125, 10 U.S.C. § 925 (1994).

F. *Maryland's Statute Is in Violation of International Law*

The 1994 decision by the Human Rights Committee of the United Nations in *Toonen v. Australia*, adds strength to the argument that Maryland should repeal sections 553 and 554.<sup>193</sup> The Human Rights Committee announced that the sodomy laws of Tasmania, a state in Australia, had violated the International Covenant on Civil and Political Rights ("Covenant").<sup>194</sup> The United States may be in violation of its obligations under the Covenant and should yield to persuasive international law, which also includes several recent "decisions of the European Court of Human Rights that have struck down sodomy laws."<sup>195</sup> One may use this decision as persuasive authority to repeal or overturn existing sodomy statutes in the United States.

VII. GOOD NEWS EMANATES FROM THE *ROMER* DECISION

Because we live in a pluralistic society and not a homogeneous one, the constitutional job of the Supreme Court is to protect the minority. Protection is exactly what the Court gave minorities in *Romer v. Evans*.<sup>196</sup> The obstacles that the *Hardwick I* decision erected were dealt a significant dent when the United States Supreme Court invalidated Colorado's Amendment 2 on the ground that it failed rational basis analysis under the Equal Protection Clause of the United States Constitution.<sup>197</sup> Amendment 2<sup>198</sup> was a "1992 amendment to the Colorado Constitution that would have repealed all

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193. See U.N. Human Rights Comm., 50th Sess., No. 488/1992, slip op. (1994).

194. See *id.*

195. Elizabeth Harris, *Intercourse Against Nature: The Role of the Covenant on Civil and Political Rights and the Repeal of Sodomy Laws in the United States*, 18 HOUS. J. INT'L L. 525, 527 (1996).

196. 517 U.S. 620 (1996).

197. See *id.* at 631-36.

198. See COLO. CONST. art II § 30b (1992) (repealed 1996). In 1977, "Aspen amended its anti-discrimination statute to prohibit discrimination on the basis of sexual orientation in the areas of employment, housing, and public accommodations. The cities of Boulder and Denver followed suit in 1987 and 1991 respectively. In 1990, Colorado Governor Roy Romer issued an executive order that prohibited discrimination against state employees on the basis of sexual orientation." Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of Bowers v. Hardwick*, 32 Harv. C.R.-C.L. L. Rev. 225, 230 (1997). Meanwhile a conservative backlash took place and an organization, Colorado for Family Values (CFV), was formed. See *id.* at 230. CFV began an initiative drive to bring the issue to the people. See *id.* at 230-31. Fifty-three percent of the people voted in support of adding Amendment 2 to the Colorado Constitution. See *id.* at 231. Several cities and individuals filed suit in state court seeking to have the measure enjoined and invalidated. See *id.*

legislation prohibiting discrimination on the basis of sexual orientation and prevented any future such enactments.”<sup>199</sup>

In a six to three decision, Justice Kennedy, writing for the majority, identified two aspects of Amendment 2 that triggered a closer analysis: the amendment’s unusual nature and its singling out of a particular group for disfavored treatment.<sup>200</sup> Statutes that solely target unpopular groups will “raise the inevitable inference” that the law is “born of animosity.”<sup>201</sup> Maryland’s sodomy statute may trigger the two warning signals identified by *Romer*, because the statute singles out a particular group and is unusual in nature. The statute is unusual in nature because the decision in *Schochet* carved out an exception from nowhere for consensual, noncommercial, sexual activity between heterosexual adults in the privacy of their home. By holding that “legislation based on animus towards a group cannot survive under even the most deferential equal protection review, the *Romer* Court provided advocates with alternative grounds to attack *Hardwick*’s foundation in prejudice.”<sup>202</sup>

#### VIII. CONCLUSION

Like Kentucky and others before her, Maryland must step forward and become a part of the moving stream. Whether it be through direct legislative action in the form of a repeal or through judicial activism, the time to act is now. The issue of equal rights and civil justice cannot be randomly supported based simply on which group seeks such protection at the moment. Equal rights, whether for homosexuals, racial minorities, women, or the disabled represent the same context in which present day issues such as repealing a sodomy statute that targets gays must be considered. Either Maryland is committed to the concept of equal protection under the law, or she is not.

This cannot be won by liberals or conservatives. It cannot be won by Democrats or Republicans. It cannot be won by gay or straight Americans. But progress can be made, if all Americans commit to reaffirming our nation’s basic commitment to liberty and justice for **ALL**.

I am not writing this paper asking for patience in the quest to remove the sodomy statutes from Maryland’s books. To do so would

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199. Joslin, *supra* note 196, at 225.

200. See *Evans*, 517 U.S. at 627-32; Joslin, *supra* note 196, at 234.

201. *Evans*, 517 U.S. at 634.

202. Joslin, *supra* note 196, at 239.

be wrong. How many more homosexuals will be convicted and thrown in jail for wanting to have consensual, noncommercial sex in the privacy of their own homes? How many more people will have to lose their jobs because of their orientation due to justifications from a sodomy statute? How many more people will have to suffer emotional and physical problems because they are made to feel like outcasts?

The time to discuss these issues is as appropriate now as it has never been before. No one has expressed the danger in waiting better than Martin Niemoller, a German Lutheran Pastor, who was arrested for his beliefs and put in the Dachau concentration camp:

*“In Germany the Nazis came first for the communists, and I didn’t speak up because I wasn’t a communist. Then they came for the Jews, and I didn’t speak up because I wasn’t a Jew. Then they came for the trade unionists, and I didn’t speak up because I wasn’t a trade unionist. Then they came for the Catholics, and I didn’t speak up because I was a Protestant. Then they came for me, and by that time there was no one left to speak for me.”*<sup>203</sup>

May all of us, regardless of our sexuality, work to encourage Maryland to be a part of the forward moving stream.

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203. Martin Niemoller, German Lutheran Pastor, quoted in MACMILLAN DICTIONARY OF QUOTATIONS 384 (1987).