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Notes: Criminal Law — the Court of Appeals of Maryland Turns to Statutory Construction to Avoid Constitutional Right-to-Privacy Issue. Schochet v. State, 320 Md. 714, 580 A.2d 176 (1990)

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NOTES

CRIMINAL LAW — THE COURT OF APPEALS OF MARYLAND TURNS TO STATUTORY CONSTRUCTION TO AVOID CONSTITUTIONAL RIGHT-TO-PRIVACY ISSUE. *Schochet v. State*, 320 Md. 714, 580 A.2d 176 (1990).

I. INTRODUCTION

In addition to invention, necessity can be the mother of either enlightened or egregious appellate decisions, depending on one's view of judicial activism. As a result of *Schochet v. State*,¹ it is probably safe to say that a majority of the members of the Court of Appeals of Maryland view such judicial activism as enlightened.

In *Schochet*, the court resorted to statutory construction to avoid a thorny constitutional right-to-privacy issue involving a private, consensual act of fellatio between an unmarried, heterosexual couple.² The practice of using statutory construction in such situations is common,³ but subjecting a statute to interpretation when its meaning appears obvious is not.⁴ Nevertheless, the court decided that Maryland's perverted sexual practices statute, adopted in 1916 and apparently all-encompassing, was subject to an interpretation removing consensual, noncommercial heterosexual acts of fellatio from its scope.⁵

As a result of the court's creative approach, a young man's conviction for engaging in fellatio with a woman was overturned.⁶ Most would agree that this is a meritorious result, especially since fellatio has become a common and widely accepted sexual practice.⁷ In fact, this is probably the reason the court applied statutory

1. 320 Md. 714, 580 A.2d 176 (1990).

2. *Id.*

3. *Lowe v. SEC*, 472 U.S. 181, 212 (1985) (White, J., concurring) (acknowledging principle that "constitutional adjudication is to be avoided where it is fairly possible to do so without negating the intent of Congress"); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947) (expressing the Court's time-honored policy of "strict necessity in dealing with Constitutional issues"); see also cases cited *infra* notes 8-10.

4. See *infra* notes 8-10.

5. *Schochet*, 320 Md. at 731, 580 A.2d at 184.

6. *Id.* at 735, 580 A.2d at 186.

7. See *infra* notes 82-83 and accompanying text.

construction in a situation that did not seem to call for it. Good intentions aside, the decision will enrage those who see it as judicial legislation. Although there is merit to this belief, the power of this argument is quelled by the minimal precedential impact of *Schochet*. In other words, the ends justify the means in *Schochet*, especially since the means employed did not create bad precedent.

The questionable aspect of the court's analysis in *Schochet* was not the use of statutory construction to avoid the constitutional issue, but the use of an *unreasonable* construction. Courts often use statutory construction to avoid constitutional issues. The general rule is that if there is more than one reasonable construction, those interpretations avoiding constitutional questions are favored.⁸ Some courts have extended this principle by holding that even a strained construction is desirable if it will save the constitutionality of a statute.⁹ Maryland courts have not gone quite this far, but they have recognized the principle that constitutional issues should be avoided through statutory interpretation, if reasonably possible.¹⁰

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8. See *United States v. Clark*, 445 U.S. 23, 27 (1980) ("It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided."); *Blasecki v. City of Durham*, 456 F.2d 87, 93 (4th Cir.) (refusing to interpret a North Carolina statute because the statute was subject to an interpretation by a state court that would avoid or modify the constitutional question presented), *cert. denied*, 409 U.S. 912 (1972); *State v. One Certain Conveyance*, 288 N.W.2d 336, 337 (Iowa 1980) (construing forfeiture of liquor conveyances to apply to conveyances used to transport drugs to avoid chance of forfeiture of property of an innocent title holder, which could create an equal protection violation); *District Land Corp. v. Washington Suburban Sanitary Comm'n*, 266 Md. 301, 312, 292 A.2d 695, 701 (1972) ("[W]here two constructions of statutory language are possible, the courts will prefer the construction [that saves the statute] rather than adopt one that will render it illegal and nugatory."); *State v. Wagner*, 15 Md. App. 413, 421, 291 A.2d 161, 165 (1972) ("If there are two reasonable constructions and one of them renders a statute of doubtful constitutionality, courts will adopt that view . . . which establishes it free of fundamental constitutional objection.").
 9. *State v. Musto*, 454 A.2d 449, 458 (N.J. Super. Ct. Law Div. 1982) ("The duty of the court is to strain, if necessary, to save the act, not to nullify it."), *aff'd*, 456 A.2d 114 (N.J. Super. Ct. App. Div. 1983); *cf. Kottsick v. Carlson*, 241 N.W.2d 842, 854 (N.D. 1976) (construing "custody" in adoption act so it has a different meaning than in a divorce proceeding or divorce decree).
 10. See *Yangming Marine Transp. Corp. v. Revon Prods. U.S.A., Inc.*, 311 Md. 496, 509-10, 536 A.2d 633, 640 (1986) (finding that, though it had an agent in Maryland who entered into contracts, a foreign corporation was not "doing business" in Maryland, because a determination that the corporation was "doing business" might undermine the federal constitution's Commerce Clause); *In re James D.*, 295 Md. 314, 455 A.2d 966 (1983) (construing "parent" in a statute making parents financially liable for losses sustained as a result of the child's delinquent acts inapplicable to parents who did not actually have custody of the child at the time of the act, thereby avoiding possible conflicts with the

II. BACKGROUND

For example, in *Yangming Marine Transport Corp. v. Revon Products U.S.A., Inc.*,¹¹ the court was faced with interpreting a "closed-door" statute that prevented an unregistered or unqualified foreign corporation from suing in Maryland courts.¹² The statute provided that any foreign corporation "doing business" in Maryland must register with the state to maintain an action in Maryland courts.¹³ If "doing business" had been broadly construed, the plaintiff, an unregistered foreign corporation, might have been barred from bringing an action in Maryland courts.¹⁴ The court construed the statute narrowly, however, finding that the corporation was not "doing business" in Maryland.¹⁵ The court reasoned that a broad interpretation of the statute might render it unconstitutional because it might violate the Commerce Clause of the United States Constitution.¹⁶

The court was reluctant to follow the *Yangming* analysis when the construction that would avoid a constitutional question was unreasonable. In *G. Heileman Brewing Co. v. Stroh Brewery Co.*,¹⁷ the court refused to narrow the definition of the phrase "beer distributor" and the word "franchisee" in the Beer Franchise Fair Dealing Act.¹⁸ The defendant, a beer distributor that also operated

14th Amendment); *Mangum v. Maryland State Bd. of Censors*, 273 Md. 176, 194, 328 A.2d 283, 293 (1974) (construing "obscenity" in movie censorship law narrowly in light of First Amendment requirements); *cf. Wilson v. Board of Supervisors of Elections*, 273 Md. 296, 303, 328 A.2d 305, 310 (1974) (construing "public funds" to mean only the funds of Baltimore City in a proposed amendment to the city charter that prohibited the construction of any stadium in Baltimore with the use of public funds, thereby avoiding a conflict with state law).

11. 311 Md. 496, 536 A.2d 633 (1986).

12. *Id.* at 499, 536 A.2d at 634.

13. *Id.* at 499 n.3, 536 A.2d at 634 n.3 (quoting MD. CODE ANN., CORPS. & ASS'NS § 7-301 (1985 & Supp. 1991)).

14. *See Yangming*, 311 Md. at 501-02, 536 A.2d at 635-36.

15. *Id.* at 509, 536 A.2d at 640.

16. *Id.* at 510, 536 A.2d at 640. The court stated:

The Supreme Court has consistently taken the position that a "closed-door" statute such as § 7-301 cannot, under the Commerce Clause, apply to unregistered or unqualified foreign corporations engaged in wholly interstate or foreign commerce. In light of the Supreme Court's opinions, it is questionable whether, under the Commerce Clause, § 7-301 could validly be applied to bar this action by *Yangming*.

Id. (citations and footnote omitted).

17. 308 Md. 746, 521 A.2d 1225 (1987).

18. *Id.* at 759, 521 A.2d at 1231-32. The Beer Franchise Fair Dealing Act is codified at MD. ANN. CODE art. 2B, §§ 203A-203G (1990). The Act seeks to deter beer manufacturers from inducing or coercing beer distributors into stimulating sales of beer products. MD. ANN. CODE art. 2B, § 203B (1990).

as a beer manufacturer, argued that it was not meant to be covered by the statute.¹⁹ The court found, however, that the terms "beer distributor" and "franchisee" were clear, unambiguous and not subject to interpretation.²⁰ The court concluded that the construction urged by the defendant was unreasonable, despite the possibility that the broad construction might run afoul of federal antitrust laws, and consequently violate the Supremacy Clause of the United States Constitution.²¹

Before *Schochet*, statutory construction had never been invoked to avoid a constitutional question arising under Article 27, section 554 of the Maryland Annotated Code — Unnatural and Perverted Sexual Practices.²² Most of the prosecutions under section 554 were for homosexual activity²³ and sexual acts with minors.²⁴ The only

19. *Heileman*, 308 Md. at 755, 521 A.2d at 1230.

20. *Id.* at 759, 521 A.2d at 1231-32.

21. *Id.* at 763-64, 521 A.2d at 1234. The court said the narrow construction urged by the defendant was not permitted by the statutory language, and therefore it would not construe the statute in light of federal antitrust principles. *Id.* at 764, 521 A.2d at 1234.

22. MD. ANN. CODE art. 27, § 554 (1992) 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 (\$1,000.00), 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.

23. See *McKenzie v. State*, 236 Md. 597, 204 A.2d 678 (1964) (involving adult male committing a perverted sexual act on the body of a minor boy); *Bradbury v. State*, 233 Md. 421, 197 A.2d 126 (1964) (involving adult male committing sodomy on a 12-year-old boy); *Canter v. State*, 224 Md. 483, 168 A.2d 384 (1961) (per curiam) (committing buggery with another male); *Jefferson v. State*, 218 Md. 397, 147 A.2d 204 (1958) (involving male school teacher committing act of perversion on a minor boy); *Taylor v. State*, 214 Md. 156, 133 A.2d 414 (1957) (involving adult male committing sodomy with a 15-year-old boy); *Gregoire v. State*, 211 Md. 514, 128 A.2d 243 (1957) (convicting defendant of committing unnatural and perverted sexual practices on two young boys); *Blake v. State*, 210 Md. 459, 124 A.2d 273 (1956) (convicting defendant of committing unnatural and perverted sexual practice on feeble minded 19-year-old).

24. See *State v. Grady*, 276 Md. 178, 345 A.2d 436 (1975) (convicting adult male of committing unnatural and perverted sex acts upon three young girls); *McKenzie*, 236 Md. 597, 204 A.2d 678 (involving adult male committing a perverted sexual act on the body of a minor boy); *Bradbury*, 233 Md. 421, 197 A.2d 126 (involving adult male committing sodomy on a 12-year-old boy); *Jefferson*, 218 Md. 397, 147 A.2d 204 (involving male school teacher committing act of perversion on a minor boy); *Saldiveri v. State*, 217 Md. 412, 143 A.2d

constitutional challenges made by the defendants in those cases were for overbreadth and vagueness, and the appellate courts treated those challenges rather cursorily.²⁵ In doing so, the appellate courts refused to apply narrow constructions to the broadly written statute.²⁶

The first right-to-privacy challenge to section 554 came in *Neville v. State*,²⁷ in which two defendants convicted of engaging in public, consensual acts of fellatio contended that section 554 violated their right to privacy.²⁸ One defendant had committed the act in a shed visible from a path used by children attending a nearby school.²⁹ The other committed the act in a clearing in a small wooded area.³⁰ The court concluded that neither act could be considered private because both defendants had engaged in "intimate sexual activity during daylight hours in a place which was out of doors, which was in a well populated community, and which was equally as accessible to uninvited other persons as it was to [them]."³¹

As a result of its holding, the court avoided the right-to-privacy claims raised by the defendants. The court did find, however, after an analysis of the Supreme Court's recognition of the right to privacy, "that there is no holding by the Supreme Court that the right of privacy applies to conduct of the type prohibited" by section 554.³² Therefore, the dicta in *Neville* indicated that section 554 would indeed prohibit unmarried couples from engaging in noncommercial, private acts of fellatio.

The majority of states deciding the right-of-privacy issue raised by the defendants in *Neville* and *Schochet* agree with the dicta in *Neville*. At least nine states other than Maryland have considered the issue, and in all but one of those nine cases the decisions were based

70 (1958) (convicting adult male of committing unnatural and perverted sexual act with an 8-year-old girl); *Taylor*, 214 Md. 156, 133 A.2d 414 (involving adult male committing sodomy with a 15-year-old boy); *Gregoire*, 211 Md. 514, 128 A.2d 243 (convicting defendant of committing unnatural and perverted sexual practices on two young boys).

25. See cases cited *supra* notes 23-24.

26. See, e.g., *Blake v. State*, 210 Md. 459, 124 A.2d 273 (1956) (holding § 554 not limited to acts of oral perversion); *Edmonds v. State*, 18 Md. App. 55, 305 A.2d 205 (1973) (classifying anal passage as a sexual organ within the meaning of § 554 and upholding conviction for inserting broom handle in rectum as a violation of § 554).

27. 290 Md. 364, 430 A.2d 570 (1981).

28. *Id.* at 366, 430 A.2d at 571. The court of appeals consolidated the defendants' cases because they presented the same issues of right of privacy and equal protection. *Id.*

29. *Id.* at 369-70, 430 A.2d at 572-73.

30. *Id.* at 370-71, 430 A.2d at 573.

31. *Id.* at 378-79, 430 A.2d at 577.

32. *Id.* at 377, 430 A.2d at 576.

on constitutional grounds involving either an interpretation of the scope of the right to privacy, or an equal protection analysis.³³ Five states found no right-to-privacy violation,³⁴ three found a right-to-privacy violation,³⁵ and one found that its statute violated the equal protection clause.³⁶ Massachusetts avoided any constitutional conflicts by interpreting its statute narrowly to exclude acts by unmarried adults.³⁷ None of the other nine state courts, even though they had statutes similar to Massachusetts', ever mentioned the possibility of interpreting their statutes to avoid a constitutional conflict.³⁸

In the Massachusetts decision *Commonwealth v. Balthazar*,³⁹ the state's highest court held a statute preventing the commission of

33. See *infra* notes 34-37 and accompanying text.

34. The five states are Arizona, Indiana, New Mexico, North Carolina and Rhode Island. See *State v. Bateman*, 547 P.2d 6 (Ariz.) (holding that the right of privacy is not unqualified and the legislature has the power to prohibit sodomy and other lewd and lascivious acts without offending that right), *cert. denied*, 429 U.S. 864 (1976); *Dixon v. State*, 268 N.E.2d 84 (Ind. 1971) (holding that, even assuming the act of cunnilingus was consensual, the defendant's conviction did not violate the federal constitutional right of privacy); *State v. Elliot*, 551 P.2d 1352 (N.M. 1976) (holding sodomy statute constitutional as applied to male for engaging in act with female, even if the act was consensual); *State v. Poe*, 252 S.E.2d 843 (N.C. Ct. App.) (holding that constitutional right of privacy does not protect an adult male from being prosecuted for engaging in private, consensual act of fellatio with an adult female), *cert. denied*, 259 S.E.2d 304 (N.C. 1979), *appeal dismissed*, 445 U.S. 947 (1980); *State v. Santos*, 413 A.2d 58 (R.I. 1980) (holding that, even though the heterosexual conduct of the adults occurred in private, the constitutional right of privacy is inapplicable to private unnatural copulation between unmarried adults).

35. The three states are New Jersey, New York and Oklahoma. See *State v. Saunders*, 381 A.2d 333 (N.J. 1977) (finding that state fornication statute violated federal and state constitutional right of privacy when applied to males engaging in consensual sexual intercourse with unmarried women); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (finding statute violated right of privacy when applied to deviant sexual conduct performed voluntarily by adults in a private noncommercial setting), *cert. denied*, 451 U.S. 987 (1981); *Post v. State*, 715 P.2d 1105 (Okla. Crim. App.) (finding that right of privacy, as formulated by the Supreme Court, includes the right to select consensual adult sex partners), *cert. denied*, 479 U.S. 890 (1986).

36. Pennsylvania is the lone state to base its decision on equal protection grounds. See *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980) (holding that statute making deviate acts criminal only when performed between unmarried persons exceeds proper bounds of police power and violates the Equal Protection Clause).

37. *Commonwealth v. Balthazar*, 318 N.E.2d 478, 480-81 (Mass. 1974); see also *Commonwealth v. Hill*, 385 N.E.2d 253 (Mass. 1979) (supporting the construction of the statute applied in *Balthazar*).

38. See cases cited *supra* notes 34-36. It is unlikely that any of the courts upholding their perverted sex acts statutes would have attempted to limit the scope of the statutes through statutory construction because such an approach would have resulted in an acquittal of the defendant.

39. 318 N.E.2d 478 (Mass. 1974).

“unnatural and lascivious acts with another person” to be “inapplicable to private, consensual conduct of adults.”⁴⁰ The court reached this conclusion after determining that the Supreme Court’s adoption of the right of privacy articulated a “constitutional right of an individual to be free from government regulation of certain sex-related activities.”⁴¹ This, coupled with the court’s finding that community values on the subject of permissible sexual conduct were no longer monolithic, permitted the court to read its statute as prohibiting only sexual conduct disapproved of by the community.⁴² It was unnecessary for the court to decide if “a statute which explicitly prohibits specific sexual conduct, even if consensual and private, would be constitutionally infirm.”⁴³ Massachusetts was alone in its method of dealing with the constitutional challenge to its perverted sexual acts statute until it was joined by the Court of Appeals of Maryland in *Schochet v. State*.⁴⁴

III. THE INSTANT CASE

The petitioner in *Schochet*, Steven Adam Schochet, was indicted in Montgomery County for rape and various sex offenses, including engaging in an act of fellatio in violation of section 554.⁴⁵ Conflicting versions of the facts giving rise to the charges were presented at trial.⁴⁶ The jury, believing Schochet’s version, acquitted him on the

40. *Id.* at 481.

41. *Id.* at 480-81.

42. *Id.* at 481.

43. *Id.*

44. 320 Md. 714, 731, 580 A.2d 176, 184 (1990).

45. *Id.* at 717-18, 580 A.2d at 177-78. Schochet was charged with first degree rape, second degree rape, first and second degree sexual offenses, sodomy, and committing an unnatural and perverted sexual act. *Id.*

46. Victim Dovie Sullivan’s testimony, as related by the court of appeals, is summarized as follows: She had put her 11-year-old daughter to bed and was celebrating her divorce when Schochet knocked on her door. She let him in to use the telephone and he began to make himself at home. She asked him to leave, but he refused. She did not scream or try to get help because her daughter was asleep and she feared for her daughter’s safety as well as her own. Even though Schochet had no weapons and made no overt threats, he forced her to perform fellatio and have vaginal and anal intercourse. The next morning she ordered Schochet to leave and he complied. A few hours later he returned, accusing her of giving him “crabs” and demanding money so that he could see a doctor. Police later came by her apartment to ask questions about a report of an abused child. The officers left a telephone number which she later called and reported the events of the previous night. *Schochet*, 320 Md. at 719-20, 580 A.2d at 178-79.

Schochet’s testimony, as related by the court of appeals, is summarized as follows: On the night of the incident, Schochet was looking for a party in Dovie Sullivan’s apartment building. Hearing loud music coming from one of

sex offense and rape charges, but found him guilty of engaging in fellatio.⁴⁷

Schochet appealed to the Court of Special Appeals of Maryland, arguing that section 554 was unconstitutional as applied to private and noncommercial sexual acts between consenting, heterosexual adults.⁴⁸ A divided court affirmed, holding that no constitutional protection for sexual activity existed outside of marriage.⁴⁹

The Court of Appeals of Maryland granted certiorari and heard oral arguments.⁵⁰ The court, *sua sponte*, added the following issue and ordered a reargument:

As a matter of statutory construction, and considering the principle that if reasonably possible courts will construe a statute so as to avoid a serious constitutional question, does Maryland Code (1957, 1987 Repl. Vol.), Art. 27, § 554, encompass consensual, noncommercial, heterosexual activity between adults in the privacy of the home?⁵¹

IV. REASONING AND ANALYSIS

The court answered no,⁵² and as a result circumvented Schochet's right-to-privacy claim.⁵³ The court employed a three step analysis to arrive at its holding. First, it emphasized the canon of statutory construction providing that if a legislative act is susceptible of two reasonable interpretations, the construction that avoids the determination of constitutionality is preferred.⁵⁴ Second, by citing decisions from other jurisdictions, the court showed the complexity of the right-to-privacy issue and the lack of uniformity in the holdings of other courts.⁵⁵ The court concluded: "We express neither agreement

the apartments, he thought he had found the party so he knocked on the door. Sullivan invited him in and fixed him a drink. She then performed fellatio on him and invited him into the bedroom where they had consensual vaginal intercourse. He went home the next morning and discovered he had "crabs." He returned to Sullivan's apartment and asked her to take him to a doctor and pay for his examination and treatment. She refused. In retaliation he called the police and falsely reported that Sullivan was abusing her daughter. *Id.* at 720-21, 580 A.2d at 179.

47. *Id.* at 723, 580 A.2d at 180.

48. *Id.*

49. *Id.*

50. *Id.* at 724-25, 580 A.2d at 181.

51. *Id.* at 725, 580 A.2d at 181.

52. *Id.* at 731, 580 A.2d at 184.

53. *Id.* at 717, 580 A.2d at 177.

54. *Id.* at 725, 580 A.2d at 181.

55. *Id.* at 726-28, 580 A.2d at 181-83.

nor disagreement with any of the above cited cases. We simply point out that the approximately even division among appellate courts reinforces our conclusion that the constitutional issue here presented is a very difficult one."⁵⁶ In the first two steps, the court established that statutory construction was a proper means to avoid deciding a difficult constitutional question. It was then free to invoke this solution if it found section 554 was subject to more than one reasonable interpretation.

The court did this in its third step when it concluded that section 554 was broad and sweeping, and that its "silence concerning the matters of consent, privacy, marriage, etc., creates legitimate questions regarding the reach of the statute."⁵⁷ It then analogized to previous decisions in which it had construed statutes narrowly to avoid constitutional issues, concluding that "the broad, nonspecific language of Art. 27, Section 554, is subject to a limiting construction in order to avoid a substantial constitutional issue."⁵⁸

The court buttressed its holding by pointing to its previous decisions regarding section 554.⁵⁹ Because none of these decisions involved a prosecution based on consensual, noncommercial, heterosexual activity between adults in private, the court reasoned that there "is a strong indication that such conduct is not within the contemplation of Section 554."⁶⁰

56. *Id.* at 728, 580 A.2d at 183.

57. *Id.* at 729, 580 A.2d at 183.

58. *Id.* at 731, 580 A.2d at 184.

59. *Id.* at 731-34, 580 A.2d at 184-85; *see supra* notes 23-32 and accompanying text.

60. *Schochet*, 320 Md. at 734, 580 A.2d at 185. In the fifth section of the opinion the court rejected the State's argument regarding the legislative history of Chapter 573 of the 1976 Acts of Maryland (now codified at MD. ANN. CODE art. 27, §§ 461-464E). *Id.* at 734-35, 580 A.2d at 185-86. Chapter 573 divided the offense of rape into first degree rape and second degree rape, and enacted new sexual offenses in the first degree through the fourth degree. *Id.* at 734, 580 A.2d at 186. Subject to exceptions for minors, the mentally defective, and the physically incapacitated, the statute "require[s] proof that the act was 'against the will and without the consent of the other person.'" *Id.*

It was originally intended that Chapter 573 replace § 554; however, the bill was amended to leave § 554 intact. *Schochet*, 320 Md. at 734-35, 580 A.2d at 186. The State argued that because Chapter 573, which only concerned nonconsensual sex crimes, did not repeal § 554, the legislature must have intended that § 554 encompass consensual, noncommercial, heterosexual activity between adults in private. *Id.* at 735, 580 A.2d at 186. The court rejected this argument, stating that the legislature may have decided that "consensual homosexual acts should still be prohibited, or that consensual sexual acts in non-private places . . . should remain criminal." *Id.*

The court's reasoning stretched the principles of statutory construction. The court did not find that section 554 was subject to more than one reasonable interpretation, but that the constitutionality of section 554 is debatable. As Chief Judge Murphy argued in dissent, "that there may be a significant division throughout the country as to the *constitutionality* of statutes similar to § 554 provides no basis to conclude that the language of the Maryland statute lends itself to more than one reasonable interpretation."⁶¹

On its face, section 554 appears all inclusive. It criminalizes unnatural or perverted sexual acts, describes such acts, yet it provides no exceptions from the prohibited conduct.⁶² It does not distinguish between "commercial and noncommercial sexual activity, public from private, homosexual from heterosexual, married from unmarried, or adult from juvenile activity."⁶³ Although broadly written, the appellate courts had previously determined that section 554 is neither overbroad⁶⁴ nor vague.⁶⁵

Moreover, there is no legislative history that sheds any light on the intent of the Maryland General Assembly when it passed section 554 in 1916.⁶⁶ The subsequent amendments to the section also provide little assistance in determining the legislative intent.⁶⁷ In light of this,

61. *Id.* at 736, 580 A.2d at 187 (Murphy, C.J., dissenting).

62. *Id.* at 736-37, 580 A.2d at 187 (Murphy, C.J., dissenting); *see also supra* note 22.

63. *Schochet*, 320 Md. at 736-37, 580 A.2d at 187 (Murphy, C.J., dissenting).

64. *See Cherry v. State*, 18 Md. App. 252, 264-66, 306 A.2d 634, 641-42 (1973) (holding that the term "lewdness" in a prostitution statute cannot be vague or overbroad since unnatural and perverted sexual practices as defined by § 554 are not vague or overbroad); *Hughes v. State*, 14 Md. App. 497, 504-05, 287 A.2d 299, 304 (1972) (holding that as it is almost inconceivable that private consensual acts between married couples would be prosecuted under § 554, the statute does not extend to or infringe upon their privacy rights).

65. *See Blake v. State*, 210 Md. 459, 462, 124 A.2d 273, 274 (1956) (holding that § 554 is not vague and uncertain, explaining that it is impossible to define some types of crime with a detailed description of all possible cases that may arise); *see also Hughes*, 14 Md. App. at 507, 287 A.2d at 306 (holding that failure to specify an age at which a minor may consent to engage in perverted sexual practices with an adult does not render § 554 unconstitutional).

66. Section 554, introduced as Senate Bill 565, was enacted by the Maryland General Assembly in 1916. Law of Apr. 18, 1916, ch. 616, 1916 Md. Laws 1293. Neither the title nor the purpose clause of Senate Bill 565 indicate that unmarried heterosexuals would be excluded from its scope. *See id.*

67. Section 554 was amended in 1976 as part of the comprehensive revision of Maryland's sexual offense laws. Law of May 17, 1976, ch. 573, 1976 Md. Laws 1258. The legislative history of the amendment shows that the statute was intended to apply to consensual, noncommercial heterosexual and homosexual conduct. *Id.* It is unclear, however, whether the statute was intended to apply to such activity when it occurs in private. *Id.*

the preferred approach to interpreting section 554 is to follow its all-encompassing plain meaning.⁶⁸

This was the method chosen by the American Civil Liberties Union and the state, both of whom concluded that a reasonable interpretation of the statute required the inclusion of acts between unmarried heterosexuals.⁶⁹ The majority disregarded these arguments and found that the statute, because of its broad and sweeping language, is susceptible to two reasonable interpretations.⁷⁰

This conclusion is unreasonable and ignores the plain meaning of the statute.⁷¹ Furthermore, it assumes that in 1916 the Maryland General Assembly intended to exclude some unnatural and perverted sexual acts even though 1916 was "a staid time in our history when the sexual mores of the people were far less tolerant than the moral attitudes that prevail in today's society."⁷²

Despite this dubious rationale, there is merit to the *Schochet* opinion. An appreciation of the opinion lies not in its legal analysis,

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68. This approach is commonly referred to as the plain meaning rule. *See United States v. Standard Brewery, Inc.*, 251 U.S. 210, 217 (1920) ("[I]n the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written . . ."); *United States v. Harvey*, 814 F.2d 905, 913 (4th Cir. 1987) ("Statutory construction properly begins with examination of the literal language of a statute, and it properly ends there unless the language is ambiguous or would, as literally read, contravene a clearly expressed legislative intention."); *Brodsky v. Brodsky*, 319 Md. 92, 98, 570 A.2d 1235, 1237 (1990) ("In construing a statute [the court] assumes that the words of the statute are intended to have their natural, ordinary and generally understood meaning in the absence of evidence to the contrary."); *Kindley v. Governor of Maryland*, 289 Md. 620, 625, 426 A.2d 908, 911 (1981) ("[When] a statute is phrased in broad general terms, it suggests that the legislature intended the provision to be capable of encompassing circumstances and situations which did not exist at the time of its enactment.").
69. *See Supplemental Brief of Respondent at 2, Schochet v. State*, 320 Md. 714, 580 A.2d 176 (1990) (No. 88-76) (arguing that the statute unambiguously applies to consensual, noncommercial, heterosexual activity between adults in the privacy of the home); *Amicus Curiae Brief of the American Civil Liberties Union of Maryland, Inc. at 9, Schochet v. State*, 320 Md. 714, 580 A.2d 176 (1990) (No. 88-76) (arguing that § 554 has clearly been understood over the years to apply to sexual acts between consenting adults regardless of sexual orientation). *But see Petitioners' Supplemental Brief at 3, Schochet v. State*, 320 Md. 714, 580 A.2d 176 (1990) (No. 88-76) (arguing that § 554 may be reasonably interpreted not to encompass consensual, noncommercial heterosexual activity between adults in the privacy of the home).
70. *See Schochet*, 320 Md. at 728-31, 580 A.2d at 183-84.
71. *See supra* notes 17-21 and accompanying text; *see also Maryland State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496, 505, 312 A.2d 216, 221 (1973) (declining to construe statute regulating cosmetologists in such a way so as to avoid the determination of a constitutional issue because it would produce a strained construction of the statute).
72. *Schochet*, 320 Md. at 737, 580 A.2d at 187 (Murphy, C.J., dissenting).

but in the way the court extricated itself from precedent that seemingly dictated an affirmance of Schochet's conviction, and overturned his conviction without creating bad precedent.

If the court had decided *Schochet* on the right-to-privacy issue presented, Schochet's conviction would likely have been affirmed. Not only was this indicated by the dicta in *Neville*,⁷³ but it was the result reached by Judge Moylan after a thorough analysis of Supreme Court opinions defining the right of privacy when *Schochet* was before the court of special appeals.⁷⁴ Judge Moylan concluded that "[t]here is not the remotest allusion to any constitutional protection for sexual activity — orthodox or unorthodox, heterosexual or homosexual — at least outside of marriage."⁷⁵ The scope of his inquiry did not concern the Maryland Declaration of Rights because it contains no express or implied right of privacy.⁷⁶

Still, the court of appeals could have disregarded Judge Moylan's influential opinion⁷⁷ and justified overturning Schochet's conviction by following other jurisdictions. Three other states had previously

73. See *supra* text accompanying note 32.

74. The Maryland court noted that the scope of the right of privacy and the limitations upon the right are found in five Supreme Court decisions. *Schochet v. State*, 75 Md. App. 314, 322, 541 A.2d 183, 186-87 (1988). The five cases are: *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that the constitutional right of privacy does not confer a fundamental right upon homosexuals to engage in sodomy); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding that the constitutional right of privacy guaranteed adults access to contraceptives and that a New York law forbidding anyone but a licensed pharmacist to distribute contraceptives was an unconstitutional infringement on that right); *Roe v. Wade*, 410 U.S. 113 (1973) (finding, as an aspect of the right of privacy, the constitutional right for an unmarried woman to choose whether to continue or abort her pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down as unconstitutional a Massachusetts statute that made it a crime to dispense contraceptive drugs or articles to unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (criminalizing the prescribing of any contraceptive drug device to married couples violates the zone of privacy created by several fundamental constitutional guarantees).

75. *Schochet v. State*, 75 Md. App. 314, 339, 541 A.2d 183, 195 (1988).

76. *Id.* at 317, 541 A.2d at 184; see *Neville v. State*, 290 Md. 364, 371 n.5, 430 A.2d 570, 574 n.5 (1981) (noting that the appellant's privacy right arguments were based upon the federal constitution, not upon Maryland's Constitution or Declaration of Rights); *Montgomery County v. Walsh*, 274 Md. 502, 512, 336 A.2d 97, 104 (1975) ("It is, of course, no longer open to question that the right of privacy is protected by the federal constitution . . ."); *Doe v. Commander, Wheaton Police Dep't*, 273 Md. 262, 269, 329 A.2d 35, 40 (1974) ("Government . . . conduct . . . that clearly invades individual privacy . . . cannot be permitted unless a compelling public necessity has been clearly shown.").

77. See *United States v. Fagg*, 33 M.J. 618, 622 (A.F.C.M.R. 1991) (James, J., dissenting) (stating that Judge Moylan's opinion "so well states my views that I cannot improve upon its analysis"), *rev'd*, 34 M.J. 179 (C.M.A. 1992).

found statutes similar to section 554 to violate the federal constitutional right of privacy when applied to private, adult, consensual, noncommercial, heterosexual deviant or perverted activities.⁷⁸ All of these opinions, however, pre-dated the Supreme Court's 1986 decision in *Bowers v. Hardwick*.⁷⁹ In *Bowers*, the Supreme Court refused to expand the scope of the constitutional right of privacy in holding that it did not extend to adult, consensual acts by unmarried persons even in the privacy of the bedroom.⁸⁰ In the wake of this restriction, it would have been difficult for the court to justify a holding based on pre-*Bowers* decisions.⁸¹

So, if the court had decided the right-to-privacy issue it was almost forced to follow Judge Moylan's opinion. Although that opinion is consistent with precedent, its result is inapposite with contemporary values. Reports on sexual behavior of adults over the last fifty years have shown a growing number of people engaging in cunnilingus and fellatio.⁸² Even Judge Moylan suggested that there

78. See cases cited *supra* note 35.

79. 478 U.S. 186 (1986); see cases cited *supra* note 35.

80. *Bowers*, 478 U.S. at 191.

81. When the three states found that their unnatural and perverted sexual act statutes violated the federal constitutional right of privacy, the Supreme Court had just begun to map out the limits of the right of privacy in intimate relationships. In 1976, the Supreme Court began to restrict the right of privacy by summarily affirming a three judge panel of the United States District Court for the Eastern District of Virginia which held that there was no authoritative judicial bar to the proscription of homosexuality since it is not a part of marriage, home or family life. *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

Because *Doe* was a summary opinion it was not treated with the same precedential authority as a plenary opinion. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 718 n.2 (1977) (Rehnquist, J., dissenting) (arguing that *Doe* established a precedent that the majority should not be permitted to ignore). It was not until *Bowers* affirmed what was suggested in *Doe* that strong precedent limiting the right of privacy was established.

82. In his 1948 report, Alfred Kinsey found that fewer than half of the men interviewed engaged in fellatio or cunnilingus, even during marriage. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 368 (1948). However, in the category of highest incidence — married men with 13 plus years of education — 45.3% performed cunnilingus and 42.7% engaged in fellatio. *Id.* Five years later, Kinsey reported that 54% of the married women interviewed had engaged in pre-coital cunnilingus and 49% had engaged in fellatio. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 399 (1953). In a 1977 Redbook Report on Female Sexuality, two researchers found that 92.7% of wives responding reported having engaged in cunnilingus and 90.9% had engaged in fellatio. CAROL TAVRIS & SUSAN SADD, *THE REDBOOK REPORT ON FEMALE SEXUALITY* 162-63 (1976). From their responses, they concluded, "[t]oday it is clear that if the sexual revolution has occurred anywhere, it is in the practice and acceptance of oral sex. Among people under age twenty-five, it is virtually a universal part of the sexual relationship." *Id.* at 87.

has been a massive sexual revolution in the last quarter of this century and that modes of sexual expression once thought to be perverted or unnatural may now be a common experience of Americans.⁸³ Therefore, the constitutional issue presented by *Schochet* forced the court to either affirm the conviction of Schochet for engaging in an accepted sexual practice, or acknowledge modern values and expand the right of privacy in a way not yet sanctioned by the Supreme Court.

Statutory construction provided an easier way out. That route created a result in harmony with modern sexual practices without wandering into areas of the right of privacy not yet chartered by the Supreme Court. The court played loosely with statutory construction, but this is not egregious because the holding will have little precedential effect on statutory construction principles.⁸⁴ Also, the effect on section 554 is the same as if the case had been decided on right-to-privacy grounds. It is now interpreted to exclude the private, noncommercial, consensual unnatural or perverted sexual practices of unmarried heterosexuals, just as it would have been if the court had decided that the private, consensual, noncommercial acts of unmarried heterosexuals enjoy a constitutional protection under the right of privacy.

This result leaves the court open to criticism for legislating from the bench. It ignored the plain meaning of the statute and imposed a restricting construction despite having no supportive legislative history. In short, the court imposed its own belief of what is and what is not an unnatural and perverted sexual act. Although many would argue that any act of judicial legislation should never be condoned,⁸⁵ the circumstances of *Schochet* present two strong arguments for overlooking the legislative liberties taken by the court. First, *Schochet* has very little precedential impact.⁸⁶ It is the only

83. *Schochet v. State*, 75 Md. App. 314, 350, 541 A.2d 183, 200-01 (1988). Chief Judge Murphy in his dissent in the Court of Appeals of Maryland decision said he shared Judge Moylan's observation that there has been a massive sexual revolution in the last 25 years. *Schochet v. State*, 320 Md. 714, 738, 580 A.2d 176, 187 (1990) (Murphy, C.J., dissenting).

84. *See supra* notes 8-10 and accompanying text. Because the court did strain to use statutory construction, *Schochet* could be seen as adopting the principle that even a strained construction is desirable if it will uphold constitutionality. *See supra* note 9 and accompanying text. However, the court never clearly stated that it had adopted this view.

85. "[I]t is not the function of this Court to decide cases on the basis of community standards." *Schochet v. State*, 75 Md. App. 314, 352, 541 A.2d 183, 202 (1988) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 530-31 (1965) (Black, J., dissenting)). The courts are to decide cases agreeably to the Constitution and laws of the United States, and it is the legislature's job to take a law off the books. *Id.* at 352-53, 541 A.2d at 202.

86. *See supra* note 84.

case reaching the appellate level in the 74-year history of section 554 that has involved a private, noncommercial, heterosexual act between consenting adults.⁸⁷ It is unlikely that anyone will escape prosecution or conviction from section 554 because of the new interpretation of the statute. Second, a sense of justice dictates the court's ruling. It was the least offensive manner in which the court could overturn Schochet's conviction⁸⁸ for engaging in a widely accepted and practiced sexual act.

V. CONCLUSION

In *Schochet*, the Court of Appeals of Maryland showed a willingness to engage in judicial activism by applying questionable reasoning to established principles to achieve what most would perceive as an equitable outcome. The result is a case with little precedential effect, thereby almost entirely limiting any judicial rights or wrongs it committed to *Schochet* alone.

Thomas F. McKeon

87. See cases cited *supra* notes 23-32.

88. There were two other methods the court of appeals could have chosen to overturn Schochet's conviction. It could have decided that the constitutional right of privacy prohibited his conviction. The court might also have read a right of privacy into the Declaration of Rights of Maryland — something which the court has never done. See *supra* note 76 and accompanying text. See also *Schochet v. State*, 75 Md. App. 314, 363, 541 A.2d 183, 207 (1988) (Wilner, J., dissenting). ("I therefore do not suggest (and indeed would oppose) grounding this right [to privacy] solely on the State Constitution.").