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POSITION ON PROPOSED LEGISLATION

BILL: HB 0209

FROM: Maryland Office of the Public Defender

POSITION: Favorable

DATE: 1/21/2022

The Maryland Office of the Public Defender respectfully requests that the Committee issue a favorable report on House Bill 209. House Bill 209 aims to correct the injustice of Maryland's current law, which prohibits sexual conduct between same-sex couples and carries a maximum sentence of ten years of incarceration, by repealing Maryland's so-called "perverted practice" statute.

The statute, Section 3-322 of Maryland's criminal code, is patently unconstitutional. That fact, however, does not assuage the terror that a person feels when charged with violating it. Nor does it stop police from filing charges against gay men for the simple act of physically expressing their affection for one another.

As a public defender, I have represented several clients—all of them gay men—who have been charged with violating Section 3-322 in just the last year. I have heard the fear and panic in their voices as they ask me if they are really facing ten years in jail. I have heard their disgust and shame and disbelief as they wonder aloud how such a law can even exist. And I have seen the worry on their faces as they ponder whether to trust me—a person that they barely know—when I tell them that the law is unconstitutional and that we can surely beat the charge if the state decides to prosecute them. My clients are regular people. And like most regular people, they make the logical assumption that a law on the books—however asinine—is a law that can be enforced.

But how did we get to this point?

Section 3-322 prohibits a person from committing an "unnatural or perverted sexual practice with another." The plain language of the statute appears to proscribe conduct irrespective of sexual orientation. In 1990, however, the Maryland Court of Appeals recognized potential constitutional problems with the statute's broad language and gave the law a decidedly homophobic interpretation.

In *Scochet v. State*, 320 Md. 714 (1990), the Court of Appeals ruled that Section 3-322's "broad, nonspecific language . . . is subject to a limiting construction in order to avoid a substantial constitutional issue." To limit the reach of the law, the court concluded that Section 3-322 "does

not encompass consensual, noncommercial, *heterosexual* activity between adults in the privacy of the home.” In other words, to protect Section 3-322 from being attacked as unconstitutionally vague, the Court of Appeals ruled that the law was to be interpreted as only proscribing homosexual activity.

The ruling in *Scochet* is an abomination and an embarrassment to the state of Maryland. Thankfully, the Supreme Court’s 2003 ruling in *Lawrence v. Texas* rendered the decision moot.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court wrote that a Texas law similar to Section 3-322 “touch[ed] upon the most private human conduct, sexual behavior, and in the most private of places, the home.” The Court went on to say that such statutes “seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.”

The *Lawrence* court ultimately held that the Texas statute furthered no legitimated state interest that could “justify its intrusion into the personal and private life of the individual” and that the law (and others like it) thus violated the Due Process Clause of the Fourteenth Amendment.

The problem, however, is that the Supreme Court’s ruling in *Lawrence* did not make all of the laws that it invalidated suddenly disappear. Rather, the ruling only makes such laws theoretically unenforceable. The laws themselves remain on the books unless and until the legislatures in the states where they exist decide to repeal them. As long as the laws are still codified, police can and will continue to charge people with violating them.

For me and, more importantly, for my clients, the passage of House Bill 209 is not a symbolic gesture. Its passage is more than an acknowledgement that the criminalization of homosexual conduct has no place in Maryland. The fear that my clients experience is real and it matters. Section 3-322’s continued existence has real-world consequences for the individuals charged with violating it. Unless House Bill 209 is passed and the law repealed, the trauma of being arrested and charged with a ten-year crime will continue to be inflicted on members of Maryland’s gay community. This is not justice. This is structural homophobia, plain and simple.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a favorable report on House Bill 209.

Submitted by: Government Relations Division of the Maryland Office of the Public Defender.

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