

IN THE SUPREME COURT OF
THE STATE OF GEORGIA

JAMES EDWARD STOVER, JR.,

Appellant,

VS.

THE STATE OF GEORGIA,

Appellee.

CASE NO. 43370

BRIEF OF AMICI CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION,
THE INSTITUTE FOR ADVANCED STUDY OF HUMAN SEXUALITY,
THE AMERICAN COLLEGE OF SEXOLOGISTS,
SOCIETY FOR THE SCIENTIFIC STUDY OF SEX,
PHE, INC., MALCOLM G. FREEMAN, M.D., AND DAVID LOFTIS, PH.D.
IN SUPPORT OF APPELLANT

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IDENTITY AND INTEREST OF AMICI

This brief amici curiae is filed pursuant to Rule 42 of the Rules of this Court.

The American Psychological Association (hereafter "APA"), a nonprofit, scientific, and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Included among these are over 1,000 psychologists who work or practice in the State of Georgia. Among APA's major functions are promoting psychological research, improving research methods, and publishing information regarding human behavior. A substantial number of APA's members are concerned with collecting data, conducting research, and providing therapy pertaining to human sexuality.

APA has had a continuing concern about statutes that seek to criminalize consensual, noncommercial sexual conduct among adults, and has filed briefs amicus curiae on the subject in the United States Supreme Court in New York v. Uplinger, 467 U.S. 246 (1984), and Bowers v. Hardwick, 106 S. Ct. 2841 (1986). Bowers, of course, involved the constitutionality of the statute at issue here -- O.C.G.A. § 16-6-2 -- as applied to consenting adult homosexuals.

APA is also concerned about the effect of the statute at issue on APA members providing therapy in Georgia for sexual dysfunction. Such therapists must temper the advice they give to their patients because helpful and healthy alternative means of sexual expression such as oral sex have been criminalized by the State. Patients may be found guilty of a felony and imprisoned if they

engage in sexual conduct a therapist otherwise might consider beneficial. Moreover, conscientious therapists might themselves be exposed to criminal liability as accessories by the combined effect of O.C.G.A. § 16-6-2 and O.C.G.A. § 16-2-20(b)(3) (making criminally liable one who "intentionally aids or abets in the commission of a crime"), if they followed accepted and customary practice within the profession by informing their patients about such alternative means of sexual expression as fellatio and cunnilingus. Cf. Griswold v. Connecticut, 381 U.S. 479, 503 (1965) (White, J., concurring) (statute criminalizing use of birth control, together with general aiding and abetting statute, "prohibits doctors from affording advice to married persons on proper and effective methods of birth control"). In these ways, the statute at issue interferes with a psychologist's exercise of sound professional judgment. It could also discourage therapists from providing needed therapeutic assistance.

As noted in Point IV, many other professional associations have opposed such laws, including the American Public Health Association, the American Bar Association, and the American Medical Association.

The Institute for Advanced Study of Human Sexuality, located in San Francisco, is a private graduate school that grants four degrees approved by the Superintendent of Public Instruction of the California State Department of Education. The Institute is a member of the California Association of State Approved Colleges and Universities. Incorporated as a non-sectarian graduate school in 1976, the Institute has designed its curriculum and its degree programs for persons wishing academic training in the field of human sexuality. The Institute, through its Department of Professional Studies, also offers three major programs leading to professional certification, including certification as a sex therapist.

The American College of Sexologists ("ACS") was incorporated in California in 1978 for the purpose of providing professional standards for the certification of sexologists and those institutions that offer training in sexology. Sexology is a discipline that originally grew out of 19th century biological, medical, historical, anthropological and sociological research, and is now the science of sexual behavior in all of its aspects. Through its distinguished Board of Examiners, ACS accredits individuals and institutions if they meet the standards established by ACS.

The Society for the Scientific Study of Sex ("SSSS"), an international organization founded in 1957 to encourage rigorous systematic investigation of sexuality, is the oldest organization of scientists and academicians engaged in research dealing with sexuality. The membership of SSSS includes biologists, therapists, psychologists, physicians, nurses, sociologists, anthropologists, historians, educators, and other professionals who share an interest in sexuality.

PHE, Inc., is a corporation organized under the laws of North Carolina, with its principal place of business in North Carolina. It publishes Sex Over Forty, a newsletter edited by a medical doctor who is a national authority on sex and older people. Sex Over Forty has a national circulation of more than 30,000. In keeping with professional standards, Sex Over Forty regularly advises its subscribers about the advantages for older couples of engaging in forms of sexual expression other than vaginal intercourse, including in particular, oral sex. PHE, Inc., therefore is concerned that the statute at issue bars Georgia subscribers to Sex Over Forty from enjoying this important aspect of sexual expression; is concerned that its subscribers who follow advice provided in Sex Over Forty may be subjecting

themselves to prosecution; and is concerned that PHE, Inc., itself, may be subjecting itself to criminal liability for aiding and abetting by informing readers about the advantages of oral sex.

Malcolm G. Freeman, M.D. is a physician licensed to practice medicine in the State of Georgia, and is professor of gynecology and obstetrics, associate professor of pediatrics and associate professor of pathology at Emory University School of Medicine in Atlanta. Dr. Freeman is certified as a sexual therapist and sex educator by the American Association of Sex Educators, Counselors and Therapists, is certified by the American Board of Obstetrics and Gynecology, and is a Clinical Member of the American Association of Marriage and Family Therapists. He is a fellow of the American College of Obstetricians and Gynecologists. Dr. Freeman practices and teaches sexual therapy (problems of sexual functions and feelings) and marriage/relationship therapy as a full-time faculty member of Emory University. Sexual issues and problems are invariably a major part of such therapy, and the matters at issue in this case are extremely relevant to Dr. Freeman's patients. As a teacher of human sexuality and relationship problems and their treatment, Dr. Freeman has the responsibility of presenting truthful information about human sex behavior, including unusual behaviors and common variations as a part of the education of health care professionals and the nonprofessional public who may seek such information. The state statute at issue threatens to restrict Dr. Freeman's freedom to teach the truth as it is generally understood by the scientific community, and places him in some jeopardy of becoming an accessory to a felony under the law.

David Loftis, Ph.D., is a clinical psychologist licensed to practice and practicing psychology in the State of Georgia. He is a member of amicus APA, as well as the Georgia Psychological Association and the American Academy

of Psychotherapy. Dr. Loftis provides adult psychotherapy, specializing in marital and couples therapy. Sexual issues and problems are often an important aspect of such therapy, and the matters at issue in this case are extremely relevant to Dr. Loftis' patients and the professional advice he gives them.

For the reasons set forth in this brief, each of the amici believes that O.C.G.A. § 16-6-2 is plainly unconstitutional under both the United States Constitution and the Constitution of this State. They also believe, as set forth below, that the statute is detrimental to individual and public health and mental health. The amici recognize that this brief is filed after oral argument in this case. They believe it will nevertheless be useful to the Court because it addresses recent decisions of the United States Supreme Court not addressed in the parties' briefs, and because it presents the Court with highly relevant scientific data and professional opinion not previously of record.

INTRODUCTION AND SUMMARY OF ARGUMENT

Georgia's official code, O.C.G.A. § 16-6-2 (1984), criminalizes certain noncommercial, nonviolent sexual conduct between consenting adults of different sexes, whether married or not, occurring in private.¹ This case poses the question whether this statute, by intruding upon extremely intimate, private, and beneficial aspects of human life and personality, infringes fundamental human rights protected in both the United States Constitution and the Constitution of this State.

In July, 1986, in a razor-close 5-4 decision, the United States Supreme Court upheld the constitutionality of the statute at issue as applied to homosexual conduct, where no conviction or prison term is imposed. Bowers

¹ The State erroneously argues that this Court should consider this case as if the conduct at issue occurred in "a public place." Brief of Appellee at 9. Nothing in the record suggests that the conduct occurred in a "public place." In fact, it took place in a secluded section of a rural Georgia forest. Moreover, no part of the conviction in this case turned on the allegedly "public" location of the conduct; had the State been required to show that the conduct took place "in public" in order to obtain a conviction, appellant very likely would have been acquitted. This Court should decline appellee's suggestion to treat this case as though it involved sexual conduct in public.

This Court also should reject appellee's plainly unconstitutional request that this case proceed as though coercion were involved. Brief of Appellee at 9-10. Appellant was charged with rape and aggravated sodomy, which require the State to prove, beyond a reasonable doubt, that the defendant used force and coercion. The jury acquitted him of those charges. Because he was not proven guilty of acting coercively, it would violate appellant's state and federal right to the presumption of innocence to rule that despite appellant's acquittal of rape and aggravated sodomy, "coercion" was an element in this case. If consent would establish that appellant was engaged in constitutionally protected activity, then taking into consideration a "possibility of non-consent," as appellee urges, Brief of Appellee at 10, would unconstitutionally shift to the criminal defendant the State's burden to prove beyond a reasonable doubt essential elements of the crime. Sandstrom v. Montana, 442 U.S. 510 (1979).

v. Hardwick, 106 S. Ct. 2841 (1986); see id. at 2847-48 (Powell, J. concurring).² The Supreme Court expressly reserved the question whether this statute can constitutionally be applied to consensual heterosexual conduct, id. at 2842, n.2, and the State of Georgia conceded at argument that O.C.G.A. § 16-6-2 cannot constitutionally be applied to married persons. Id. at 2858, n.10 (Stevens, J., dissenting) (quoting from the transcript of oral argument). The only Justice to reach the question the present case poses, Justice Stevens, ruled clearly that O.C.G.A. § 16-6-2 may not constitutionally be applied to married or unmarried heterosexual couples. Id. at 2858 (Stevens, J., dissenting).

Amici believe Bowers was wrongly decided, on legal, scientific and health grounds, and because it primarily relied upon historical condemnation of homosexuality to reach its decision. Id. at 2844-46; see id. at 2847 (Burger, C. J. concurring); id. at 2847-48 (Powell, J. concurring). But whatever the status of homosexual relations, heterosexual relations are basic to the traditional American family. Moreover, like contraceptive devices, which unmarried heterosexual couples have a constitutional right to use, Eisenstadt v. Baird, 405 U.S. 438 (1972), the sexual conduct at issue here, as

² Justice Powell, who cast the decisive fifth vote upholding the statute, emphasized (as did the Court) that homosexual rather than heterosexual conduct was at issue in Bowers. Bowers v. Hardwick, 106 S. Ct. at 2848, n.2 (Powell, J., concurring). Justice Powell indicated he would probably not vote to uphold any prison sentence even for homosexual sodomy, because he believed that would violate the Eighth Amendment's proscription of cruel and unusual punishment. Id. And in a very unusual public statement, Justice Powell later revealed that after initially voting with the dissenters -- which would have provided a majority to strike down O.C.G.A. § 16-6-2 even as applied to homosexual conduct -- he later changed his vote to create the very shaky majority that ultimately upheld the statute as applied to homosexual conduct. Washington Post, August 13, 1986 at A4.

an alternative to vaginal intercourse, is a means to prevent conception and is constitutionally protected for this reason as well. Bowers therefore has no bearing on the question whether a fundamental right is at issue in the present case.

Furthermore, recently the U.S. Supreme Court unanimously denied a petition for a writ of certiorari in Oklahoma v. Post, 107 S. Ct. 290 (1986). In that case, presenting facts similar to those here, the highest court in Oklahoma found that State's consensual sodomy law unconstitutional as applied to unmarried heterosexual sodomy. Post v. State, 715 P.2d 1105 (Okla. Cr. 1986). The Court's decision not to review Post strongly suggests, as do the several opinions in Bowers (particularly the key concurring opinion of Justice Powell), that the Oklahoma court ruled correctly, and that this Court should reverse appellant's conviction. Point I.

In addressing the question presented, this Court should consider scientific, demographic, and clinical information concerning the intimate conduct made criminal by O.C.G.A. § 16-6-2. Despite some people's moral or theological objections to oral sex, this conduct is almost universal among married and unmarried heterosexual couples. Mental health professionals have found that the sexual conduct this statute prohibits is not harmful to health or social functioning. Clinical research also indicates that the freedom to engage in such conduct is important to the psychological health of individuals and of their most intimate and profound relationships. Like the decision whether to use contraceptives, the decision whether to engage in this type of nonprocreative sexual conduct is among "the most private and sensitive" of decisions, concerning "the most intimate of human activities and

relationships." Carey v. Population Services Int'l, 431 U.S. 678, 685 (1977). For these reasons, the statute as applied to the consensual heterosexual expression of both married and unmarried individuals violates the fundamental constitutional rights of personal privacy and association under both the federal and the state constitutions. Point II.

Based on clinical and scientific data, amici also submit that the statute as applied here furthers no legitimate state interest and therefore imposes an unlawful abridgement of individual freedom that is unconstitutional under both constitutions. See Blincoe v. State, 231 Ga. 886, 887-888, 204 S.E.2d 597 (1974). Indeed, this statute is actually harmful to the public health and to individual mental health. Furthermore, exclusive reliance upon alleged "moral judgments" cannot support a statute, such as this one, that infringes fundamental privacy interests. Point III.

Finally, statutes such as the present one have been severely criticized by legal scholars, professional associations, and religious organizations, and have been repealed or struck down as unconstitutional in a substantial majority of U.S. jurisdictions. Point IV.

Amici respectfully urge this Court to overturn appellant's conviction.

ARGUMENT

I. BOWERS V. HARDWICK DOES NOT AUTHORIZE OR SUPPORT APPELLANT'S CONVICTION.

Bowers v. Hardwick plainly provides no support for appellant's conviction. Nevertheless, like most Americans, see Newsweek, July 14, 1986, p. 38, amici believe the Bowers majority erred in holding that the Fourteenth Amendment does not afford to homosexuals a right to engage in consensual

sexual intimacy in private.³ Indeed, amicus APA filed a brief in the Bowers case urging the Supreme Court to reach the contrary result.⁴

The several opinions in Bowers plainly do not support appellant's conviction for engaging in heterosexual oral sex in private. The Court stated the issue at the outset as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," 106 S. Ct. at 2843, and the Court emphasized that "[t]he only claim properly before the Court . . . is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy," id. at 2842, n.2. Accordingly, the Court was careful to "express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." Id.

As the Court approached that case, then, the issue was not the nature of the conduct engaged in, but homosexuality itself. Two basic assertions underlie the Bowers decision: First, the Court asserted that "[n]o connection

³ The U.S. Supreme Court did not hold that a prison sentence -- even a probated term of five years -- can be imposed even for homosexual conduct violating the statute. See 106 S. Ct. at 2847 (Powell, J., concurring). In fact, Justice Powell's opinion suggests that such a sentence would violate the Eighth Amendment. Id. at 2847-48.

⁴ Amicus APA, joined by the American Public Health Association ("APHA") informed the Court that the vast majority of mental health professionals, including members of APA, APHA, and the American Psychiatric Association, no longer consider homosexuality to be a disorder of any kind. Extensive scientific research conducted over almost three decades has conclusively established that homosexuality is not related to psychological adjustment or maladjustment. See Brief of Amici Curiae American Psychological Association and American Public Health Association, at 8-11, in Bowers v. Hardwick, 106 S. Ct. 2841 (1986). Amici join the four dissenting Justices in Bowers and "hope that . . . the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do." Bowers v. Hardwick, 106 S. Ct. at 2856 (Blackmun, J., dissenting).

between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." Id. at 2844. Second, the Court focused on the long history of majoritarian disapproval of homosexual relationships. Id. at 2844-46.

As to the first point, there can be no doubt that heterosexual relations are connected directly to majoritarian and historical concepts of "family, marriage, and procreation."⁵ As shown in Point II, infra, the behavior prohibited by section 16-6-2 plays a major role in these aspects of life, and has a definite relationship as well to contraception, another fundamental right of married and unmarried adults. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). As to the second point, even assuming that historical condemnation of homosexual relationships is relevant to the constitutional inquiry,⁶ it is indisputable that heterosexual relationships have not received majoritarian condemnation; indeed, heterosexual relationships are the social convention from which homosexual relationships have been said to vary.⁷

⁵ It can legitimately be argued that many homosexual relationships are connected with concepts of family and even marriage. See Brief of Amici Curiae American Psychological Association at 13-14, in Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

⁶ Although the issue is not directly germane to this case, amici agree with the dissenters in Bowers that neither "the length of time a majority has held its convictions [n]or the passions with which it defends them can withdraw legislation" from constitutional scrutiny. 106 S. Ct. at 2854 (Blackmun, J., dissenting). Courts have on many occasions held unconstitutional laws long on the books and supported by majoritarian prejudice, even where that prejudice existed at the time the Bill of Rights and/or the Fourteenth Amendment were enacted. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Education, 347 U.S. 483 (1954).

⁷ Although the Court cited many statutes proscribing both heterosexual and homosexual conduct, it was careful to limit its discussion to homosexual

(footnote continued on next page)

The concurring opinions in Bowers emphasize that "homosexual conduct [has] been subject to state intervention throughout the history of Western Civilization." 106 S. Ct. at 2847 (Burger, C.J., concurring); see id. at 2848, n.2 (Powell, J., concurring). And Justice Powell's crucial concurring opinion recognized "the moribund character today of laws criminalizing this type of private consensual conduct," id. (emphasis added), and emphasized historical condemnation as important to his vote, id. Furthermore, Justice Powell noted that "respondent has not been tried, much less convicted and sentenced," id. at 2848, and observed that in his view "a prison sentence for such conduct -- certainly a sentence of long duration -- would create a serious Eighth Amendment issue." Id. at 2847.⁸

In this case, of course, James Stover has been tried, convicted, and has received a prison sentence for consensual, heterosexual oral sex. At a minimum, Justice Powell's analysis requires that this sentence be vacated pursuant to the Eighth Amendment. See Solem v. Helm, 463 U.S. 277 (1983).

7 Continued

conduct. 106 S. Ct. at 2842, n.2. Thus, the Court's reliance on these statutes is properly understood as reliance on historical disapproval of homosexuality, not "sodomy" generally.

But it is of critical importance that the Court in Bowers did not in any way suggest that it based its judgment on the view that homosexuality, or the sexual conduct proscribed by the statute, is in any sense pathological or unhealthy. Indeed, given the overwhelming evidence to the contrary, the Court could not appropriately have done so. Instead, it acted on the basis of historical disapproval of homosexuality, disapproval not present when heterosexual relations are at issue.

⁸ In off-the-bench remarks after the decision was handed down, Justice Powell stated that the Bowers case was not as significant as many had claimed, because Hardwick had not been tried, convicted, or sentenced. Washington Post, August 13, 1986 at A4.

Moreover, the fact that this case concerns heterosexual conduct, which society has accepted both today and historically, distinguishes it from Bowers.

Finally, the Supreme Court's recent denial of certiorari in Post v. State, 715 P.2d 1105 (Okla. Cr. 1986), cert. denied, 107 S. Ct. 290 (1986), strongly suggests that Bowers is not controlling here. In Post, Oklahoma's highest court held that that State's consensual sodomy statute could not constitutionally be applied to heterosexual sodomy.⁹ Had the United States Supreme Court considered Bowers to be controlling, or even relevant, it could have granted certiorari, reversed summarily, or it could have vacated and remanded the Oklahoma court's decision with instructions to reconsider in light of Bowers. Instead, the Court unanimously denied certiorari. Obviously, any potential conflict between Bowers and Post was considered so insignificant as to permit the state court's decision to stand.

II. O.C.G.A. § 16-6-2 IMPLICATES FUNDAMENTAL PRIVACY INTERESTS THAT ARE BASIC TO MARITAL AND NONMARITAL HETEROSEXUAL RELATIONSHIPS.

The U.S. Supreme Court has "long recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." Thornburgh v. American College of Obstetrics & Gynecology, 106 S. Ct. 2169, 2184 (1986). The constitutional right of privacy protects fundamental decisions basic "to individual dignity and autonomy." Id.; see, e.g., Carey v. Population Services Int'l, 431 U.S. 678, 684-85 (1977). Control of one's own body is an essential component of this right. Id.; Roe v. Wade, 410 U.S. 113 (1973). These values are also

⁹ The Oklahoma court did not reach the question of the constitutionality of the law's application to homosexual conduct, "since the application of the statute to such conduct is not an issue in the case." 715 P.2d at 1109.

protected by the independent safeguards of Georgia law,¹⁰ which has a deeply rooted tradition of respect for individual autonomy regardless of the scope of federal protection for these interests. See, e.g., Zant v. Prevatte, 248 Ga. 832, 286 S.E.2d 715 (1982) (each person has a "right of privacy" under state law that affords him "the right to control his own body" and the "right to refuse medical treatment," even when its exercise may cost him his life); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E.68, 70 (1905) ("Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public"). These constitutions protect all of us in making "the most private and sensitive" decisions, concerning "the most intimate of human activities and relationships." Carey v. Population Services Int'l, 431 U.S. at 685.

Because "individuals draw much of their emotional enrichment from close ties with others," the constitutional rights of privacy and personal association protect, in addition to decisions implicating basic autonomy interests, decisions fundamental to close human relationships. Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984). "Protecting these relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity that is central to any concept of liberty." Id.

One such relationship is marriage, see, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978); Griswold v. Connecticut, 381 U.S. 479, 486 (1965), and

¹⁰ State constitutional provisions, of course, may go beyond the protections of the federal constitution in shielding the individual from the power of the State. See, e.g., Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980); Mills v. Rogers, 457 U.S. 291 (1982).

sexual intimacy is basic to the marital relationship. The Constitution protects sexual intimacy from unwarranted state intrusion -- because sexuality is so intimately personal and because of its associational importance -- and married couples may choose whether and in what way to engage in sexual activity, without the interference of the State. The State of Georgia conceded at argument in Bowers that application of § 16-6-2 to married couples "would be unconstitutional," because it would violate the "right of marital privacy as identified by the Court in Griswold." Bowers, 106 S. Ct. at 2858, n.10 (Stevens, J., dissenting) (quoting transcript of oral argument at 8). The State thus concedes that the conduct this statute proscribes is constitutionally protected if engaged in by heterosexuals who are married.

But marital relationships are not the only ones that "involve deep attachments and commitments," Roberts v. United States Jaycees, 468 U.S. at 619, and constitutional protection of sexual intimacy is not limited to married people. "[T]he marital couple is not an independent entity with a mind and a heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis added). Thus, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. (emphasis in original). The right of privacy and association, with its protection of sexual intimacy, "must be the same for the unmarried and the married alike." Id.; see Carey v. Population Services Int'l, 431 U.S. at 686-87. As Justice Stevens observed in Bowers, "our prior cases . . . establish that a State may not prohibit sodomy within 'the sacred province of

marital bedrooms,' . . . or, indeed, between unmarried heterosexual adults." Bowers v. Hardwick, 106 S. Ct. at 2858 (Stevens, J., dissenting) (citations omitted).¹¹

Thus, the decisions of the United States Supreme Court clearly establish that heterosexual individuals have fundamental privacy and associational interests in engaging in sexual conduct, interests that are protected by the Constitution whether the individuals are married or unmarried. The State must advance compelling interests to justify abridgement of these individual rights, and must show that it has chosen to achieve those compelling interests with the least restrictive means of doing so. Thornburgh v. American Coll. of Obst. & Gyn., 106 S. Ct. at 2186, n.3 (Stevens, J., concurring) (quoting Griswold v. Connecticut, 381 U.S. at 503-04 (White, J., concurring) (collecting cases)).

As amici will demonstrate in the balance of Point II, O.C.G.A. § 16-6-2 proscribes extremely common and healthy sexual conduct that forms an integral part of fundamental human relationships. This statute therefore is unconstitutional, unless justified by virtue of being narrowly drawn to achieve a compelling state interest.

A. O.C.G.A. § 16-6-2 Prohibits and Criminally Punishes Sexual Conduct That Is Common And Not Psychologically Harmful.

1. The specific sexual conduct prohibited by the statute is common in marital and nonmarital relationships.

In 1948, Kinsey estimated that if the then extant criminal laws forbidding various sex acts were enforced, 95% of all white American males

¹¹ A Newsweek poll conducted immediately after the U.S. Supreme Court's Bowers decision revealed that by a margin of 74% to 18%, the American people believe the State should have no right to prohibit particular sexual practices conducted in private between adult men and women. Newsweek, July 14, 1986, p. 38.

would be subject to prosecution.¹² Today, study after study has demonstrated that a vast majority of all adult Americans -- men and women, married and unmarried -- have engaged in the intimate conduct the statute at issue makes felonious.

Statistical studies show that this sexual conduct is commonplace. Kinsey's data show that, as of the early 1950s, 54% of exclusively or predominantly heterosexual men and 49% of exclusively or predominantly heterosexual women engaged frequently in oral or anal sex.¹³ Kinsey also reported that 60% of married, college-educated people engaged in oral sex on a fairly regular basis.¹⁴ A major study of couples in the United States published in 1983 found that 90% of the married and unmarried heterosexual couples studied had engaged in fellatio and that 93% of these couples had engaged in cunnilingus.¹⁵ Other recent surveys similarly report that 80-90% of all married couples engage in oral sex.¹⁶

¹² A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 390-93 (1948) [hereafter KINSEY 1948].

¹³ A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953) [hereafter KINSEY 1953]; KINSEY 1948, supra note 12, at 368-70.

¹⁴ KINSEY 1948, supra note 12, at 368-70.

¹⁵ P. BLUMSTEIN & P. SCHWARTZ, AMERICAN COUPLES 236 (1983) [hereafter BLUMSTEIN & SCHWARTZ]. This national study of 12,000 people, including Georgians, considered married couples, unmarried couples, and homosexual couples currently living together. In addition to the data reported in text, the researchers reported that 72% of married and unmarried heterosexual couples engaged in fellatio, and 74% engaged in cunnilingus, every time they had sex, frequently, or sometimes. Id.

¹⁶ E.g., C. TAVRIS & S. SADD, THE REDBOOK REPORT ON FEMALE SEXUALITY (1977) [hereafter REDBOOK REPORT] (85% of married couples engage in cunnilingus, and over 83% engage in fellatio, often or occasionally); M. HUNT, SEXUAL BEHAVIOR IN THE SEVENTIES 198-99 (1974) [hereafter M. HUNT] (90% of married couples under 25 years old engage in oral sex).

Studies also demonstrate that oral-genital sex is an important part of heterosexual relations in the United States among substantial percentages of married and unmarried adults of every age. One recent study found that approximately 80% of single men and women aged 25-34 have engaged in oral-genital sex.¹⁷ Another recent major study reported that, after reaching the age of 50, 43% of women and 49% of men had engaged in fellatio, and 49% of women and 56% of men had engaged in cunnilingus.¹⁸

It is clear from the data that the consensual sexual conduct for which appellant was convicted -- and for which he has been sentenced to five years in prison -- is an important, traditional, and frequent aspect of sexual expression in heterosexual relationships, and has been engaged in by most adult Georgians.

2. The sexual conduct criminalized by the statute is not, by itself, pathological or harmful to the individual or to individual functioning, and is considered to be "normal" by professionals and the vast majority of the American public.

The sexual conduct prohibited by O.C.G.A. § 16-6-2 is not pathological: that is, it is not detrimental to an individual's happiness, functioning, or mental health. The American Psychiatric Association's Diagnostic and Statistical Manual (Third Edition), used as an authoritative

¹⁷ M. HUNT, supra note 16.

¹⁸ E. BRECHER, LOVE, SEX, AND AGING: A CONSUMER'S UNION REPORT 358-59 (1984) [hereafter LOVE, SEX AND AGING]. Fewer data exist on the incidence of anal intercourse, which is also outlawed by §16-6-2, but which is not directly at issue here. One researcher found that 25% of married couples under 35 years old had engaged in anal intercourse in the year preceding the study. HUNT, supra note 16, at 204. Six percent of the sample reported engaging in anal intercourse "sometimes" or "often." Another study found that 16% of heterosexual men and women reported having their anus stimulated during sex after reaching the age of 50. LOVE, SEX, AND AGING at 363.

description of diagnostic categories of mental disorders by most health-care practitioners and the insurance industry, does not include oral sex in its catalogue of pathological sexual syndromes.¹⁹ Mental health clinicians have long observed that diverse expressions of sexual feelings between consenting adults are symptoms not of mental disorder, but of mental health. A recent study of public attitudes toward oral sex indicated that an overwhelming majority of Americans consider oral-genital contact to be "part of normal sex."²⁰ Indeed, 91% of persons under 35, and 78% of all persons, said they consider oral sex to be normal.²¹ No significant data show that engaging in a variety of sexual expressions, including the conduct criminalized by § 16-6-2, results in mental or physical dysfunction. Instead, repression of desires for such expression can lead to dysfunction and pathology.²²

- B. The Freedom to Express Intimacy Through The Sexual Conduct Prohibited By O.C.G.A. § 16-6-2 Is Important To The Psychological Health Of Individuals And To Intimate Human Relationships, and the Statute Therefore Infringes The Fundamental Privacy Interests of Individuals.

The American family and the American household have changed more in the last 30 years than in the previous 250.²³ People are marrying less, marrying later, and divorcing more.²⁴ Researchers also note a marked

¹⁹ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL 261-83 (3d ed. 1980) [hereafter DSM-III]. Nor does it include anal sex as a pathological syndrome. Id.

²⁰ Callan & Planco, Attitudes Towards Oral-Genital Sexuality, 42 CONN. MED. 500, 502 (1978) [hereafter Callan & Planco].

²¹ Id.

²² See, e.g., W. MASTERS & V. JOHNSON, HUMAN SEXUAL INADEQUACY (1970).

²³ BLUMSTEIN & SCHWARTZ, supra note 15, at 25-45.

²⁴ Id. at 31, 33-34.

increase in unmarried heterosexual cohabitation; between 1970 and 1981, there were approximately 1.8 million unmarried couples of the opposite sex living together in the United States.²⁵

Recent social science research indicates that these unmarried couples share principal elements of the marital relationship. Like married couples, unmarried couples often form deep emotional "attachments and commitments," Roberts v. United States Jaycees, 468 U.S. at 620, to each other.²⁶ Couples, whether married or not, confront a common set of issues and confront them in similar ways. Principal concerns include equity, loyalty, stability, intimacy, and love.²⁷ Unmarried couples also often make substantial commitments to each other; many live together for very long periods of time; and many eventually marry.²⁸

Sexuality is of course an important element in the lives and relationships of both married and unmarried couples. Sex functions as a complex bond between partners; for both married and unmarried couples "a good sex life is central to a good overall relationship."²⁹ Married or not, "[h]aving sex is an act that is rarely devoid of larger meaning for the couple. It always says something about partners' feelings about each other,

²⁵ Id. at 36; see Spanier, Married and Unmarried Cohabitation in the United States: 1980, 45 MARRIAGE & FAMILY 277 (1983).

²⁶ BLUMSTEIN & SCHWARTZ, supra note 15, at 170-74, 332-447.

²⁷ See generally, BLUMSTEIN & SCHWARTZ, supra note 15; Cardell, Finn & Marecek, Sex-Role Identity, Sex-Role Behavior, and Satisfaction in Heterosexual, Lesbian, and Gay Male Couples, 5 PSYCHOLOGY OF WOMEN Q. 488 (1981).

²⁸ See, e.g., BLUMSTEIN & SCHWARTZ, supra note 15, at 315.

²⁹ Id. at 201, 205-206.

what kind of values they share, and the purpose of their relationship."³⁰

In short, as the four dissenting Justices (without opposition on this point from the majority) stated in Bowers, "[o]nly the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'" 106 S. Ct. at 2851 (Blackmun, J., dissenting) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 (1973)). This observation applies equally to married or unmarried heterosexual relationships.

Oral sex is not only harmless, but it substantially benefits many people and relationships, as well. Although oral sex with their partners appears to have little impact on heterosexual women's overall happiness with their sex lives or relationships (it is not correlated positively or negatively with overall happiness for women), both married and unmarried men who engage in oral sex with their wives or partners are happier with their sex lives and more satisfied with their relationships in general than those who do not.³¹ A majority of Americans sampled in a 1978 study agreed that "oral-genital sex leads to better and happier relationships."³²

These findings are not surprising. Oral sexuality is a significant source of sexual pleasure for a large majority of participants of both sexes

³⁰ Id. at 193.

³¹ Id. at 231, 233-37.

³² Callan & Planco, supra note 20, at 502.

and all ages.³³ Moreover, the salutary effects of sexual flexibility is a prevalent theme in the scientific literature on sex therapy. Virtually every expert in the field has recognized the importance of sexual contact through behaviors other than vaginal intercourse. Underlying Masters and Johnson's pioneering sex therapy was the theme of abstinence from vaginal intercourse and use of "sensate focus" exercises to expand a couple's sensitivity and sexual repertoire.³⁴

It is the consensus of the many practitioners in sex therapy, gleaned from clinical experience and the scientific literature, that reliance on vaginal intercourse as the sole sexual activity is not healthy, and that couples need to expand their behavior options. Oral-genital contact, in particular, has been suggested as an option for inorgasmic women, because only a minority of women respond orgasmically to intercourse without other stimulation. For many women, oral sex may be the only way to achieve orgasm with their partners.³⁵ Standard human sexuality textbooks consistently report that sexual conduct other than vaginal intercourse enhances sexual functioning and health.³⁶ Persons experiencing sexual dysfunction benefit

³³ See LOVE, SEX, AND AGING, supra note 18, at 358-59 (98% of men and 75% of women over 50 who have experienced fellatio enjoyed it; 82% of women and 95% of men over 50 who have experienced cunnilingus enjoyed it); REDBOOK REPORT, supra note 16 (82% of wives reported they enjoy cunnilingus; 65% of wives reported they enjoy fellatio).

³⁴ W. MASTERS & V. JOHNSON, HUMAN SEXUAL INADEQUACY (1970); W. MASTERS & V. JOHNSON, HUMAN SEXUAL RESPONSE (1966).

³⁵ L. BARBACH, FOR YOURSELF, THE FULFILLMENT OF FEMALE SEXUALITY (1975) [hereafter L. BARBACH].

³⁶ See, e.g., R. KOLODNY, W. MASTERS & V. JOHNSON, TEXTBOOK ON SEXUAL MEDICINE (1979) [hereafter R. KOLODNY, et al.]; MCCARY, MCCARY'S HUMAN SEXUALITY (1978); H. KATCHEDOURIAN & D. LUNDE, FUNDAMENTALS OF HUMAN SEXUALITY (1975).

from therapy that informs the patient about the use of sexual techniques other than vaginal intercourse.³⁷ These techniques improve mental health by increasing feelings of sexual competence, intimacy, and self-esteem.

Even among married couples seeking fertility counseling and wanting to reproduce, behaviors other than vaginal intercourse are commonly suggested as a means to ease the pressure and perhaps increase sexual arousal and frequency of orgasm, which is known to increase the probability of conception in women.³⁸ In this way, freedom for heterosexual couples to choose whether to engage in the prohibited sexual conduct is directly connected to decision-making about family and procreation, well-established core aspects of the privacy right encompassed by the Fourteenth Amendment. See, e.g., Carey v. Population Services Int'l, 431 U.S. at 685 ("The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices").

O.C.G.A. §16-6-2, as applied to heterosexual conduct, also violates another well-established aspect of the fundamental right to privacy. It deprives heterosexual couples who do not desire to produce a pregnancy of the option of engaging in non-coital sexual behavior instead of using a contraceptive device or pharmaceutical. It is well-established, of course, that all adults have a fundamental right to prevent conception through the use of devices or pharmaceuticals obtained for that purpose. Carey v. Population

³⁷ L. BARBACH, *supra* note 35; see W. MASTERS & V. JOHNSON, *HOMOSEXUALITY IN PERSPECTIVE* 208-09 (1979) (functional failure rates for sexually experienced men and women are four times higher for coition than for fellatio or cunnilingus).

³⁸ E.g., J. GAGNON, *HUMAN SEXUALITIES* 131, 193-214 (1977).

Services Int'l, 431 U.S. 678; Eisenstadt v. Baird, 405 U.S. 438; Griswold v. Connecticut, 381 U.S. 479. It follows from this a fortiori that all adults have the same fundamental right to prevent conception through the use of safe non-reproductive sexual techniques, such as oral sex.

Finally, people who are unable to engage in vaginal intercourse because of physical disability or handicap also benefit from the intimate contact that is provided by non-coital sexual behavior. Their therapists and rehabilitation specialists advise them as to the availability of such behaviors as oral stimulation to ensure the continuation of a pleasurable physical relationship with their loved ones. Such contact, in fact, has been shown to be a crucial determinant of survival for certain patients who may not be able to have vaginal intercourse and would otherwise terminate physical contact relationships.³⁹ Moreover, physically disabled men and women who achieve a level of sexual functioning that is personally satisfying will usually develop the self-confidence and assertiveness necessary to form meaningful relationships, to develop work skills, and to be otherwise productive.⁴⁰ The range of disabilities that may interfere with conventional vaginal intercourse is substantial.⁴¹ The Georgia statute has

³⁹ J. LYNCH, THE BROKEN HEART: THE MEDICAL CONSEQUENCES OF LONELINESS (1977).

⁴⁰ Cole, Sex and the Paraplegic, MED. WORLD NEWS 35 (January 17, 1972). The development of an adequate self-image may be a central element in total habilitation and rehabilitation. Weiss & Diamond, Sexual Adjustment, Identification, and Attitudes of Patients With Myelopathy, 47 ARCHIVES OF PHYSICAL MED. & REHABILITATION 245 (1966); Lindner, Perceptual Sensitization to Sexual Phenomena in the Chronic Physically Handicapped, 9 J. CLINICAL PSYCHOLOGY 67 (1953).

⁴¹ For example, many people with significant medical problems or physical disabilities are unable to participate in vaginal intercourse because of

(footnote continued on next page)

the effect of making criminal the sole or principal sexual activities available to such disabled people.

The effect of O.C.G.A. § 16-6-2 is thus to deprive married and unmarried couples alike of options that enhance the quality of their individual lives and their most intimate relationships. The conduct this statute proscribes forms an important, extremely private and sensitive part of close relationships in most households in Georgia and the United States. For some disabled couples, the prohibited forms of conduct are the primary or exclusive means of sexual expression. For other couples, they are an important means of expressing sexual intimacy and an alternative means of contraception. For these reasons, the statute infringes appellant's fundamental constitutional rights of privacy and association. Interests advanced by the State to justify this deep intrusion into the private lives of its citizens must therefore be subjected to strict judicial scrutiny.

41 Continued

organic erectile dysfunction, pain, or surgical trauma to the genitals. R. KOLODNY, et al., supra note 36. Some women may have pain with intercourse as a result of arthritis or dryness due to aging; others may have had cancer surgery that removed or greatly constricted the vagina. Forms of sexual expression other than vaginal intercourse may, however, be pleasurable and satisfying to them. For some men, oral stimulation might be used to produce an erection or to facilitate orgasm. LOVE, SEX, AND AGING, supra note 18, at 359. Moreover, for some men with spinal cord injuries, stimulation of the penis during vaginal intercourse can result in automatic dysreflexia, which can be a life-threatening increase in blood-pressure. It is absolutely essential that these men find other ways, such as with oral stimulation, to please their wives or partners. Lenz, Becoming Active Partners: A Couple's Perspective, in SEXUALITY AND PHYSICAL DISABILITY: PERSONAL PERSPECTIVES (Bullard et al. eds. 1981).

III. THE STATE CAN ADVANCE NO LEGITIMATE GOAL -- MUCH LESS A COMPELLING ONE -- TO WHICH O.C.G.A. § 16-6-2 BEARS A SUBSTANTIAL RELATION.

Because O.C.G.A. § 16-6-2 encroaches upon the fundamental constitutional rights of privacy and association, to survive constitutional review it must achieve a compelling purpose, and do so in the manner least restrictive of the constitutional rights abridged. O.C.G.A. § 16-6-2 cannot survive rational basis review, much less review under this more demanding standard.

Appellee asserts the following as "legitimate state interests": "the suppression of sexual crimes, the regulation of sexual promiscuity or misconduct between unmarried persons, and the promotion of society's moral attitudes towards pre-marital sex." Brief of Appellee at 5. The claim that the statute serves an interest in "the suppression of sex crimes," is of course entirely circular, because any criminal law serves the purpose of attempting to suppress that which it makes illegal. A law banning racial intermarriage could be said to advance an alleged state interest in suppressing the "crime of miscegenation," and yet this assertion would prove nothing.⁴² Amici will address the second and third asserted rationales in part A, immediately below. They will then turn to rationales only hinted at by appellee here, but made more expressly by the State in the U.S. Supreme Court in Bowers (protecting public health or individual mental health) and will show that none of the rationales provides a compelling, or even rational, justification for the abridgement of constitutional rights this statute entails.

⁴² The State cannot assert (and has not asserted) that its interest in suppressing "sex crimes" other than consensual sodomy is served by criminalizing consensual sodomy. There is no data suggesting any link between consensual sodomy and rape or any other sex crime.

- A. The Statute Cannot Be Justified As Regulating "Sexual Misconduct Among Unmarried Persons," Or Promoting "Society's Moral Attitudes Towards Pre-Marital Sex," Because On Its Face It Makes Oral Sex Unlawful Whether Or Not The Participants Are Married.

The statute as written is decidedly not intended to criminalize sexual conduct only between unmarried persons. It condemns, instead, any person -- married or not -- "when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of the other." O.C.G.A. § 16-6-2(a). Unlike, for example, a provision directed at preventing adultery or fornication, section 16-6-2 makes no distinction whatsoever based upon marriage. It is no part of the State's case in obtaining a conviction to prove that the participants in the sexual conduct were unmarried, and an unmarried couple could not avoid prosecution under the statute by marrying prior to engaging in the proscribed conduct. Thus, the very text of O.C.G.A. § 16-6-2(a) fatally undermines the State's claim that deterring extramarital sex is the statute's purpose. The statute is unconstitutional unless the State has a compelling interest in regulating "sodomy" by any heterosexual couple, including a married couple. For the same reasons, promoting society's attitudes toward sex before marriage cannot be relied upon to support this statute. On its face it does not express any societal attitude toward that subject; the law reflects only the belief that all "sodomy" is immoral and unacceptable. Only on this basis, if at all, can the statute be upheld.

- B. Because It Encroaches On Fundamental Rights, The Statute Cannot Be Justified As Enforcing A Majority's Moral Or Theological Judgments On A Minority.

Even if appellee could rely upon unexpressed legislative moral opposition to extra-marital sexual relations in order to justify this statute, or even if appellee relies, more honestly, on the legislative moral

opposition expressed in the statute to oral sex as practiced within or outside of marriage, exclusive reliance upon a majoritarian moral view cannot, as a matter of law, justify infringement of the fundamental constitutional rights of the individual. See Roe v. Wade, 410 U.S. 113 (1973) (right to abortion); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry interracial); Brown v. Board of Education, 347 U.S. 483 (1954) (right to attend integrated public school). See Thornburgh v. American College of Obst. & Gyn., 106 S. Ct. at 2178 (quoting Brown v. Board of Education: "it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."). Fundamental constitutional rights, by definition, cannot be overcome simply because a public or legislative majority wishes to do so. The very purpose of the Bill of Rights is to protect certain rights from hostile majority sentiment. That remains true even if the hostile sentiment is based on the majority's concept of morality. Id.

Thus, in Loving v. Virginia, the State asserted a purely religious or moral justification for its law. 388 U.S. at 9 (quoting trial court's statements that separation of the races was required by God). In Loving, as in this case, see infra at 30 & n.52, a diminishing number of States had criminal statutes prohibiting the conduct at issue. Id. at 6, n.5 (noting that 16 States still outlawed interracial marriage). Yet the U.S. Supreme Court held not only that the racism expressed in the statute violated the Equal Protection Clause, see id. at 7-12, but also that the law, despite its asserted moral basis, deprived the Lovings of due process by denying them the fundamental right to marry. Id. at 12. In Roe v. Wade, a long history of widespread moral opposition to abortion could not sustain laws criminalizing

abortion. Similarly, when Brown v. Board of Education was decided, there were many who believed that racial integration was a moral evil, but laws requiring racial segregation were nevertheless found unconstitutional. More generally, as the Supreme Court has unanimously held, "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). Any other rule would nullify the Bill of Rights.

Because married and unmarried people have the same fundamental constitutional right to privacy, Eisenstadt v. Baird, 405 U.S. at 453, and because the sexual conduct O.C.G.A. § 16-6-2 proscribes falls within the scope of that right, the State's exclusive reliance in this case upon majoritarian "moral" sentiments cannot support the statute. Bowers is not to the contrary. It apparently, and unfortunately, affirmed reliance on "moral" bases for legislation, but only in the context of the Bowers majority's ruling (with which amici disagree) that homosexuals (unlike heterosexuals) do not have a fundamental right to engage in private consensual sex.

Under Georgia law, too, a statute restricting liberty can survive constitutional scrutiny only if based on some ground in addition to or apart from the majority's abstract desire that all persons adhere in private to the majority's values. In Blincoe v. State, 231 Ga. 886, 204 S.E.2d 597 (1974), an unsuccessful constitutional challenge to laws criminalizing the possession of marijuana, this Court stated:

"It cannot be questioned that the state has no right, under the guise of exercising the police power, to invade the personal rights and liberty of the individual citizen by legislation which has no reasonable relation to a legitimate state purpose. If marijuana is a perfectly harmless substance, then its possession cannot constitutionally be made criminal. If it is a dangerous drug, the State has a right to make its sale and use criminal." Id. at 887.

Thus, this Court held, the question whether the State had a legitimate justification in that case was "essentially a scientific one." Id. at 888. Scientific evidence of harmful effect would have been irrelevant, rather than being essential, if moral opposition to marijuana use could, without more, have validated legislation.

If, as Blincoe holds, scientific or empirical, and not purely moral, justifications must be advanced by the State when it infringes only ordinary liberty interests such as were at stake in Blincoe, it follows a fortiori that when the State violates the fundamental right "to be let alone . . . in matters purely private," Pavesich v. New England Life Ins. Co., 122 Ga. 158, 50 S.E.60, 70-71 (1905), such as an adult's sexual privacy, strong empirical support for the assertion of substantial state interests must be shown. Merely abstract and speculative "injury" to the majority's sensibilities resulting from the majority's knowledge that elsewhere, in private, others may not be adhering to the majority's moral code is not sufficient to justify abridgment of a constitutionally protected right. Appellee cannot show a compelling interest based on empirical or scientific data. Indeed the State has offered only "moral" justifications for the law.⁴³

⁴³ Although this Court need not decide these questions at this time, there can be little doubt that reversal of appellant's conviction would not call into question the State's power to prohibit adultery, incest, statutory rape, prostitution, possession or use of dangerous drugs, and the like. Marriage, in addition to its spiritual and emotional aspects, is a civil contract that entitles the contracting parties to a variety of governmentally provided benefits. A State might define a commitment of fidelity as a requirement to become eligible for such benefits, and punish persons for breaching that contract. And a State might conclude that adultery is likely to injure third persons, in particular spouses and children. With respect to incest and statutory rape, the nature of familial relationships and the

(footnote continued on next page)

C. O.C.G.A. § 16-6-2 Is Not A Public Health Or Individual Mental Health Measure, And Is Counterproductive To Public Health Goals And Detrimental To Individual Mental Health.

As discussed in Part II above, the sexual conduct prohibited by O.C.G.A. § 16-6-2 is not psychologically harmful, and the freedom to choose to engage in such conduct can be highly beneficial to the quality of individual lives and intimate relationships. Because this statute deprives individuals of that choice, and stigmatizes persons who choose to engage in such conduct, it harms, rather than protects individual mental health. The State does not even contend the statute advances individual mental health.

Similarly, appellee does not and cannot contend that the statute is justified generally as advancing the public health or specifically as combating any sexually transmitted disease. The statute's original purpose was only to perpetuate in Georgia the English common law's harsh moral

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decision-making ability of young children may render true consent sufficiently problematical that a blanket proscription is warranted. With respect to incest, or the age of consent, recognition of a fundamental right to marry the person of one's choice in Loving v. Virginia, 388 U.S. 1 (1967), and Zablocki v. Redhail, 434 U.S. 374 (1978), has not invalidated laws banning incestuous marriages or the marriages of unemancipated minors. There is no reason to suppose recognition of the right urged here will invalidate statutory rape or incest laws, either. With respect to prostitution, the commercial aspect of the offense is subject to the State's power to regulate commerce, a power far more extensive than its power to restrict non-commercial interests in autonomy. Moreover, this Court has observed that there are ample rationales unrelated to "morality" alone for prohibiting prostitution. See Fluker v. State, 248 Ga. 290, 292, 282 S.E.2d 112 (1981) ("prostitution exposes the female to risks of physical harm and sexual violence . . . and contracting (and subsequent transmittal) of venereal disease"). Finally, as noted by this Court in Blincoe v. State, 231 Ga. 886, 204 S.E.2d 597 (1974), unlike oral sex, dangerous drugs are, by definition, dangerous to the user. Nor can it be argued that the ingestion of narcotics is so bound up with the family, procreation, contraception, individual identity, self-expression, and fundamental human relationships as to merit special constitutional protection.

condemnation of the specified sexual conduct.⁴⁴ It had nothing to do with public health. Nor has the statute acquired a legitimate public health rationale, as is obvious from the fact that oral sex is no more likely to transmit disease than is conventional vaginal intercourse, which the statute does not prohibit. Preventing the conduct proscribed -- even if the state could constitutionally do so -- would have virtually no impact on preventing the transmission of disease.⁴⁵

Thus, the statute does not protect the public health. Instead, it harms the public health. The achievement of public health goals depends upon the cooperation of patients, physicians, and government officials. To make sound decisions about individual treatment and public health, individual physicians and public health personnel must have access to accurate information. Criminal statutes such as section 16-6-2 can impede these essential public health processes by causing individuals, fearful of criminal punishment, to conceal medically relevant information from their physicians.⁴⁶ Health professionals, too, may fail to report crucial

⁴⁴ Moral condemnation was sufficient at common law because the common law, unlike our constitutional system, did not purport to protect certain rights from hostile majoritarian sentiment.

⁴⁵ See Brief of Amici Curiae American Psychological Association and American Public Health Association at 20-22, in Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (collecting authorities).

⁴⁶ A clear example is provided by the effects of the U.S. Army's venereal disease policy during World War I. American soldiers in Europe were subject to court martial if they were diagnosed as having contracted a venereal disease. A. BRANDT, NO MAGIC BULLET 102 (1985). The threat of court martial did not prevent the contraction of venereal diseases: more than 380,000 soldiers were diagnosed as having a venereal disease during the period from April 1917 to December 1919. Id. at 115. But, many military physicians believed that the threat of court martial induced soldiers to conceal their illness for as long as possible. Id. at 102, n.20, 103-105. That meant that they did not receive treatment early, when it is most effective, and that they spread the disease to others before they themselves were treated.

information in order to protect their patients.⁴⁷ False or distorted reporting also may interfere with scientific investigation about public health problems. Not surprisingly, researchers have confirmed that societies with harsher penalties for certain types of sexual conduct suffer from poorer reporting and treatment of diseases transmitted by that conduct.⁴⁸ This statute is therefore likely to deter only conduct necessary to improve the public health. From a public health standpoint, and from the standpoint of individual mental health, the statute is simply counterproductive.

IV. BECAUSE LAWS CRIMINALIZING CONSENSUAL SEXUAL CONDUCT BETWEEN ADULTS IN PRIVATE INFRINGE BASIC RIGHTS WITH NO LEGITIMATE GOVERNMENTAL PURPOSE, THEY HAVE BEEN WIDELY CRITICIZED, REPEALED, AND STRUCK DOWN AS UNCONSTITUTIONAL.

The futility and inappropriateness of criminalizing consensual sexual conduct has been widely recognized. The famous Wolfenden Report, based upon a ten-year study by Great Britain's Committee on Homosexual Offenses and Prostitution, recommended decriminalization of England's consensual sodomy laws in 1957.⁴⁹ Most European countries have either never had laws against consensual sodomy, or have repealed them.⁵⁰

⁴⁷ Early in this century, for example, many private physicians believed they would be violating their duty to their patients if they reported syphilis cases. *Id.* at 43, 183-84. Non-reporting by physicians has persisted, frustrating public health efforts to control syphilis and gonorrhea. *Id.* at 46.

⁴⁸ Ostrow & Altman, Sexually Transmitted Diseases and Homosexuality, 10 SEXUALLY TRANSMITTED DISEASES 208, 212 (1983).

⁴⁹ COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT (1957).

⁵⁰ France, Spain, Portugal, Italy, Belgium, and the Netherlands, countries whose criminal laws are derived from the Napoleonic Code, have not had laws against consensual sodomy. Denmark, Switzerland, Sweden, Hungary,

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In the United States, the American Law Institute removed the consensual sodomy provisions from the Model Penal Code in 1955, and recommended that States having laws against consensual sodomy repeal them. Its commentators stated:

"The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences." The American Law Institute, Model Penal Code, Article 207.1, comment (1955).

Many professional associations have come to the same conclusion, and have strongly advocated the repeal of laws that criminalize non-commercial sexual conduct between consenting adults in private. Among them are amicus American Psychological Association, the American Public Health Association, the American Bar Association, and the American Medical Association.⁵¹ In addition, as shown by appellant, many major religious groups have opposed criminalization of consensual sodomy, even though some of them continue to regard such behavior as sinful or immoral. Brief of Appellant, at Appendix B.

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Czechoslovakia, England, Wales, East Germany, West Germany, Finland, Austria, and Norway have repealed their sodomy laws in this century. The Soviet Union, Rumania, Bulgaria, Yugoslavia, Ireland, and Scotland have retained their criminal sexual conduct statutes. H. KATCHADOURIAN & D. LUNDE, FUNDAMENTALS OF HUMAN SEXUALITY 511 (2d ed. 1975).

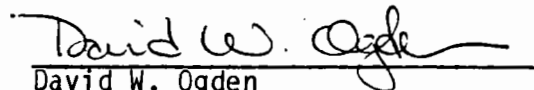
⁵¹ Resolution of the Council of Representatives of the American Psychological Association (January 1975); Resolution of the American Bar Association House of Delegates, Summary of Action (August 1973) at p. 23; Resolution No. 7514 adopted by the American Public Health Association (1975); Resolution Adopted in Lieu of Report I by the American Medical Association House of Delegates, Annual Meeting Report, p. 84 (1975).

In response, many States have determined that consensual sodomy laws serve no legitimate governmental purpose. Since the early 1960's, thirty-three States have repealed or judicially invalidated such laws as applied to heterosexual conduct.⁵² Criminal consensual sodomy laws have been declared unconstitutional by the highest courts of at least four states.⁵³

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed.

Respectfully submitted,


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⁵² Private consensual sodomy involving a man and a woman is no longer a criminal offense in these 33 states: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Of these, seven apparently continue to criminalize consensual homosexual sodomy. See Survey on the Constitutional Right to Privacy In the Context of Homosexual Activity, 40 U. MIAMI L. REV. 521, 524-25, nn.9-10 (1986); Post v. State, 715 P. 2d 1105 (Okla. Cr. 1986), cert. denied, 107 S. Ct. 290 (1986).

⁵³ Massachusetts, Commonwealth v. Balthazar, 366 Mass. 298, 318 N.E.2d 478 (1974); New York, People v. Onofre, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. denied, 451 U.S. 987 (1981); Oklahoma, Post v. State, 715 P.2d 1105 (Okla. Cr. 1986), cert. denied, 107 S. Ct. 290 (1986); Pennsylvania, Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).

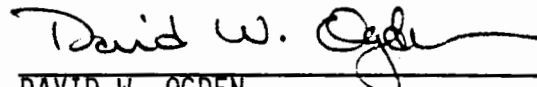
* Counsel gratefully acknowledge the assistance of Donald B. Verrilli, Jr., in the preparation of this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of November, 1986, a copy of the foregoing Brief Amici Curiae American Psychological Association, The Institute For Advanced Study Of Human Sexuality, The American College Of Sexologists, Society For The Scientific Study of Sex, PHE, Inc., Malcolm G. Freeman, M.D., And David Loftis, Ph.D. In Support Of Appellant was mailed first-class, postage prepaid to:

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