
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 94-3855, 94-3973

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., a not-
for-profit Ohio corporation, **RICHARD BUCHANAN, CHAD BUSH,**
EDWIN GREENE, RITA MATHIS, ROGER ASTERINO,
and HOUSING OPPORTUNITIES MADE EQUAL,

Plaintiffs-Appellees,

v.

THE CITY OF CINCINNATI,
an Ohio municipal corporation,

Defendant-Appellant

and

EQUAL RIGHTS, NOT SPECIAL RIGHTS; MARK MILLER, THOMAS E.
BRINKMAN, JR., and ALBERT MOORE,

Intervenors-Appellants.

**BRIEF AMICUS CURIAE OF THE
AMERICAN PSYCHOLOGICAL ASSOCIATION,
THE NATIONAL ASSOCIATION OF SOCIAL WORKERS,
AND THE OHIO PSYCHOLOGICAL ASSOCIATION**

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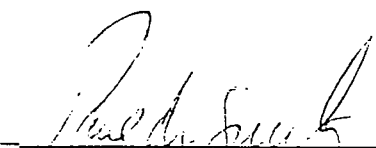
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EQUAL RIGHTS,
NOT SPECIAL RIGHTS, et al.,
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CASE NO. 94-3855;
94-3973

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 25, Amici Curiae
American Psychological Association, the National Association
of Social Workers, Inc., and the Ohio Psychological
Association, make the following disclosure:

1. Is any of said parties a subsidiary or affiliate of a
publicly-owned corporation? No.
2. Is there a publicly-owned corporation, not a party to
the appeal, that has a financial interest in the
outcome? No.


Paul M. Smith

12/4/94
Date

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BRIEF AMICUS CURIAE OF THE
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THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC.
AND THE OHIO PSYCHOLOGICAL ASSOCIATION

INTEREST OF AMICI CURIAE

The American Psychological Association ("APA"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 120,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among APA's major functions are promoting psychological research and promulgating the results of this research as it

applies to important human concerns. A substantial number of APA's members are concerned with research and provision of therapy pertaining to human sexuality and the nature of prejudice and its impact on individuals and groups.

APA has submitted amicus briefs in important cases that raise issues to which psychological research and opinion are pertinent, including constitutional challenges to laws and regulations affecting human sexuality.^{1/} APA's amicus briefs have been relied upon by the Supreme Court in many other cases of national significance. E.g., Maryland v. Craig, 497 U. S. 836, 833 (1990); Hodgson v. Minnesota, 497 U. S. 417, 437 n.24, 454 n.38 (1990).

The National Association of Social Workers, Inc. (NASW), a nonprofit professional association with over 150,000 members, is the largest association of social workers in the world. The Ohio Chapter has over 5,433 members. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing professional learning, and

^{1/} Among other cases, the APA filed amicus briefs at both the panel, 847 F. 2d 1329 (9th Cir. 1988), and en banc stages of Watkins v. United States Army, 875 F. 2d 699 (9th Cir. 1989), cert. denied, 494 U.S. 1004 (1990), a challenge to the constitutionality of excluding gay people from the military, see generally id., 875 F. 2d at 711-31 (Norris, concurring in judgment); in Kentucky v. Wasson, 842 S.W.2d 487 (Ky. 1992), in which the Kentucky Supreme Court overturned that state's statute criminalizing homosexual sodomy, see id. at 490 & n.1; and in Bottoms v. Bottoms, 444 S.E.2d 276 (Va. App. 1994) (appeal pending), in which the court ruled that a lesbian mother could not be denied custody of her child on the basis of the her sexual orientation or her private sexual conduct, see id. at 283. APA's amicus brief was prominently cited by the four dissenting Justices in Bowers v. Hardwick, 478 U. S. 186, 199, 202 n.2, 208 n.3 (1986) (Blackmun, J., dissenting).

to improving the quality of life through the application of social work knowledge and skills. NASW is deeply committed to the principle of self-determination and to the protection of individual rights and personal privacy.

In 1993, NASW adopted a policy on "Lesbian and Gay Issues" expressing its commitment to ending legal discrimination against lesbians and gay men. NASW has a strong interest in this litigation and other cases challenging unfair and unequal treatment of gay people under color of law. NASW participated as an amicus in Evans v. Romer, 1994 WL 554621 (Colo. 1994), in which the Colorado Supreme Court struck down a Colorado constitutional amendment imposing special political disabilities on gay people. The charter amendment involved in this case is in relevant respects identical to the measure at issue in Evans.

Amicus Ohio Psychological Association (OPA) is a nonprofit professional membership organization of approximately 1500 psychologists throughout Ohio. OPA provides a variety of services, including professional education, to its member psychologists. In addition, OPA seeks to advance public understanding and to assist in the shaping of public policy on questions to which psychological expertise is relevant. The members of OPA voted at their 1993 Spring Convention to oppose all efforts to enact legislation that discriminates against people because of their sexual orientation. OPA participated as amicus in the

district court in this case and filed a brief in that court supporting plaintiffs.

Amici submit this brief to bring to this Court's attention the principal body of scientific knowledge pertinent to the fundamental constitutional questions posed in this case.^{2/} Amici consider it particularly important that the Court consider such scientific research in view of the widespread prejudice and stereotyping that is directed against gay people in the United States. See infra 26-40.

As is discussed below, social science research indicates that sexual orientation has no bearing on an individual's ability to contribute to society; that gay people are subject to intense prejudice; and that groundless discrimination against them is a significant social problem.^{3/} Amici have frequently taken formal stands against

^{2/} This brief reviews empirical research from the social and behavioral sciences pertaining to sexual orientation and the social psychology of discrimination. Amici describe data from studies conducted using the scientific method, which requires that data be collected through procedures that minimize the likelihood that a particular researcher's personal biases and values will influence the observation he or she makes. Thus, for example, in a valid study, research subjects should be unaware of the study's hypotheses because such knowledge might influence their responses or behavior. In addition, scientific studies typically are subject to critical review by outside experts, usually during the peer review process preceding publication in a scholarly journal.

^{3/} As used in this brief, the terms gay and lesbian describe men and women, respectively, whose social identity or sexual orientation is based on their primary sexual, emotional, or romantic attraction to members of their own sex. See generally Gonsiorek & Weinrich, The Definition and Scope of Sexual Orientation, in Homosexuality: Research Implications for Public Policy 1-12 (Gonsiorek & Weinrich eds. 1991).

discrimination based on sexual orientation, and have urged the enactment of laws barring discrimination on that basis.^{4/}

Such laws do not confer on gay people advantages that heterosexual people lack. Instead, they respond to actual conditions that are, in many respects, demonstrably worse for people who are gay than for those who are not. Without a law specifically forbidding employment discrimination on the basis of sexual orientation, for example, a gay person faces the cruel dilemma of risking loss of livelihood or attempting to conceal his or her status, a decision that itself can entail serious psychological harm. See infra at 39. Similarly, general laws against assault have been insufficient to protect lesbians and gay men from a profusion of specifically anti-gay violence. See infra note 71.^{5/}

Amicus APA has declared its opposition to the recent enactment of state-law provisions that prevent local governments from enacting policies protecting gay people. See infra at 21. The deep prejudice that gay people face, the frequency of vehement political appeals at their expense, and their relatively small numbers all ensure that gay people will encounter obstacles in securing governmental protection and recognition even when they are allowed equal access to

^{4/} See supra at 3; infra, nn. 46, 47.

^{5/} Youth counselling programs, health education initiatives, or even such modest but symbolically important forms of recognition as legislatively proclaimed gay history days are among the many other governmental actions that respond to the legitimate concerns of gay people.

normal policy-making processes. Measures that single out gay people and deny them any realistic prospect of obtaining public redress for their problems are simply indefensible.

STATEMENT OF FACTS

On November 2, 1993, Cincinnati approved Issue 3, a ballot initiative to amend the city charter. The initiative arose in response to the enactment by the City Council of two ordinances that prohibited discrimination on the basis of, among other things, sexual orientation. In relevant part, Issue 3 provides that the City of Cincinnati and its agencies

may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

On November 8, 1993, plaintiff-appellees filed suit challenging the constitutionality of Issue 3. The district court entered a preliminary injunction against its implementation on November 19, 1993, see Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 838 F. Supp. 1235 (S.D. Ohio 1993), and entered a permanent injunction on August 9, 1994, see 860 F. Supp. 417 (1994). The court held the measure unconstitutional on multiple grounds, including the grounds that it deprives gay people of their fundamental constitutional right to equal access to the political process; that its classification based upon sexual orientation could not withstand heightened equal protection

scrutiny; and that it lacks a rational basis. Supporting the court's rulings was a set of factual findings, based in large part on expert testimony, concerning sexual orientation, prejudice and discrimination on the basis of homosexual orientation, and participation by gay people in politics. Id. at 426-427.

SUMMARY OF ARGUMENT

The district court's factual findings concerning sexual orientation are consistent with prevailing scientific understanding. Specifically, the court's findings that sexual orientation is distinct from sexual conduct, that gay people do not choose their sexual orientation, and that sexual orientation does not adversely affect a person's ability to contribute to society are consistent with the great weight of scientific literature and opinion. (Part I).

Scientific opinion also supports the district court's finding that gay people constitute an "identifiable" group. There is no dispute among psychologists that lesbians and gay men share a characteristic--homosexual orientation--that has immense importance both to them and to others, one that sets them apart from the majority. Lesbians and gay men are also bound together as a discrete group by the societal prejudice they face because of their sexual orientation. (Part II).

The district court's findings concerning discrimination against gay people are also supported by a large body of scientific literature. Gay people have been

subjected to a history of prejudice and discrimination both public and private. Measured by a variety of standards--from research on public attitudes to statistics on hate crimes--lesbians and gay men remain subject to intense societal prejudice and discrimination. Like ethnic prejudice, prejudice against lesbians and gay men consists largely of inaccurate stereotypes. Prejudice and discrimination against gay men and lesbians leads to serious harms. (Part III).

ARGUMENT

I. SCIENTIFIC RESEARCH AND OPINION SUPPORT THE DISTRICT COURT'S FINDINGS CONCERNING SEXUAL ORIENTATION

The district court made a number of findings concerning the general nature of sexual orientation. Among them were the court's findings that sexual orientation (i) "is a deeply rooted, complex combination of factors including a predisposition towards affiliation, affection, or bonding with members of the opposite and/or the same gender," (ii) "exists separately and independently from sexual conduct or behavior," (iii) is not voluntarily chosen, (iv) and "bears no relation to an individual's ability to perform, contribute to, or participate in, society." 860 F. Supp. at 426. These findings are fully consistent with scientific research and opinion concerning sexual orientation.

A. The Nature of Sexual Orientation

Sexual orientation is one of four distinct but related components of human sexuality commonly identified by

social scientists.^{6/} It "can be defined as an enduring erotic, affectional, or romantic attraction to individuals of a particular gender."^{7/} Sexual orientation is generally classified as heterosexual, bisexual, or homosexual.^{8/} Sexual orientation has a number of aspects, including experiencing an ongoing attraction to persons of a particular gender; developing a private personal identity or self-concept as heterosexual, gay, lesbian, or bisexual; establishing a public identity based upon sexual orientation; and identifying with a community of those who share the same sexual orientation.^{9/}

As the trial court correctly found, sexual orientation is distinct from sexual conduct.^{10/} The fact

^{6/} The other three are biological sex, gender identity (the psychological sense of being male or female), and social sex role (adherence to cultural norms for masculine or feminine behaviors and attitudes). See Herek, Myths about Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 Law & Sexuality 133, 149 (1991) (hereinafter Myths); Shively and De Cecco, Components of Sexual Identity, 3 J. Homosexuality 41-48 (1977).

^{7/} Herek, Myths, supra note 6, at 134. See Gonsiorek and Weinrich, The Definition and Scope of Sexual Orientation, in Homosexuality, supra, note 3, at 1-12; Shively and De Cecco, Components of Sexual Identity, 3 J. Homosexuality 41 (1977), reprinted in Psychological Perspectives on Lesbian & Gay Male Experiences at 84-87 (Garnets and Kimmel eds. 1993) (hereinafter Psychological Perspectives). See also R.29 at 172-74 (Gonsiorek preliminary injunction testimony); Jt. Ex. V at 31 (Gonsiorek deposition).

^{8/} See, e.g., Shively and De Cecco, Components of Sexual Identity, supra note 6.

^{9/} See Herek, Myths, supra note 6, at 134-35.

^{10/} See, e.g., Money, Sin, Sickness, or Status? Homosexual Gender Identity and Psychoneuroendocrinology, 42 Am.

(continued...)

that a person engages in same-sex sexual activity, other-sex sexual activity, both, or neither, is not sufficient to determine his or her sexual orientation; indeed, "[a]ny definition of sexuality based solely on behavior is bound to be deficient and misleading."^{11/} Thus, many individuals who identify themselves as gay or lesbian, or who are predominantly attracted to members of the same sex, nonetheless engage in other-sex sexual behavior.^{12/} Similarly, many persons who identify themselves as heterosexual engage in same-sex sexual behavior.^{13/} As in

^{10/} (...continued)
Psychologist 384 (1987), reprinted in Psychological Perspectives, supra note 7, at 133-34; West, Homosexuality and Social Policy: The Case for a More Informed Approach, 51 Law & Contemp. Problems, 181, 183-85 (1988) [hereinafter Homosexuality and Social Policy]. The court's findings on this and other matters was consistent with the testimony of plaintiffs' expert Dr. John Gonsiorek. See Jt. Ex. V at 96; R. 29 at 175-76. Dr. Gonsiorek is a licensed psychologist with extensive expertise in the psychological study of sexual orientation. Many of the subjects discussed in Dr. Gonsiorek's testimony are treated in more detail in a work he co-edited with James Weinrich and that was sponsored by a division of amicus APA. See Homosexuality, supra note 3. (Jt. Ex. V (Gonsiorek deposition), Ex. 2).

^{11/} Haldeman, The Practice and Ethics of Sexual Orientation Conversion Therapy, 62 Journal of Consulting and Clinical Psychology 221, 221 (1994) (hereinafter Practice and Ethics). See also Laumann, Gagnon, Michael, and Michaels, The Social Organization of Sexuality: Sexual Practices in the United States 311-312 (1994). The Laumann study, based on a survey of a representative sample of American adults between the ages 18 and 60 and conducted by the National Opinion Research Center at the University of Chicago, is hereinafter referred to as "NORC Study".

^{12/} See NORC Study, supra note 11, at 311-12.

^{13/} See id. at 310-312; Doll, Peterson, White, Johnson, Ward, & The Blood Donor Study Group, Homosexually and Nonhomosexually Identified Men Who Have Sex with Men: A
(continued...)

the case of heterosexuals, some people who identify as gay or lesbian do not engage in any sexual activity at all.^{14/} Some gay male and lesbian relationships, again like their heterosexual counterparts, do not include an overtly sexual component.^{15/}

B. The Prevalence of Homosexual Orientation

Few generalizable estimates exist of the prevalence of homosexual orientation.^{16/} Among existing surveys on sexuality, estimates differ substantially depending upon (among other things) whether the researcher inquires into same-sex sexual conduct, sexual orientation measured in terms of enduring attraction, or self-reported sexual identity. The renowned study of sexuality recently released by the National Opinion Research Center illustrates this point, and

^{13/} (...continued)

Behavioral Comparison, 29 J. Sex Research 1-14 (1992); Kinsey, Pomeroy, and Martin, Sexual Behavior in the Human Male 623-30 (1949); Kinsey, Pomeroy, Martin, and Gebhard, Sexual Behavior in the Human Female 474-75 (1953).

^{14/} See NORC Study, supra note 11, at 312 n. 29 ("non-sexually active people had the same distribution on sexual identity as sexually active people").

^{15/} See Peplau & Cochran, Value Orientations in the Intimate Relationships of Gay Men, 6 J. of Homosexuality 1 (1990).

^{16/} This scarcity is due in part to practical research problems, particularly many individuals' unwillingness to acknowledge homosexual orientation even in anonymous surveys, which compound the usual difficulties of eliciting accurate survey data on sexual matters. See, e.g., NORC Study, supra note 11, at 284 (noting that, due to social stigma attached to same-sex sexual activity and homosexual orientation, survey data on these subjects are "no doubt lower-bound estimates"); id. at 308 ("measurement of same-gender practices and attitudes is crude at best, with unknown levels of underreporting for each").

further demonstrates the distinctness of homosexual orientation from same-sex sexual activity. In that survey, 4.9 percent of men, and 4.1 percent of women, reported having had sex with a same-sex partner since age 18.^{17/} A substantially larger proportion of respondents--7.7 percent of the men, and 7.5 percent of the women--reported experiencing attraction to persons of their own sex, considered the prospect of sex with a same-sex partner appealing, or both.^{18/} When respondents were asked whether they thought of themselves as "heterosexual, homosexual, bisexual, or something else," 2.8 percent of the male respondents identified themselves as "homosexual" or "bisexual," while 1.4 percent of the women identified

^{17/} NORC Study, supra note 11, at 305. Studies on homosexual behavior, generally focusing on males, have reached widely varying conclusions regarding prevalence. See, e.g., Billy, Tanfer, Grady, and Klepinger, The Sexual Behavior of Men in the United States, 25 Family Planning Perspectives 52 (1993); Rogers and Turner, Male-Male Sexual Contact in the USA: Findings from Five Sample Surveys, 1970-1990, 28 J. of Sex Research 491 (1991).

^{18/} NORC Study, supra note 11, at 305. The Chicago study did not inquire into sexual orientation as such. The researchers' "attraction/appeal" inquiry would be only a poor proxy for sexual orientation. It is over-inclusive as a measure of orientation because it would include people who, while predominantly heterosexual, experience occasional feelings for persons of their own sex. On the other hand, the attraction/appeal measure is unlikely to reflect those aspects of sexual orientation that are less directly connected with sexual desire. The NORC study's self-reported "identity" category is likewise not a faithful measure of sexual orientation; a sizeable number of people who consistently experience same-sex attractions and engage in same-sex sexual activity nonetheless do not identify themselves as "homosexual," as the NORC findings themselves suggest. See id. at 300-301.

themselves as homosexual or bisexual.^{19/} The Chicago researchers found a significantly higher prevalence of self-reported homosexual or bisexual identity (9.2 percent for men; 2.6 percent for women) among residents of the 12 largest American cities.^{20/}

C. The Development of Sexual Orientation

For most people, the core feelings and attractions that form the basis for adult sexual orientation emerge by early adolescence or earlier.^{21/} For some people, adult homosexual orientation is predictable by early childhood,^{22/} but developmental precursors of homosexual orientation in adulthood have not been consistently identified for the

^{19/} Id. Other methodologically valid studies have found a somewhat greater prevalence of self-reported gay or lesbian identity. See Elliot, A Sharper View of Gay Consumers, New York Times C-1, C-17 (June 9, 1994) (reporting results of nationwide Yankelovich Partners probability survey finding that 5.7% of respondents identified themselves as gay, "homosexual," or lesbian); Edelman, Understanding the Gay and Lesbian Vote in '92, The Public Perspective (March 1993) (reporting exit poll research by Roper Center at University of Connecticut finding that between 2.4-3% of voters in 1992 elections reported that they were lesbian, gay, or bisexual); Results of Poll, San Francisco Examiner A-20 (June 6, 1989) (6% of nationwide sample self-reported as gay or lesbian in random telephone survey).

^{20/} See NORC Study, supra note 11, at 305-307.

^{21/} See Bell, Weinberg & Hammersmith, Sexual Preference: Its Development in Men and Women (1981) [hereinafter Sexual Preference].

^{22/} See Green, The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis, 16 J. Psychiatry & Law 537 (1988); Green, The "Sissy Boy Syndrome" and the Development of Homosexuality 370 (1987). See also Jt. Ex. V at 38-39 (Gonsiorek deposition); R. 29 at 175, 216 (Gonsiorek preliminary injunction testimony).

population as a whole.^{23/} There appear to be significant differences in developmental precursors to adult homosexual orientation for different groups.^{24/} Some researchers have found familial patterns and biological correlates of adult homosexual orientation, suggesting that biological or anatomical factors may contribute to its development.^{25/} These factors may also differ substantially within the population.^{26/}

^{23/} See Bell et. al., Sexual Preference, supra note 21, at 193-211.

^{24/} Id.

^{25/} See Hamer, Hu, Magnuson, Hu, Pattatuci, A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation, 261 Science 321 (July 1993) (hereinafter Linkage); Byne and Parsons, Human Sexual Orientation: The Biologic Theories Reappraised, 50 Arch. Gen. Psychiatry 228, 236-37 (March 1993). One study compared the concordance between the sexual orientation of three samples of male homosexuals and their monozygotic ("identical") twin, dizygotic ("fraternal") twin, or adoptive brother, and found that "heritabilities were substantial under a wide range of assumptions." Bailey & Pillard, A Genetic Study of Male Sexual Orientation, 48 Arch. Gen. Psychiatry 1089, 1089 (1991). Where one identical twin was gay, the other was also gay in 52% of the cases; where one fraternal twin was gay, the other was also gay in 22% of the cases; where one brother by adoption was gay, his adoptive brother was gay in just 11% of the cases. Id. These findings were replicated in two subsequent studies. Bailey, Neale and Agyei, Heritable Factors Influence Sexual Orientation in Women, 50 Arch. Gen. Psychiatry 217 (March 1993); Bailey and Benishay, Familial Aggregation of Female Sexual Orientation, 150 Am. J. Psychiatry 272 (1993). Another study, as yet unreplicated, reported differences between heterosexual and gay men in the volume of a cell group in the anterior hypothalamus, a brain structure that is involved in sexual behavior. See LeVay, A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men, 253 Science 1034 (1991).

^{26/} See Hamer et al., Linkage, supra n. 25.

Most gay people report having experienced feelings of being different from their peers in childhood or early adolescence, and that those feelings translated into same-sex attractions by early or mid-adolescence, with same-sex sexual behavior following a few years later.^{27/} "By the time boys and girls reach adolescence, their sexual preference is likely to be already determined, even though they may not yet have become sexually very active."^{28/}

Research on the origin and development of sexual orientation does not support the view that it is voluntarily acquired. As one researcher has explained,

[t]he concept of voluntary choice is as much in error here as in its application to handedness or native language. You do not choose your native language as a preference, even though you are born without it. . . . Once assimilated through the ears into the brain, a native language becomes securely locked in--as securely as if it had been phylogenetically preordained to be locked in prenatally by a process of genetic determinism or by the determinism of fetal hormonal or other brain chemistries. So also, sexual status or orientation, whatever its genesis, may become assimilated and locked into the brain as . . . homosexual or heterosexual or as [bisexual].^{29/}

^{27/} See Troiden, The Formation of Homosexual Identities, 17 J. Homosexuality 43-73 (1989) (reviewing research literature); Bell et al., Sexual Preference, supra note 21, at 186-87.

^{28/} Id. at 186.

^{29/} Money, Sin, Sickness or Status? Homosexual Gender Identity and Psychoneuroendocrinology, 42 Am. Psychologist 384 (1987), reprinted in Psychological Perspectives, supra note 7, at 131.

D. The Unalterability of Sexual Orientation

Once established, sexual orientation is highly resistant to change.^{30/} Although some therapists have reported that their clients have changed their sexual orientation in treatment (from homosexual to heterosexual), closer scrutiny has shown that such changes were more likely to occur among bisexuals who were highly motivated to adopt a heterosexual behavior pattern. Many interventions aimed at changing sexual orientation have succeeded only in reducing or eliminating homosexual behavior rather than in creating or increasing heterosexual attractions. As one scholar has concluded upon review of reports on "conversion therapy," there is no reliable evidence that "sexual orientation is amenable to redirection or significant influence from psychological intervention."^{31/}

Many practitioners have questioned the propriety of seeking to alter through therapy a trait that is not a disorder and that is extremely important to individual identity.^{32/} Indeed, psychologists generally agree that

^{30/} See Haldeman, Practice and Ethics, supra note 11; Haldeman, Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination, in Homosexuality, supra n. 3, at 149-160; Martin, Innovations in Psychotherapy with Homosexuals 24-57 (1984).

^{31/} Haldeman, Practice and Ethics, supra note 11, at 224.

^{32/} See Davison, Constructionism and Morality in Therapy for Homosexuality, in Homosexuality, supra n. 3, 137-148; Silverstein, Psychological and Medical Treatments of Homosexuality, in Homosexuality, supra n. 3, 101-114; Malyon, Psychotherapeutic Implications of Internalized Homophobia In Gay Men in Homosexuality and Psychotherapy: A Practitioners (continued...)

psychological adjustment is positively correlated with acceptance and integration of one's sexual orientation, while maladjustment is positively correlated with nonacceptance of sexual orientation.^{33/} In sum, prevailing professional opinion is that sexual orientation is highly resistant to change and that acceptance of one's sexual orientation--whether heterosexual, gay, lesbian, or bisexual--is most often conducive to well-being.

E. One's Sexual Orientation Does Not Affect One's Ability to Contribute to Society.

The mental health profession does not consider homosexual orientation to be a disorder.^{34/} More than twenty years ago, the American Psychiatric Association removed homosexuality from its list of mental disorders. In so

^{32/} (...continued)

Handbook of Affirmative Models 59 (Gonsiorek ed. 1982). See also Reiter, Sexual Orientation, Sexual Identity, and the Question of Choice, 17 Clin. Soc. Work J. 138 (1989).

^{33/} See Garnets, Herek, & Levy, Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences, 5 J. Interpersonal Violence 366, reprinted in Psychological Perspectives, supra note 7, at 582-83; Bell & Weinberg, Homosexualities: A Study of Diversity Among Men and Women 195-228 (1978) [hereinafter Homosexualities]; Gonsiorek & Rudolph, Homosexual Identity: Coming Out and Other Developmental Events, in Homosexuality, supra note 3, at 230-43; Hammersmith & Weinberg, Homosexual Identity: Commitment, Adjustment and Significant Others, 36 Sociometry 56 (1973).

^{34/} A mental disorder is "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders--DSM-IV at xxi (4th ed. 1994).

doing, the organization stated that "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities."^{35/} In 1975, amicus APA passed a resolution supporting the American Psychiatric Association's action. The APA further urged all mental health professionals to help dispel the stigma of mental illness that long has been associated with homosexual orientation.^{36/} Amicus NASW has a similar policy.^{37/} Thus, the district court's finding that "[h]omosexuality is not a mental illness," 860 F. Supp. at 426, is consistent with the overwhelming weight of professional opinion.

The declassification of homosexual orientation as a mental disease followed a long reevaluation of the view that homosexuality was a mental illness. Extensive scientific findings by a large number of independent researchers supported declassification. In 1957, a study by Dr. Evelyn Hooker provided the first major challenge to the "illness model."^{38/} Dr. Hooker determined that standard psychological

^{35/} Resolution of the American Psychiatric Association (December 15, 1973).

^{36/} See Resolution of the Council of Representatives of the American Psychological Association (1975).

^{37/} See NASW, Policy Statement on Lesbian and Gay Issues (approved by Delegate Assembly in August 1993).

^{38/} Prior studies reporting disproportionate incidence of psychological problems among gay people had relied on methods, such as testing samples composed of prisoners or persons under treatment, that could not lead to reliable findings about the population as a whole. See Gonsiorek, The Empirical Basis for the Demise of the Illness Model of Homosexuality [hereinafter Empirical Basis], in Homosexuality, supra note 3, 124-32.

tests did not distinguish homosexual and heterosexual men, and that a similar majority of the two groups appeared to be free of psychopathology.^{39/} Extensive psychological research over three decades has conclusively established that homosexual orientation is not related to psychological adjustment or maladjustment.^{40/} The comprehensive literature on the subject demonstrates that "theories contending that the existence of differences between homosexuals and heterosexuals implies maladjustment are irresponsible, uninformed, or both."^{41/} It is well established that "homosexuality in and of itself bears no necessary relationship to psychological adjustment."^{42/}

Nor is there any reliable evidence that homosexual orientation impairs social functioning. Surveys of lesbians and gay men reveal them to be as highly diverse a group as

^{39/} See Hooker, The Adjustment of the Male Overt Homosexual, 21 J. Projective Techniques 17 (1957). This findings were replicated in studies with female samples. See, e.g., Freedman, Homosexuality and Psychological Functioning (1971).

^{40/} See Gonsiorek, Empirical Basis, in Homosexuality, supra n. 3, at 115-136; Reiss, Psychological Tests in Homosexuality, in Homosexual Behavior: A Modern Reappraisal 296-311 (Marmor ed. 1980); Hart, Roback, Tittler, Weitz, Walston and McKee, Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature, 39 J. Clinical Psychiatry 604 (1978) [hereinafter Psychological Adjustment].

^{41/} Gonsiorek, Empirical Basis, in Homosexuality, supra n. 3, at 136.

^{42/} Id. See also Gonsiorek, Results of Psychological Testing on Homosexual Populations, 25 Am. Behavioral Sci. 385, 394 (1982); Reiss, Psychological Tests in Homosexuality, in Homosexual Behavior: A Modern Reappraisal 296 (Marmor ed. 1980); Hart et al., Psychological Adjustment, supra note 40.

are heterosexuals. They are employed productively in a wide range of occupations and professions.^{43/} Lesbian and gay parents have consistently been shown to be as effective as heterosexual parents.^{44/} Research has demonstrated that "gay people have an overall potential to contribute to society similar to that of heterosexual people, including in the workplace."^{45/}

^{43/} See, e.g., Bell & Weinberg, Homosexualities: A Study of Diversity Among Men and Women, 141-48 (1978) [hereinafter Homosexualities]; Results of Poll, San Francisco Examiner, A-19 (June 6, 1989).

^{44/} See, e.g., Green and Bozett, Lesbian Mothers and Gay Fathers, in Homosexuality, supra note 3, at 213:

The most striking feature of the research on lesbian mothers, gay fathers, and their children is the absence of any pathological findings. The second most striking feature is how similar the groups of gay and lesbian parents and their children are to the heterosexual parents and their children that were included in the studies. It is evident that homosexuality is compatible with effective parenting[.]

See also, e.g., Patterson, Children of Lesbian and Gay Parents, 63 Child Development 1025 (1992). Having gay parents or childhood role models does not appear to influence one's sexual orientation. See Herek, Myths, supra note 6, at 157-161 (summarizing research); Bozett, Gay Fathers: A Review of the Literature, 18 J. Homosexuality 137 (1989), reprinted in Psychological Perspectives, supra note 7, at 442. The district court's findings regarding children raised by gay and lesbian parents, see 860 F. Supp. at 426, were consistent with the results of social science research. See also Jt. Ex. V (Gonsiorek deposition) at 11, 123-125; R. 29 (Gonsiorek preliminary injunction testimony) at 188.

^{45/} Melton, Public Policy and Private Prejudice, 44 Am. Psychologist 933, 936 (1989). See, e.g., Snyder & Nyberg, Gays and the Military: An Emerging Policy Issue, 8 J. Pol. & Military Soc. 71, 77-79 (1980) (summarizing research and finding that gay people and heterosexuals score about the same in job stability and job satisfaction); Bell & Weinberg, Homosexualities, supra note 32, at 141-148. Apparently
(continued...)

Recognizing these facts, the Council of Representatives of amicus APA has passed a series of resolutions urging that gay men and lesbians not be discriminated against in employment, housing, licensing, public accommodation, and child custody.^{46/} On August 22, 1993, APA's Council passed a resolution condemning state-law provisions purporting to bar legislation against sexual orientation discrimination; the Council declared that "there is no basis for such discrimination and such discrimination is detrimental to mental health and the public good."^{47/}

^{45/} (...continued)
recognizing the irrelevance of sexual orientation to individual job performance, many major corporations and other organizations have implemented non-discrimination policies as to sexual orientation. See, e.g., Swisher, Area Firms Lauded on Gay Bias Policies, Washington Post C2 (October 11, 1994) (reporting that over half of metropolitan Washington's 50 largest publicly held companies have such policies).

^{46/} American Psychological Association, Minutes of the Council of Representatives, 30 American Psychologist 633 (1975); American Psychological Association, Minutes of the Council of Representatives, 32 American Psychologist 532 (1977); American Psychological Association, Minutes of the Council of Representatives, 36 American Psychologist 581 (1981); American Psychological Association, Policy Statements on Lesbian and Gay Issues (1987). See also American Medical Association, Report of the Board of Trustees, Annual Meeting of the House of Delegates (June 1993) ("AMA policy is unequivocal -- discrimination based on sexual orientation is improper and unacceptable by any part of the federation of medicine."); American Medical Association Bylaws, Section 1.50 ¶ 1 (prohibiting denial of AMA membership because of "sex, color, . . . sexual orientation . . . or for any other reason unrelated to character or competence"); American Bar Association Report No. 8, House of Delegates (1989) (resolution "urg[ing] . . . governments to enact legislation prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations").

^{47/} American Psychological Association, Council of Representatives, Resolution on State Initiatives and Referenda (August 22, 1993).

II. GAY PEOPLE COMPRISE A DISCRETE AND IDENTIFIABLE GROUP

The district court found that "gays, lesbians, and bisexuals are an identifiable group based upon their sexual orientation, " 860 F. Supp. at 427, a finding supporting the court's conclusion that Issue 3 denies them their right to equal participation in the political process. See id. at 430-34; see also Evans v. Romer, 854 P.2d 1270 (Colo. 1993). This finding is consistent with psychological literature and opinion, and indeed is not disputed within the mental health professions. One's sexual orientation (whether heterosexual, homosexual, or bisexual) is a fundamental facet of one's experience and sense of self, one that is of immense consequence for the ordering of an individual life.

Many gay people publicly identify themselves as such and are readily recognizable to others on that basis. Many live in distinctively gay communities, which heightens their visibility to non-gay people.^{48/} Those who, fearing adverse consequences, wish to conceal their sexual

^{48/} See, e.g., NORC Study, supra note 11, at 306-309; Herek, Myths, supra note 6, at 166; Gay Culture in America: Essays from the Field (Herdt ed. 1992); Levine, Gay Ghetto, 4 J. Homosexuality 363-77 (1979); Murray, Institutional Elaboration of a Quasi Ethnic Minority, 9 International Rev. of Modern Sociology 165-78 (1979). As in the case of other stigmatized minorities, gay individuals' well-being appears to be enhanced through identification and association with other gay people. See Garnets, Herek, and Levy, Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences, 5 J. Interpersonal Violence 366 (1990), reprinted in Psychological Perspectives, supra note 7, at 583; Crocker and Major, Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma, 96 Psychological Review 608, 620 (1989) [hereinafter Social Stigma].

orientation are frequently discovered nonetheless.^{49/} The fact that gay people are themselves diverse, with differing views and varying degrees of comfort with self-identification as gay, lesbian or bisexual, does not diminish the fact that they share a fundamentally important characteristic with wide-ranging personal and social ramifications.

In contrast to groups whose membership is the result of some purposeful action--such as a union, a street gang, or a profession--one's status as gay or lesbian does not depend in any ordinary sense on personal choice. See supra at 16-17. A gay man or lesbian, like a member of an ethnic minority group, may succeed in concealing his or her status, but cannot alter it merely by acting differently. Even a "closeted" gay person continues to experience the attraction, desire, and emotional longings associated with his or her sexual orientation.^{50/}

^{49/} See Martin, Learning to Hide: The Socialization of the Gay Adolescent, 10 Adolescent Psychiatry 52, 59 (1982) ("Possibilities for disclosure lie in the most prosaic situations."); Paul, Minority Status for Gay People: Majority Reaction and Social Context, in Homosexuality, supra note 3, at 356. Any minority group's visibility to society at large will in part be a function of whether they are subject to prejudice and discrimination, because such factors encourage persons to conceal their membership. See Allport, The Nature of Prejudice 145 (1954) (describing efforts to "pass" as "simplest" response to ethnic prejudice, but one that causes its own psychological stresses).

^{50/} See, e.g., West, Homosexuality and Social Policy, supra note 10, at 184-186.

In a society in which the vast majority of people are not gay, and often intensely disapprove of those who are,^{51/} homosexual orientation has enormous social implications. Lesbians and gay men share a characteristic--homosexual orientation--that, once it is known, tends to become the predominant social identifier in the minds of others.^{52/} Particularly in places in which openly gay people are few, a gay man, lesbian, or bisexual is likely to be thought of only in terms of his or her sexual orientation, even in settings in which it is not demonstrably relevant.^{53/} However diverse gay and lesbian individuals may be in their personalities, occupations, or political or religious affiliations, it is their sexual orientation that comes overwhelmingly to define them in the minds of others.

^{51/} See infra at 30-31; Herek, Assessing Heterosexuals' Attitudes Toward Lesbian and Gay Men: A Review of Empirical Research with the ATLG Scale, in Lesbian and Gay Psychology: Theory, Research, and Clinical Applications 206-228 (Green & Herek eds. 1994) [hereinafter Lesbian and Gay Psychology].

^{52/} Whatever its merits, the Department of Defense policy excluding openly gay people from military service provides a illustration of this effect. The services have often defended the exclusion on the ground that heterosexual soldiers would be so disturbed by the presence of openly gay people that their presence would pose a threat to military order and morale. See, e.g., Watkins, 875 F. 2d at 728 (Norris, J., concurring) (Army argued that exclusion is justified because it avoids tensions between "'known homosexuals'" and members "'who despise/detest homosexuality'" (quoting Army brief). See also infra note 71.

^{53/} See, e.g., Herek, Stigma, Prejudice, and Violence Against Lesbians and Gay Men, in Homosexuality, supra note 3, at 66-72 (describing process of anti-gay stereotyping); id. at 61 (discussing 1987 Roper poll in which 25% of respondents stated they would object to working around a gay person, and another 27% stated they would prefer not to do so).

This overriding, strongly negative, significance that homosexual orientation often carries in the minds of many of those who are not gay has contributed to a history of intensely unfavorable treatment. In the district court's words, gay people are bound together, not only by their sexual orientation itself, but also by "their shared history of discrimination based upon that characteristic." 860 F. Supp. at 427. The pervasive and intense antipathy directed against lesbians and gay men is an important component of their collective experience and identity, one that finds close parallels in the experience of other stigmatized minorities.^{54/}

Indeed, scholars who study intergroup relations have concluded that a prime feature, if not the defining characteristic, of a social minority is that it is consistently subject to discriminatory treatment from the larger society, an experience which in turn shapes the

^{54/} See, e.g., Crocker and Major, Social Stigma, supra note 48, at 620.

disfavored group's own identity.^{55/} Researchers have found that the experience of gay people fits this pattern.^{56/}

III. THE DISTRICT COURT'S FINDINGS CONCERNING PREJUDICE AND DISCRIMINATION BASED UPON SEXUAL ORIENTATION ARE CONSISTENT WITH SCIENTIFIC RESEARCH AND OPINION

The district court made a number of findings concerning the prevalence of prejudice and discrimination against lesbians and gay men. These findings were particularly relevant to the court's conclusion that legal classifications on the basis of sexual orientation fit the criteria for heightened judicial scrutiny under the Equal Protection Clause.^{57/} The court found that "[h]omosexuals have suffered a history of pervasive, irrational and invidious discrimination in government and private

^{55/} See Herek, Myths, supra note 3, at 164 ("The most important feature is that a minority group's members must manifest one or more characteristics that society uses as a basis for discrimination, despite the irrelevance of those characteristics to the setting in which the discrimination occurs.") (citing, inter alia, Seeman, Intergroup Relations, in Social Psychology: Sociological Perspectives 378 (Rosenberg & Turner eds. 1981)); Wirth, The Problem of Minority Groups, in The Science of Man in the World Crisis 347 (Linton ed. 1945) (defining a social minority as "a group of people who, because of their physical or cultural characteristics, are singled out from the others in the society in which they live for differential or unequal treatment, and who therefore regard themselves as objects of collective discrimination").

^{56/} See, e.g., Herek, Myths, supra note 6, at 164-169; A. Martin, Learning to Hide, supra note 47, at 52-53; Paul, Minority Status for Gay People, in Homosexuality: Social, Psychological and Biological Issues 365-366 (Paul, Weinrich, Gonsiorek & Hotveld, eds. 1982) [hereinafter Issues].

^{57/} See 860 F. Supp. at 434-40. See also Watkins, 875 F.2d, at 711-731 (Norris, concurring in judgment).

employment, in political organization and in all facets of society in general, based on their sexual orientation," and that "[p]ervasive private and institutional discrimination against gays, lesbians and bisexuals often has a profound and negative psychological impact on gays, lesbians and bisexuals." 860 F. Supp. at 426. These findings are amply supported in social science literature.^{58/} It is beyond question that intense prejudice and discrimination against lesbians and gay men have been widespread in our society, and continue to impair the well-being of many gay people.

A. History and Prevalence of Prejudice and Discrimination Against Gay People

Gay people have historically been subject to intense prejudice and discrimination,^{59/} both public and private, based upon their sexual orientation. Extreme

^{58/} The district court was presented with extensive expert testimony concerning the nature and consequences of anti-gay prejudice and discrimination. See, e.g., R. 29 (Gonsiorek preliminary hearing injunction) at 176, 182-83, 192-95; Jt. Ex. V (Gonsiorek deposition) at 57, 139-47, 157-66.

^{59/} "Prejudice" as a psychological phenomenon has been defined as "the possession of negative attitudes targeted at members of some particular group" that give rise to "negative or unfavorable evaluations of individuals seen as belonging to that group. The perception that one belongs to a certain group is the precipitating factor in prejudicial feelings -- not the actual attributes or behaviors of the person being judged." 3 Encyclopedia of Psychology 110 (Corsini ed. 1994). "Discrimination" typically refers to "the negative actions that result from prejudicial attitudes and that are directed at against the targets or victims of prejudice." Id. An influential study identified five ways in which prejudice is expressed: (i) antilocution (verbal expressions of antagonism); (ii) avoidance of members of the disliked group; (iii) discrimination against members of the disliked group; (iv) physical attack of group members, and (v) extermination, such as lynchings or pogroms. See Allport, The Nature of Prejudice, supra note 48, at 14-15.

prejudice and even persecution were common in Europe since at least the Middle Ages.^{60/} Social prejudice and discrimination, both public and private, have been widespread in American society as well.^{61/} Indeed, "lesbians and gay males have been the object of some of the deepest prejudice and hatred in American society."^{62/}

The mental health professions have not been immune from such prejudice, as is evidenced by the role of many professionals in promoting the "illness model" of homosexual orientation.^{63/} As Professor George Chauncey of the

^{60/} See Posner, Sex and Reason 346 (1992) ("[H]omosexuals--who, like Jews, are despised more for what they are than for what they do--were frequently bracketed [with Jews] in medieval persecutions."); Boswell, Christianity, Social Tolerance, and Homosexuality (1980). Thousands of gay people were exterminated along with Jews and Gypsies in Nazi concentration camps. See, e.g., Heger, The Men with the Pink Triangle (1980).

^{61/} Professor George Chauncey of the University of Chicago described some aspects of this history in his affidavit and testimony in the district court proceedings. See Pl. Ex. VII; Jt. Ex. VI. See also, e.g., Chauncey, Gay New York, Urban Culture and the Making of the Gay Male World: 1890 to 1940 (1994); Faderman, Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth Century America (1991); Berube, Coming Out Under Fire: The History of Gay Men and Women in World War II (1990); D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970 (1983).

^{62/} Melton, Public Policy and Private Prejudice, 44 Am. Psychologist 933, 934 (1985). See Posner, Sex and Reason, supra note 58, at 291 ("In the United States . . . , not only is there a strong residue of hostility to homosexuals, but they labor under a series of legal disabilities.").

^{63/} See Berube, Coming Out under Fire, supra note 60, at 136-37; Gonsiorek, Empirical Basis, in Homosexuality, supra note 3, at 116 ("homosexuality first evolved into a medical 'illness' in the late 19th or early 20th century depending on the country"); Herek, Stigma, Prejudice, and Violence Against (continued...)

University of Chicago testified in the district court, the illness theory encouraged the development of bizarre, inhumane and sometimes brutal "treatments" and "aversion therapies" for homosexual orientation.^{64/} In the 1940s and 1950s, many states authorized compulsory psychiatric examinations and involuntary commitment of gay people until they were deemed "cured" of their "illness."^{65/} According to amicus APA's Task Force on Sexual Orientation, the research that had supported the "illness model" of homosexuality was "influenced by poorly founded stereotypes and social prejudice."^{66/} Nonetheless, until 1990, gay people were frequently excluded from the United States under

^{63/} (...continued)

Lesbians and Gay Men, in Homosexuality, supra note 3, at 66-72 (discussing earlier disease models that purported to explain perceived inferiority of racial minority groups).

^{64/} See Haldeman, Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination in Homosexuality, supra note 3, at 152; Silverstein, Psychological and Medical Treatments of Homosexuality, in Homosexuality, supra note 3, at 106-111; Pl. Ex. VII (Chauncey Aff.), at ¶ 14.

^{65/} Pl. Ex. VII (Chauncey aff.), ¶¶ 14, 24; Jt. Ex. VI (Chauncey dep.), at 39, 42, 43-51. See Berube, Coming Out Under Fire, supra note 60, at 258 (recounting that, between 1947 and 1955, 21 states and the District of Columbia enacted "sex psychopath laws" that allowed the indefinite detention of certain "personality types," including gay people, in institutions for the mentally ill and that "often required their registration as sex offenders with local police departments wherever they lived").

^{66/} Weinrich, Task Force Findings: Overview and Prospect, in Issues, supra note 55, at 377.

an immigration statute denying entry in cases of "psychopathic personality or sexual deviation."^{67/}

Intense prejudice against lesbians and gay men remains prevalent in contemporary American society. Public opinion studies of attitudes towards lesbians and gay men indicate that, among large segments of the public, gay people are the subject of strong antipathy.^{68/} Verbal abuse is common.^{69/} Discrimination against gay people in such

^{67/} See Rivera, Sexual Orientation and the Law, in Homosexuality, *supra* note 3, at 88 & n.73.

^{68/} See, e.g., Herek, Assessing Heterosexuals' Attitudes Toward Lesbian and Gay Men: A Review of Empirical Research with the ATLG Scale [hereinafter Assessing Heterosexuals' Attitudes], in Lesbian and Gay Psychology: Theory, Research, and Clinical Applications 206-228 (Green & Herek eds. 1994) [hereinafter Lesbian and Gay Psychology]; Kite, When Perceptions Meet Reality: Individual Differences in Reactions to Lesbians and Gay Men, in Lesbian and Gay Psychology, *supra*, at 25-53. In his testimony in this case, Professor Kenneth S. Sherrill reviewed a number of studies of public opinion illustrating the extent and depth of antipathy to gays and lesbians, including three American National Election Studies finding that respondents had more intense antipathy to gay people than against such other groups as African Americans, Jews, Hispanics, or illegal aliens. See Expert Opinion of Kenneth Sherrill, at 18-24. As a result of such attitudes, openly gay politicians are few and gay people have encountered not only a want of support, but often outright hostility, from elected representatives. See Gay Officials Gather to Share Ideas, New York Times, A-20 (Nov. 23, 1994) (reporting that 216 out of 475,000 public officials in the United States are openly gay); Sullivan, A Bibliographic Guide to Government Hearings and Reports, Legislative Action, and Speeches Made in the House and Senate of the United States Congress on the Subject of Homosexuality, 10 J. Homosexuality 135 (1984) (outlining congressional documents concerning gay men and lesbians from 1920-1983 and indicating both level of animus against gay people by many in Congress and failure of Congress to enact legislation of any kind protecting them).

^{69/} See, e.g., Berrill, Anti-Gay Violence and Victimization in the United States, 5 J. Interpersonal Violence 276-277 (continued...)

critical areas as employment and housing remains lawful in most jurisdictions, and appears to be widespread.^{70/} High rates of specifically anti-gay violence or "hate crimes" have been consistently documented.^{71/}

^{69/} (...continued)

(1990) (in six studies, between 80 and 87 percent of gay people reported being subject to verbal abuse; between 24 and 48 percent reported receiving threats of violence); Herek, Stigma, Prejudice, and Violence in Homosexuality, *supra* note 3, at 61 (citing studies); R. 29 (Gonsiorek preliminary injunction testimony) at 223-31.

^{70/} A survey published the National Gay and Lesbian Task Force Policy Institute of 20 employment discrimination studies conducted between 1980 and 1991 found that between 16% and 44% of lesbians and gay men had experienced employment discrimination. See Badgett, Donnelly, and Kibbe, Pervasive Patterns of Discrimination against Lesbians and Gay Men: Evidence from Surveys Across the United States (1992) (copy on file with APA). The authors noted that discrimination was also common in such other areas as housing, public accommodations, and health care, and that fear of discrimination forces many gays and lesbians to remain 'closeted.' *Id.* See also Levine, Employment Discrimination Against Gay Men, 9 International Review of Sociology 151 (1979); Levine and Leonard, Discrimination Against Lesbians in the Work Force, 9 Signs 700 (1984); Rhonda R. Rivera, Sexual Orientation and the Law, in Homosexuality, *supra* note 3, at 88-91. A recent nation-wide econometric study found that gay male workers earn from 11% to 27% less than otherwise identical heterosexual male workers, controlling for experience, education, occupation, marital status, and residence. See Badgett, The Wage Effects of Sexual Orientation Discrimination, Industrial and Labor Relations Rev. (forthcoming 1995). Openly gay people have, of course, have long been and are still excluded entirely from one major sector of the economy--military service.

^{71/} See, e.g., Berrill, Anti-Gay Violence and Victimization in the United States: An Overview, 5 J. Interpersonal Violence 274, 275-279 (1990) (reviewing 20 studies of victimization of lesbians and gay men and concluding that all "found harassment and violence to be widespread"); Herek, Hate Crimes Against Lesbians and Gay Men, 44 Am. Psych. 948, 494 (1989) (because of stigma, gay people seldom report bias crimes motivated by anti-gay prejudice). See generally Hate Crimes: Confronting Violence against Lesbians and Gay Men (Herek & Berrill, eds. 1992); Comstock, Violence against (continued...)

B. The Nature of Anti-Gay Prejudice

Negative attitudes towards lesbians and gay men are prevalent in the United States.^{72/} Social science research indicates that these attitudes are unlikely to be based on personal experience or accurate information. Only one in three Americans has a friend, relative or acquaintance who is known by them to be gay.^{73/} Anti-gay attitudes have been found to be significantly less common among that one-third of the population.^{74/} People who report knowing someone who is gay express more positive attitudes toward lesbians and gay

^{71/} (...continued)

Lesbians and Gay Men (1991); Special Issue, Violence against Lesbians and Gay Men, 5 J. Interpersonal Violence 267-543 (1990). A recent study of hate crimes (i.e., specifically targeted crimes in which bigotry was demonstrably the central motive) in Los Angeles found that "gay men were not only the largest victim group in 1993, but they were the group victimized most violently." Los Angeles County Commission on Human Relations, Report to the Los Angeles County Board of Supervisors 17 (May 1994); see id. at 16 (anti-gay hate crimes had increased each year but one since 1987). The district court thus correctly found that "[g]ays, lesbians, and bisexuals are often the target of violence by heterosexuals due to their sexual orientation." 860 F. Supp. at 427. See also Jt. Ex. V at 145 (Gonsiorek deposition) (noting "consistent and high level of anti-gay and anti-lesbian violence").

^{72/} In a representative nation-wide survey of Americans conducted in late 1991 and early 1992, 59.9% of the respondents agree with the statement "I think male homosexuals are disgusting," and the same percentage agreed when the question was asked regarding lesbians. See Herek, Assessing Heterosexuals' Attitudes, in Lesbian and Gay Psychology, supra note 67, at 216.

^{73/} See id. at 219.

^{74/} See id.

men than do those who lack contact experiences.^{75/} Studies have shown that people holding negative attitudes toward gay people "are less likely to have had personal contact with lesbians or gay men," and, hence, are basing their attitudes on popular beliefs and misconceptions, not on accurate information or personal experience.^{76/} Similarly, several studies indicate that exposure to truthful information about lesbians and gay men often leads to a reduction in antipathy.^{77/}

Research has shown that many people base their opinions about gay people on a entrenched set of negative stereotypes.^{78/} One leading researcher has summarized the content of some of them:

^{75/} See Herek and Glunt, Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey, 30 Journal of Sex Research 239 (1993); Schneider & Lewis, The Straight Story on Homosexuality and Gay Rights, 7 Pub. Opinion 16-20, 59-60 (Feb./Mar. 1984) [hereafter Schneider & Lewis].

^{76/} Herek, Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men, 10 J. of Homosexuality 1, 6 (1984) [hereafter Beyond "Homophobia"] (summarizing research). Dislike toward gay and lesbian people tends to be higher among people who believe that homosexual orientation is learned or chosen. See Schneider & Lewis, supra note 73; Agüero, Bloch, and Byrne, The Relationships Among Sexual Beliefs, Attitudes, Experience, and Homophobia, 10 J. Homosexuality 95, 102 (1984).

^{77/} See Herek, Beyond "Homophobia", supra note 75, at 6.

^{78/} As used by scholars of inter-group relations, the term "stereotype" refers to an exaggerated and fixed belief that serves "both as a justificatory device for categorical acceptance or rejection of a group, and as a screening or selective device to maintain simplicity in perception and in thinking." See Allport, The Nature of Prejudice, supra note 47, at 192.

Most common stereotypes are related to cross-sex characteristics.^{79/} Additionally, significant numbers of individuals characterize male homosexuals as mentally ill, promiscuous, lonely, insecure, and likely to be child molesters, while lesbians have been described as aggressive and hostile toward men.^{80/}

The same researcher explains that "[l]abeling itself can lead people to perceive stereotypical behaviors, whether or not they occur," and that stereotypes can be so influential that those gay people "who violate stereotypical expectations (e.g., masculine gay men and feminine lesbians) may actually be disliked" for that reason.^{81/}

Another study reached stark conclusions about the inaccuracy of the stereotypes popularly held about gay people:

Until now, almost without exception, people in general . . . have been outraged, fearful, or despairing toward

^{79/} See also Taylor, Conceptions of Masculinity and Femininity as a Basis for Stereotypes of Male and Female Homosexuals, in Homosexuality and Sex Role Studies 51 (Ross ed. 1983) ("It is not the case, as most of the present respondents believe, that most homosexuals behave like the opposite sex."). The district court appears to have recognized the existence and falsity of this stereotype. See 860 F. Supp. at 426 (finding that "[g]ender non-conformity such as cross-dressing is not indicative of homosexuality").

^{80/} Herek, Beyond "Homophobia", supra note 75, at 9. See also Kite, When Perceptions Meet Reality, in Lesbian and Gay Psychology: Theory, Research, and Clinical Applications 25-53 (Green and Herek eds. 1994); Hetrick and Martin, Developmental Issues and Their Resolution for Gay and Lesbian Adolescents, 14 J. Homosexuality 25, 27 (1987) (describing variety of social ills falsely attributed to gays and lesbians by publicists, including high crime rates, low SAT scores, and anorexia) [hereinafter Developmental Issues].

^{81/} Herek, Beyond "Homophobia", supra note 75, at 9.

homosexuality because of the stereotypes they hold. Not only have they believed that homosexuals are pretty much alike, but that this similarity necessarily involves irresponsible sexual conduct, a contribution to social decay, and, of course, psychological pain and maladjustment. Given such a stereotype, it is little wonder that the heterosexual majority has seen fit to discourage the acceptance of homosexuality by . . . refusing to employ homosexuals, [and] withholding from homosexual men and women the civil rights enjoyed by the majority and by a growing number of other minority groups.

The present investigation, however, amply demonstrates that relatively few homosexual men and women conform to the hideous stereotypes people have of them.
. . . .

Most are indistinguishable from the heterosexual majority with respect to the nonsexual aspects of their lives and whatever differences there are between homosexuals' and heterosexuals' social adjustment certainly do not reflect any malevolent influence on society on the part of the homosexuals concerned.^{82/}

Psychologists have conceptualized anti-gay prejudice as manifesting the same social psychological dynamics as ethnic prejudice.^{83/} "Although each form of bigotry has its own unique history and content, antigay

^{82/} Bell & Weinberg, Homosexualities, supra note 33, at 229-31.

^{83/} See, e.g., Herek, Religious Orientation and Prejudice: A Comparison of Racial and Sexual Attitudes, 13 Personality and Soc. Psychology Bull. 34 (1987); Herek, Can Functions be Measured?, 50 Soc. Psychology Q. 285 (1987); Gergen & Gergen, Social Psychology 140-141 (1981). See also Bierly, Prejudice Toward Contemporary Outgroups as a Generalized Attitude, 15 J. of Applied Soc. Psychology 189 (1985) (finding that negative attitudes toward gay people were positively correlated with negative attitudes toward blacks and women).

prejudice manifests the same general psychological structure and dynamics as racism, anti-Semitism, and other prejudices against stigmatized groups."^{84/}

Some of the most common and damaging stereotypes concerning lesbians and gay men appear to have figured prominently in the campaign for enactment of the charter amendment at issue in this case.^{85/} For example, proponents' publicity repeatedly linked gay people with child molestation.^{86/} While gay men in particular have long faced this uniquely stigmatizing accusation,^{87/} there is no evidence of any positive correlation between homosexual orientation and child molestation.^{88/}

^{84/} Herek, Stigma, Prejudice, and Violence Against Lesbians and Gay Men, in Homosexuality, supra n. 3, at 65.

^{85/} See 860 F. Supp. at 427 (finding number 23). See also Jt. Ex. V (Gonsiorek deposition) at 139-45, 157-66.

^{86/} See, e.g., Pl. Ex. II, at 2 (Take Back Cincinnati pamphlet stating that gay people "want the children" and "want to eliminate age of consent laws so that adults can have sex with children").

^{87/} See e.g., Martin, Learning to Hide, supra note 49, at 54-55 (1982); Jt. Ex. VI (Chauncey Aff.) ¶ 23.

^{88/} See Herek, Myths, supra note 6, at 152-56; Freund, Watson and Rienzo, Heterosexuality, Homosexuality, and Erotic Age Preference, 26 J. Sex. Res. 107, 115 (1989); West, Homosexuality and Social Policy, supra note 10, at 187-188; Groth and Birnbaum, Adult Sexual Orientation and Attraction to Underage Persons, 7 Arch. of Sexual Behavior 175, 180-81 (1978); R. 29 (Gonsiorek preliminary injunction testimony) at 188. A recent study found that, of the 220 child sex abuse cases in which the perpetrator's sexual orientation could be ascertained, only 2 perpetrators were persons of homosexual orientation. See Jenny, Roesler, Poyer, Are Children at Risk for Sexual Abuse by Homosexuals?, 94 Pediatrics 41-44 (1994). Early studies often failed to assess the sexual orientation of persons who molested children, thereby inaccurately

(continued...)

Campaign material also inaccurately suggested that gay people possess abnormal sex drives and lack stable relationships.^{89/} Gay and lesbian committed relationships share principal elements of heterosexual marital relationships.^{90/} Like married people, gay couples form deep emotional attachments.^{91/} Gay couples, like married couples, frequently make substantial commitments to each other that endure for decades.^{92/}

C. Effects of Prejudice and Discrimination

When prejudice against lesbians and gay men takes the form of discrimination or violence, it can have such

^{88/} (...continued)
counting all men who molested boys as "homosexual." See Herek, Myths, supra note 6, at 155-56.

^{89/} See, e.g., Pl. Ex. II at 2 (Take Back Cincinnati pamphlet at 2). The abnormal sex drive claim is one of several common stereotypes of gays that closely parallel those previously applied to ethnic minorities. See Duckitt, Psychology and Prejudice: A Historical Analysis and Integrative Framework, 47 Am. Psychologist 1182, 1183 (1992); Martin, Learning to Hide, supra note 48, at 53.

^{90/} See Kurdek, The Nature and Correlates of Relationship Quality in Gay, Lesbian and Heterosexual Cohabiting Couples: A Test of the Individual Difference, Interdependence, and Discrepancy Models, in Lesbian and Gay Psychology, supra note 67, at 133-55; McWhirter & Mattison, The Male Couple: How Relationships Develop (1984); Peplau & Amaro, Understanding Lesbian Relationships, in Issues, supra note 55, at 237-39.

^{91/} See Peplau, Lesbian and Gay Relationships in Homosexuality, supra note 3, at 179-83; Peplau, Research on Homosexual Couples: An Overview, 8 J. of Homosexuality 3, 5 (1982); Larson, Gay Male Relationships, in Issues, supra note 55, at 233-47.

^{92/} See, e.g., McWhirter & Mattison, The Male Homosexual: How Relationships Develop 285-86 (1984); Peplau, Research on Homosexual Couples: An Overview, 8 J. of Homosexuality 3, 5 (1982); Silverstein, Man to Man: Gay Couples in America (1981).

tangible consequences as lost employment or physical injury. The harmful effects of prejudice, discrimination, and violence, however, are not limited to such bodily or pecuniary consequences.

People who have an immediate and personal confrontation with anti-gay prejudice--whether in the form of verbal harassment from strangers, derision from family or co-workers, physical threats or violent attack--may experience post-traumatic stress that endures long after the initial confrontation.^{93/} Effects can include denial, depression, a persistent sense of vulnerability, and efforts to rationalize the experience by viewing one's victimization as just punishment.^{94/}

Moreover, gay people, like members of other groups that are subject to social prejudice, inevitably internalize society's negative stereotypes. Psychologists are particularly concerned about the harms that internalized social stigma can produce in gay adolescents who are newly becoming aware of their sexual orientation.^{95/}

^{93/} See generally Garnets, Herek, and Levy, Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences, 5 J. Interpersonal Violence 366 (1990).

^{94/} See id.; Herek, Stigma, Prejudice and Violence Against Lesbians and Gay Men, in Homosexuality, supra note 3, at 73-75; cf. Bard & Sangrey, The Crime Victim's Book (1979).

^{95/} See, e.g., Remafedi, Farrow, and Deisher, Risk Factors for Attempted Suicide in Gay and Bisexual Youth, 87 Pediatrics 869 (1991); Gonsiorek, Mental Health Issues of Gay and Lesbian Adolescents, 9 J. Adolescent Health Care 114 (1988). See also U.S. Department of Health and Human Services, 3 Report of the Secretary's Task Force on Youth

(continued...)

The stigma and ill treatment that attach merely to acknowledging homosexual orientation lead many gay people to remain "in the closet."^{96/} However, concealing one's sexual orientation, or attempting to avoid association with other gay people, tends only to compound psychological distress. As explained in one recent review of the research literature,

Psychological adjustment appears to be highest among men and women who are committed to their gay identity and do not attempt to hide their homosexuality from others. As with other stigmatized minorities, gay men and lesbians probably maintain self-esteem most effectively when they identify with and are integrated into the larger gay community. Conversely, people with a homosexual orientation who have not yet come out, who feel compelled to suppress their homoerotic urges, who wish that they could become heterosexual, or who are isolated from the gay community may experience significant psychological distress, including impairment of self-esteem. Chronically hiding one's sexual orientation can create a painful discrepancy between public and private identities, feelings of inauthenticity, and social isolation. (citations omitted).^{97/}

^{95/} (...continued)

Suicide, 110 (Feinleib ed. 1989) (summary) ("Gay youth face problems in accepting themselves due to internalization of a negative self-image and the lack of accurate information about homosexuality during adolescence. Gay youth face extreme physical and verbal abuse, rejection and isolation from family and peers. They often feel totally alone and socially withdrawn out of fear of adverse consequences.").

^{96/} See, e.g., Bell and Weinberg, Homosexualities, supra note 33, at 62-68.

^{97/} Garnets, Herek, and Levy, Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences, 5 J. Interpersonal Violence 366, reprinted in Psychological Perspectives, supra note 7, at 582-83. See also id. at 593 n.2 (noting danger of blackmail); United States v. Lallemand, 989 F.2d 936, 940 (7th Cir. 1993) (Posner, J.). In his preliminary injunction hearing testimony, Dr. Gonsiorek called concealing one's sexual orientation a "prescription for mental health problems." R. 29 at 191.

The "daily need to hide an important aspect of . . . personal and social identity" operates as a "corrosive denial[] of self-respect and self-worth."^{97/} For some, social stigma turns into feelings of personal inferiority or self-hatred.^{98/}

The district court's finding that the psychological effects on gay people of societal prejudice and discrimination are "profound" and "negative," 860 F. Supp., at 426, is consistent with a large body of psychological research and clinical experience.

CONCLUSION

The district court's central factual findings are well supported in the scientific literature. In our view, those findings demonstrate that measures imposing special political disabilities on gay people have no legitimate purpose and threaten to compound the serious problems gays and lesbians already face. In light of the history of harsh discrimination against gay people, and the prevalence of intense prejudice against them today, a charter provision

^{97/} Hetrick and Martin, Developmental Issues, supra note 80, at 28. See also Martin, Learning to Hide, supra note 47, at 58; Malyon, The Homosexual Adolescent: Developmental Issues and Social Bias, 60 J. of Child Welfare 321, 327 (1981).

^{98/} See, e.g., Gonsiorek, Mental Health Issues of Gay and Lesbian Adolescents, supra note 94; Gonsiorek and Rudolph, Homosexual Identity: Coming Out and Other Developmental Events, in Homosexuality, supra note 3, at 166 (effects range from a "mild tendency toward self-doubt in the face of prejudice to overt self-hatred and self-destructive behavior").

that denies gay people "any claim of minority or protected status" appears to reflect bare antipathy.

Quite apart from our view that there is a need for public policies that specifically address such serious social problems as anti-gay discrimination and violence, amici view with grave concern any efforts to restrict the continuing ability of gay people to obtain recognition and protection from legislative and other public institutions. As we have explained, prejudice against lesbians and gay men is based in large part on inaccurate information and false stereotypes about them. As judges and social scientists alike have recognized,^{100/} legislation and public policy plays an important role both in reinforcing and in changing existing attitudes toward socially vulnerable groups. Without equal access to such a fundamental means of disputing stereotypes and altering public attitudes, lesbians and gay men may be

^{100/} See, e.g., West, Homosexuality and Social Policy, *supra* note 10, at 196; Pettigrew, Racial Change and Social Policy, 441 Ann. Amer. Acad. Pol. & Soc. Sci. 114-131 (1979); Pettigrew, Racially Separate or Together? 278-280 (1971); Allport, The Nature of Prejudice, *supra* note 49, at 477 (legislation is "one of the major methods of reducing, not only public discrimination, but private prejudice as well"); Simpson and Yinger, Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination 449-450 (1953). See also, e.g., Palmore v. Sidoti, 466 U. S. 429, 433 (1984); Mississippi U. for Women v. Hogan, 458 U. S. 718, 729-730 (1982); Frontiero v. Richardson, 401 U. S. 667, 684-685 (1973); Brown v. Board of Education, 347 U. S. 483, 494 (1957).

condemned to continued suffering from the many harmful
consequences of prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief Amicus Curiae Of The American Psychological Association, The National Association Of Social Workers, and The Ohio Psychological Association were mailed, first class, postage prepaid, this 5th day of December 1994 to:

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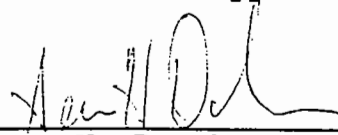
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