No. D-2393

IN THE SUPREME COURT OF TEXAS

THE STATE OF TEXAS,

Petitioner,

v.

LINDA MORALES, TOM DOYAL, PATRICIA CRAMER, CHARLOTTE TAFT, and JOHN THOMAS,

Respondents.

BRIEF FOR AMICI CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND TEXAS CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS

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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 108,000 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, the nature of prejudice and its impact on individuals and groups, and the dynamics of behavior change and persuasive communications to induce and maintain preventive behaviors.[1/]

APA has submitted amicus briefs in important cases throughout the country raising issues as to which psychological research and opinion are pertinent. Based on such research and opinion, APA has submitted briefs in connection with several legal challenges to the constitutionality of laws and regulations banning certain intimate behaviors between consenting adults in private. APA's amicus brief was prominently cited by the four dissenting Justices in Bowers v. Hardwick, 478 U.S. 186, 199,

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[1/] A number of these experts contributed extensively to the preparation of this brief. In particular, counsel wishes to acknowledge the substantial contributions of Gregory Herek, Ph.D.; John C. Gonsiorek, Ph.D.; Thomas Coates, Ph.D; Letitia Anne Peplau, Ph.D.; and Clinton Anderson.

Introduction

Under the Texas sodomy statute, Texas Penal Code, § 21.06, a person may be charged with and convicted of a crime for simply engaging in noncommercial and consensual intimate conduct with another adult in the privacy of the home.[2/] The court of appeals and the trial court have found that the statute violates the Texas Constitution. See Texas v. Morales, 826 S.W. 2d 201 (Tex. Ct. App. 1992).

A substantial body of empirical research and expert opinion about human sexuality and sexual orientation supports the decision of the court of appeals and trial court. This knowledge demonstrates that the prohibited conduct is not harmful to health or social functioning. Indeed, research shows that the freedom to engage in this conduct contributes to the psychological health of individuals and their most intimate and profound relationships. (Point I.) To criminalize healthy intimate conduct between consenting

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[2/] Section 21.06 provides:

Homosexual Conduct

(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.

(b) An offense under this section is a Class C misdemeanor.

"Deviate sexual intercourse" is defined in Texas Penal Code Ann. § 26.01(1) as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."

support for, but rather undermines, various public health goals, such as combatting the spread of acquired immunodeficiency syndrome (AIDS).

Moreover, the statute does not contribute, but rather is actually harmful, to individuals' mental health. Neither homosexual orientation nor the prohibited sexual conduct evidence psychological disorder. Thus, even if the statute deterred the development of homosexual orientation or the occurrence of the prohibited conduct -- which it plainly does not -- there are no grounds for finding that these are legitimate mental health goals. Instead, the threat of criminal punishment actually is detrimental to the psychological health of people who wish to engage in the proscribed conduct. (Point III.)

The Kentucky Supreme Court recently recognized the validity of these arguments and struck down a similar law under the Constitution of that Commonwealth. Kentucky v. Wasson, 1992 Ky. LEXIS 140 (Sept. 24, 1992). For the reasons set forth herein, amici respectfully urge this Court to find the same protection for human freedom in the Texas Constitution, and to affirm the decision below.

Scientific, demographic, and clinical knowledge demonstrates that the intimate conduct prohibited by the statute is healthy, and important to the mental health of individuals and their most profound relationships. The statute bans these forms of intimacy even in the privacy of the home. A more stark violation of the Texas constitutional guarantee of privacy and due process can scarcely be imagined than such a law, regulating the private sexual intimacies of adults. See Texas v. Morales, 826 S.W.2d at 204 ("we can think of nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private").

A. The Relationships of Homosexual Couples Are Psychologically Important.

Empirical studies have found that between 40% and 71% of gay men[5/] and between 45% and 80% of lesbians[6/] are

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[4/] (...continued)
sodomy statute at issue there violated the Fourteenth Amendment to the United States Constitution.

[5/] M. Weinberg & C. Williams, Male Homosexuals: Their Problems and Adaptations (1974) [hereafter Weinberg & Williams]; A. Bell & M. Weinberg, Homosexualities: A Study of Diversity Among Men and Women (1978) [hereafter Bell & Weinberg]; Harry, Gay Male and Lesbian Relationships, in Contemporary Families and Alternative Lifestyles: Handbook on Research & Theory 216-234 (E. Macklin & R. Rubin eds. 1983); K. Jay & A. Young, The Gay Report (1977) [hereafter Jay & Young]; Peplau & Cochran, Value Orientations in the Intimate Relationships of Gay Men, 6 J. of Homosexuality 1-19 (1981) [hereafter Peplau & Cochran]; J. Spada, The Spada Report (1979).

[6/] Bell & Weinberg, supra n. 5; Jay & Young, supra n. 5; Peplau, Cochran, Rook & Padesky, Women in Love: Attachment and Autonomy in Lesbian Relationships, 34 J. of Soc. Issues 7-27 (1978); Raphael & Robinson, The Older Lesbian: Love
(continued...)

Gay, lesbian, and heterosexual couples usually do not differ on standard indices of relationship satisfaction[11] or social support[12] when comparison samples are matched on appropriate variables such as age and background. Thus, a recent review of the literature on gay and lesbian couples concluded that "[r]esearch has shown that most lesbians and gay men want intimate relationships and are successful in creating them. Homosexual partnerships appear no more vulnerable to problems and dissatisfactions than their heterosexual counterparts."[13] And a major study of heterosexual and gay couples in the United States concluded in the early 1980s that "[c]ouplehood, either as a reality or

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[11] Cardell, Finn & Marecek, Sex-Role Identity, Sex Role Behavior, and Satisfaction in Heterosexual, Lesbian and Gay Male Couples, 5 Psychology of Women 488-494 (1981) [hereafter Cardell, Finn & Marecek]; Dailey, Adjustment of Heterosexual and Homosexual Couples in Pairing Relationships: An Exploratory Study, 15 J. of Sex Research 143-157 (1979); Duffy & Rusbult, Satisfaction and Commitment in Homosexual and Heterosexual Relationships, 12 J. of Homosexuality 1-24 (1986); Kurdek & Schmitt, Relationship Quality of Partners in Heterosexual Married, Heterosexual Cohabiting, and Gay and Lesbian Relationships, 5 J. of Personality & Soc. Psychology 711-720 (1986); Kurdek & Schmitt, Relationship Quality of Gay Men in Closed or Open Relationships, 12 J. of Homosexuality 85-99 (1986); Kurdek & Schmitt, Partner Homogamy in Married, Heterosexual Cohabiting, Gay and Lesbian Couples, 23 J. of Sex Research 212-232 (1987); Peplau, Cochran & Mays, Satisfaction in the Intimate Relationships of Black Lesbians, Paper presented at the Annual meeting of the American Psychological Association, Washington, D.C. (August 1986); Peplau, Padesky & Hamilton, Satisfaction in Lesbian Relationships, 8 J. of Homosexuality 23-35 (1982) [hereafter Peplau, Padesky & Hamilton].

[12] Kurdek, Perceived Social Support in Gays and Lesbians in Cohabiting Relationships, 54 J. of Personality & Soc. Psychology 504-509 (1988).

[13] Peplau, Lesbian and Gay Relationships, in Homosexuality supra n. 3, at 195.

B. Sexuality Is a Fundamental Aspect of Gay and Heterosexual Couples' Intimate Relationships.

Sexuality is fundamental to the lives and relationships of all couples, gay and heterosexual, marital and non-marital. In both heterosexual and gay couples, sex functions as a complex bond between the partners, and "[h]aving sex is an act that is rarely devoid of larger meaning for a couple. It always says something about partners' feelings about each other, what kind of values they share, and the purpose of their relationship."[18/] For all couples, "a good sex life is central to a good overall relationship."[19/] Gay and heterosexual couples are thus similar in such fundamental respects as their emotional makeup, the importance of the relationship to the individual, and the role of sexuality in the relationship.

C. The Proscribed Sexual Conduct Is an Important Aspect of Private, Sexual Expression for the General Population As Well As Gay Men and Women.

In 1948, Kinsey estimated that, if the existing criminal laws forbidding various sex acts were enforced, 95% of all white American males would have been subject to prosecution.[20/] There can be no doubt that a substantial percentage of all adult American men and women, heterosexual

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18/ Blumstein & Schwartz, supra n. 10, at 193.

19/ Blumstein & Schwartz, supra n. 10, at 201, 205-06; see McWhirter & Mattison, supra n. 9, at 262.

20/ A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male 390-393 (1949) [hereafter Male Sexual Behavior].

old had engaged in anal intercourse in the year preceding the study.[24] One recent review of the published literature weighted results by their sample size and estimated that 18% of heterosexual men and 39% of heterosexual women have had at least one experience of heterosexual anal intercourse.[25] It can reasonably be assumed, therefore, that much of the heterosexual behavior occurring in Texas -- among young and old, married and unmarried -- involves oral or anal sex.[26]

Just as it is important to many heterosexual relationships, oral and anal sex are among the primary forms of sexual expression available to gay people. Past surveys have shown that oral sex is a primary vehicle for sexual expression for both gay men and lesbians, and that anal intercourse is a primary means of expression for gay men.[27]

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[24] Hunt, supra n. 21, at 204. Six percent of the sample reported engaging in anal intercourse "sometimes" or "often."

[25] Reinisch, Sanders & Ziemba-Davis, The Study of Sexual Behavior in Relation to the Transmission of Human Immunodeficiency Virus: Caveats & Recommendations, 43 American Psychologist 922 (1988).

[26] In addition to those sources cited above, see S. Hite, The Hite Report: A Nationwide Study of Female Sexuality (1976); S. Hite, The Hite Report on Male Sexuality (1981); and A. Kinsey, W. Pomeroy, C. Martin, & P. Gebhard, Sexual Behavior in the Human Female (1953) [hereafter Female Sexual Behavior].

[27] One study reports that 89% of male couples and 77% of lesbian couples regularly engage in oral sex. Only 1% and 4% respectively reported never engaging in oral sex with their partners. Blumstein & Schwartz, supra n. 10, at 236. 17% of male couples and 12% of lesbian couples reported engaging in oral sex every time they had sexual relations. Id. 70% of male couples reported regularly engaging in anal intercourse. Id. at 243. Kinsey Institute studies have reported estimates (continued...)

authoritative diagnostic descriptions of mental disorders used by health care practitioners and the insurance industry, does not include as pathological sexual syndromes either oral or anal sex between persons of different sexes or the same sex.[29] Engaging in a variety of sexual expression, including oral and anal sex, does not result in mental or physical dysfunction;[30] rather, repression of desires for such expression is associated with dysfunction and pathology.[31]

In fact, research reveals that oral and anal sex, far from being harmful or pathological, significantly benefit both heterosexual and gay relationships. As with heterosexual couples, lesbian and gay male couples who engage in oral sex are (on the whole) happier than those who do not.[32] Gay people also benefit by engaging in behavior that

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[29] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 261-83 (3d ed. rev. 1987) [hereafter DSM-III-R].

[30] Mental problems associated with such sexual expression, whether engaged in by heterosexual or gay people, are usually the product of internalized social condemnation of those who practice it. Thus, the pathologies sometimes associated with variant sexual conduct can be viewed as social rather than personal pathologies. See, Gonsiorek, Social Psychological Concepts in the Understanding of Homosexuality, in Issues, supra n. 15, 115-19.

[31] W. Masters & V. Johnson, Human Sexual Inadequacy (1970); see Gonsiorek & Rudolph, Homosexual Identity: Coming Out and Other Developmental Events, in Homosexuality, supra n. 3, at 161-176 [hereafter Gonsiorek & Rudolph].

[32] Blumstein & Schwartz, supra n. 10, at 239-240 (lesbians and gay male couples). Married men who engage in oral sex with their wives are happier with their sex lives and more satisfied with their relationships in general than those who (continued...)

protection are more extensive than that provided in the federal constitution. Edgewood v. Kirby, 777 S.W.2d 391 (Tex. 1989); In Interest of McLean, 725 S.W.2d 696, 698 (Tex. 1987). It is well established that laws prohibiting marriage only to persons of another race discriminate impermissibly on the basis of race. See Loving v. Virginia, 388 U.S. 1 (1967). By the same token, laws such as section 21.06 that prohibit intimate conduct only with persons of the same sex discriminate on the basis of sex. Discrimination on the basis of sexual orientation shares the essential characteristics of other forms of invidious discrimination. See Watkins v. United States, 875 F.2d 699, 724-728 (9th Cir. 1989) (en banc) (Norris, J., concurring), cert. denied, 111 S. Ct. 384 (1990); Kentucky v. Wasson, 1992 Ky. LEXIS 140 (Sept. 24, 1992). The prohibition of same-sex intimacy reflects an irrational classification violative of equal protection guarantees.

As discussed in this section, research shows that: (1) homosexuality bears no relation to ability to perform or contribute to society; (2) gay people have been subjected to prejudice and inaccurate stereotypes; and (3) sexual orientation generally is a characteristic over which

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35/ (...continued)
of men, is entitled to exclusive and separate public emoluments, or privileges, but in consideration of public services."

Article I, Section 3A states: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."

The declassification of homosexual orientation as a mental disease followed a long reevaluation of the "illness model" of homosexuality. Extensive scientific findings by a large number of independent researchers supported this result.[39/] In 1957, a study by Dr. Evelyn Hooker provided the first major challenge to the illness model. Dr. Hooker determined that standard psychological tests did not distinguish homosexual and heterosexual men, and that a similar majority of the two groups appeared to be free of psychopathology.[40/] Extensive psychological research over three decades has conclusively established that homosexual orientation is not related to psychological adjustment or maladjustment.[41/] The extensive psychological literature on

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[38/] (...continued)
Resolution]. Amicus National Association of Social Workers has adopted a similar policy. Policy Statement on Lesbian and Gay Issues Approved by NASW Delegate Assembly, November 1987 [hereafter NASW Policy Statement].

[39/] 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." Weinrich, Task Force Findings: Overview and Prospect, in Issues, supra n. 15, at 377.

[40/] Hooker, The Adjustment of the Male Overt Homosexual, 21 J. Projective Techniques 17 (1957). Subsequent studies have replicated these findings with female samples. See, e.g., M. Freedman, Homosexuality and Psychological Functioning (1971).

[41/] See, Gonsiorek, The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Homosexuality, supra n. 3, at 115-136 [hereafter Gonsiorek]; Gonsiorek, Results of Psychological Testing on Homosexual Populations, 25 Am. Behavioral Sci. 385, 394 (1982) [hereafter Psychological Testing]; Reiss, Psychological Tests in Homosexuality, in Homosexual Behavior: A Modern Reappraisal 296-311 (Marmor ed. 1980) [hereafter Reiss]; Hart, Roback, Tittler, Weitz, (continued...)

Recognizing these facts, 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] Amicus NASW has

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[45] (...continued)
document no lack of suitability and no inferior performance in gay male and lesbian Armed Services personnel. K. Dyer, Gays in Uniform: The Pentagon's Secret Reports (1990). Recognizing the irrelevance of sexual orientation to individual job performance and the functioning of the workplace, many large organizations (including governments, universities, and major corporations) have implemented non-discrimination policies with regard to sexual orientation. See The Human Rights Foundation, Demystifying Homosexuality: A Teaching Guide About Lesbians and Gay Men (1984); The National Gay Task Force, The NGTF Corporate Survey (on file with APA).

[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, Resolution 12, Annual Meeting of the House of Delegates 322 (1989); American Bar Association Report No. 8, House of Delegates (1989) (The resolution "urges . . . governments to enact legislation prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations.")

B. Discrimination Against Gay People Is Based on Prejudice and False Stereotypes.

Psychologists have found that anti-gay prejudice can be conceptualized as manifesting the same social psychological dynamics as racial and other ethnic prejudice.[49/] Indeed, in passing its 1975 resolution declaring that homosexuality is not a disorder, APA noted that the prejudice and stigma to which gay people are subjected is essentially the same as that encountered by other minorities, and is no more justifiable.[50/]

Empirical research confirms that those holding negative attitudes about gay people are more likely than those with positive attitudes to believe in false stereotypes. 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.[51/]

[49/] See, e.g., Herek, Stigma, Prejudice, and Violence Against Lesbians and Gay Men, in Homosexuality, supra n. 3, at 60-80 [hereafter, Herek, Stigma]; Bierly, Prejudice Towards Contemporary Out Groups as a Generalized Attitude, 15 J. of Applied Soc. Psychology 189-199 (1985); K. Gergen & M. Gergen, Social Psychology 140-141 (1981) [hereafter Gergen & Gergen]; 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) [hereafter Herek, Functions].

[50/] APA Resolution, supra n. 38.

[51/] Herek, Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men, 10 J. of Homosexuality 1, 6 (1984) [hereafter Herek, Beyond

(continued...)

> 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, 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.[54/]

C. Sexual Orientation Is Highly Resistant to Change, and It Is Therefore Abhorrent for The State to Penalize Gay People.

Literal "immutability" is not essential to merit treatment as a suspect classification. In Lyng v. Castillo, 477 U.S. 635 (1986), the U.S. Supreme Court framed the inquiry for federal purposes as whether the class of people in question "exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group." Id.

[54/] Bell & Weinberg, supra n. 5, at 229-231 (emphasis added).

biological[56] as well as socio-environmental factors; these factors may differ substantially within the population.[57]

Research indicates that for most people, homosexual feelings have already developed by early adolescence and that these feelings typically precede homosexual behavior by three years.[58] "By the time boys and girls reach adolescence, their sexual preference is likely to be already determined,

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[56] One recent study reported differences between heterosexual and homosexual men in the volume of a cell group in the anterior hypothalamus, a brain structure that is involved in sexual behavior. LeVay, A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men, 253 Science 1034-1037 (1991). Another 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. Bailey & Pillard, A Genetic Study of Male Sexual Orientation, 48 Arch. Gen. Psychiatry 1089 (1991). It concluded that "heritabilities were substantial under a wide range of assumptions." Id. at 1089. 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.

[57] See, A. Bell, M. Weinberg & S. Hammersmith, Sexual Preference: Its Development in Men and Women 183-186 (1981) [hereafter Sexual Preference]; Green, supra n. 55; L. Ellis & M. Ames, Neurohormonal Functioning and Sexual Orientation: A Theory of Homosexuality-Heterosexuality, 101 Psychological Bull. 233 (1987); Money, Sin, Sickness, or Status? Homosexual Gender Identity and Psycho-neuroendocrinology, 42 Am. Psychologist 384 (1987); Storms, A Theory of Erotic Orientation Development, 88 Psychological Rev. 340 (1981). Although some researchers have postulated that homosexual orientation may result from a different hormonal constitution, a series of studies has failed to establish that gay people are characterized by abnormal hormone levels or other abnormal psychological characteristics. See Ricketts, Biological Research on Homosexuality: Ansell's Cow or Occam's Razor? 9 J. of Homosexuality 65 (1984); Meyer-Bahlberg, Homosexual Orientation in Women and Men: A Hormonal Basis, in The Psychobiology of Sex Differences and Sex Roles 105-130 (Parsons ed. 1980).

[58] Sexual Preference, supra n. 57, at 186-187.

Furthermore, it is ethically questionable, from the point of view of a practitioner, to seek to alter through therapy a trait that is not a disorder and is extremely important to individual identity.[62] Indeed, because psychologists generally agree that psychological adjustment is positively correlated with acceptance and integration of one's sexual orientation, and maladjustment is positively correlated with nonacceptance of sexual orientation,[63] many clinicians also believe that "change-of-orientation therapy programs are ethically improper and should be eliminated."[64]

It is abhorrent for government to penalize an individual for possessing a trait so important to her or his identity and over which the individual has little or no meaningful control. See Bowers v. Hardwick, 478 U.S. at 205 (Blackmun, J., dissenting); Watkins v. United States Army,

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[61] (...continued)
more than social prejudice garbed in psychological accouterments." Statement of Bryant L. Welch, J.D., Ph.D., American Psychological Association, January 26, 1990.

[62] See, Davison, Constructionism and Morality in Therapy for Homosexuality, in Homosexuality, supra n. 3, 137-148 [hereafter Davison]; Silverstein, Psychological and Medical Treatments of Homosexuality, in Homosexuality, supra n. 3, 101-114 [hereafter Silverstein]; Malyon, Psychotherapeutic Implications of Internalized Homophobia In Gay Men in Homosexuality and Psychotherapy: A Practitioners Handbook of Affirmative Models 59 (J. Gonsiorek ed. 1982) [hereafter Malyon].

[63] Bell & Weinberg, supra n. 5, at 195-228; see Gonsiorek & Rudolph, supra n. 31.

[64] Davison, supra n. 62, at 148. See, Silverstein, supra n. 62.

self-reported identity or sexual orientation, a recent national telephone survey conducted for the San Francisco Examiner found that 6.2% of American adults identified themselves to be lesbian, gay, or bisexual.[68] For all of the surveys mentioned here, the investigators believed that their data underestimated the actual prevalence of homosexuality because of the widespread reluctance among respondents to acknowledge their own homosexuality, even in anonymous surveys.

POINT III

SECTION 21.06 ACTUALLY HARMS THE PUBLIC HEALTH AND INDIVIDUAL MENTAL HEALTH.

A. The Statute Is Not a Public Health Measure and Is Counterproductive to Public Health Goals.

1. The statute does not deter behavior through which HIV or other sexually transmitted diseases may be spread.

The State cannot seriously contend that the statute is justified generally as advancing the public health or specifically as combatting acquired immunodeficiency syndrome ("AIDS") or any other sexually transmitted disease. The statute was enacted long before AIDS was known.[69] Such a

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[67] (...continued)
United Kingdom and France, Paper presented at the Sixth International Conference on AIDS, San Francisco, California (June 1990).

[68] San Francisco Examiner, June 5, 1989, at A-20.

[69] Medical description in the United States of what has come to be known as AIDS dates from 1981. Pneumocystic Pneumonia - Los Angeles, 30 Morbidity & Mortality Weekly Rep. 250 (June 5, 1981), reprinted in Public Health Service, Department of Health and Human Services, Reports on AIDS
(continued...)

oral-genital sexual behavior, yet oral and anal sex are not inevitably associated with transmission of the virus, even when one partner has been exposed. HIV cannot be transmitted by oral or anal sex between two uninfected persons; it is highly unlikely to be transmitted even by an infected person who follows medically approved guidelines for safer sex.[72] Use of a condom during oral or anal intercourse greatly reduces or eliminates the risk of transmission of HIV.[73] Yet oral and anal sex with a condom is proscribed equally with behavior more likely to transmit the virus. Prevention efforts which are overly broad are not only likely to fail, but may decrease the success of other more reasonable efforts to prevent the spread of the AIDS virus.[74]

Nor, given what is known about the nature and strength of the human sex drive, is it likely that the fear

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[72] Understanding AIDS, HHS Publication No. (CDC) HHS-88-8404 [hereafter Understanding AIDS]; see Institute of Medicine, Confronting AIDS: Update 1988 [hereafter Confronting AIDS].

[73] See Confronting AIDS, supra n. 72; Detels et al., Seroconversion, Sexual Activity, and Condom Use Among 2915 HIV Seronegative Men Followed For Up to 2 Years, 2 J. of Acquired Immuno Deficiency Syndromes 77-83 (1989); Heterosexual Transmission, supra n. 71, reprinted in MMWR Reports, supra n. 69, at 113; Questions and Answers, 252 J. Am. Med. A. 826 (1984). Condoms appear to be effective, so long as they do not rupture. The results of research conducted at the University of California indicate that HIV cannot penetrate the fine membranes of condoms. See Conant et al., Letter to the Editor, Condoms Prevent Transmission of the AIDS-Associated Retrovirus, 255 J. Am. Med. A. 1706 (1986).

[74] Gonsiorek and Shernoff, AIDS Prevention and Public Policy: The Experience of Gay Males, in Homosexuality, supra n. 3, at 230-243 [hereafter Gonsiorek & Shernoff].

encouraging people to follow "safe sex" guidelines.[77] It is still the case, as one government official has stated, that "the best chance of controlling the AIDS epidemic at present is through education and counseling to enhance behavioral change and personal responsibility."[78]

Researchers report dramatic changes in sexual behavior to reduce the risk of AIDS in areas where major educational efforts are underway, demonstrating the urgency of such efforts.[79] A recent review suggests "that a positive self-image with regard to homosexuality is a foundation upon which gay men successfully participate in and implement HIV infection prevention strategies."[80] By undermining the positive self-image that may be necessary for successful behavior change, see infra, at 36-37 & n. 83, the statute hampers the effectiveness of health education programs.

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[77] Understanding AIDS, supra n. 72; Confronting AIDS, supra n. 72. As noted, the use of condoms during oral and anal sex is a preventive measure. Gay men can also engage in other, low risk, types of sexual conduct, including, for example, kissing, hugging, body rubbing, and mutual masturbation. See M. Delaney & P. Goldblum, Strategies for Survival: A Gay Men's Health Manual for the Age of AIDS (1986); J. Preston & G. Swann, Safe Sex (1986).

[78] Dr. James O. Mason, Acting Assistant Secretary for Health, Department of Health and Human Services, Testimony before the Republican Study Committee, House of Representatives (Nov. 7, 1985).

[79] Becker & Joseph, supra n. 28. See also, e.g., McKusick et al., Longitudinal Predictors of Reductions in Unprotected Anal Intercourse Among Gay Men in San Francisco: The AIDS Behavioral Research Project, 80 Am. J. of Pub. Health 978-983 (1990); Martin, Dean, et al., supra n. 28.

[80] Gonsiorek & Shernoff, supra n. 74, at 240.

Indeed, although the statute probably deters none of the conduct it criminalizes, see supra, at 33-34, it does substantial psychological harm. In part because their behavior is punishable by criminal law,[81] lesbians and gay men become stigmatized as "deviants"[82] and are viewed in terms of undesirable stereotypes. This process results in prejudice -- often called homophobia -- against lesbians and gay men. The great majority of gay people come to terms with the stigma associated with their sexual orientation. Studies demonstrate that these gay people are the most psychologically well-adjusted.[83] As with other stigmatized

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[81] It is well-known in both law, see Brown v. Board of Educ., 347 U.S. 483 494-95 (1954), and psychology, see, e.g., J. Jones, Prejudice and Racism 138-40 (1972), that social or moral pronouncements as expressed through the law and imposed by a majority on a minority can through the process of stigmatization significantly injure the mental health of members of the minority.

[82] The term "deviant" as used in the social sciences refers to the social reaction to behavior, not to the intrinsic characteristics of the behavior itself. H. Becker, Outsiders: Studies in the Sociology of Deviance (1963).

[83] Gonsiorek & Rudolph, supra n. 31; Gonsiorek, Mental Health Issues of Gay and Lesbian Adolescents, 9 J. of Adolescent Health Care 117 (1988) [hereafter Gonsiorek, Mental Health Issues]. Gay people who have been able to express their homosexuality are psychologically healthier than those who have repressed or hidden it. Bell & Weinberg, supra n. 5; Hammersmith & Weinberg, Homosexual Identity: Commitment, Adjustment, and Significant Others, 36 Sociometry 56 (1973) [hereafter Hammersmith & Weinberg]; Weinberg & Williams, supra n. 5; Pilard, Psychotherapeutic Treatment for the Invisible Minority in Issues, supra n. 15, at 99; Martin, supra n. 61. A cross-cultural study of young homosexual men from Sweden, Finland, Ireland and Australia concluded "that mental health consequences of antihomosexual environments are most negative where homosexuality is most severely stigmatized." The study also concluded "that homosexual adolescents are likely to have more problems in the more

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fosters internalized homophobia and its self-destructive effects, and thereby does serious psychological harm.[88]

2. The statute is likely to reinforce hostility, discrimination, and violence against gay people.

Lesbians and gay men are a stigmatized group in American society. They are the victims of extensive discrimination,[89] interpersonal prejudice,[90] and violence[91] because of their sexual orientation. This stigmatization has been exacerbated by the AIDS epidemic.[92] Although the specific forms taken by prejudice against minority groups differ among the various targets, the psychological processes underlying heterosexuals' prejudices against gay people are similar to those underlying whites' prejudices against blacks

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[88] See Gonsiorek, Gay and Lesbian Clients, supra n. 87, at 73-76; Malyon, supra n. 62, at 56-59.

[89] Levine, Employment Discrimination Against Gay Men, 9 Int'l Rev. of Modern Sociology 151 (1977) [hereafter Levine]; Levine & Leonard, Discrimination Against Lesbians in the Work Force, 9 Signs 700 (1984) [hereafter Levine & Leonard].

[90] Herek, Beyond "Homophobia", supra n. 51, at 1, 1-21; Herek, Stigma, supra n. 49.

[91] Herek, Stigma, supra n. 49; Herek & Berrill, Violence Against Lesbians and Gay Men: Issues for Research, Practice, and Policy, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men 289-305 (Herek & Berrill eds. 1992) [hereafter Herek & Berrill, Violence].

[92] Herek, Stigma, supra n. 49; Herek, Illness, Stigma, and AIDS, in Psychological Aspects of Serious Illness 103-150 (Costa & VandenBos eds. 1990); Herek & Glunt, An Epidemic of Stigma: Public Reactions to AIDS, 43 American Psychologist 886, 886-891 (1988); Herek, Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy, 44 American Psychologist 948, 948-955 (1989) [hereafter Herek, Hate Crimes].

gay people.[95] In order for such interaction to occur, the heterosexual person must come to learn the sexual orientation of the gay man or lesbian. Such knowledge is inhibited most often by fears concerning the stigmatization that might follow such exposure.[96] By reinforcing such stigmatization, sodomy laws inhibit disclosure by gay people of their sexual orientation. This, in turn, prevents heterosexuals from interacting with openly gay people which, in turn, reinforces anti-gay prejudice.

3. The statute is likely to interfere with law enforcement efforts to deter violent crimes against gay men and lesbians.

In 1990, President Bush signed the Hate Crimes Statistics Act, Public Law No. 101-275, which mandates the collection of data by the federal government for crimes based on race, ethnicity, religion, and sexual orientation. This law reflects the government's response to a nationwide upsurge in the incidence of violent crimes against minority groups.[97] In order for data to be collected concerning bias

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[95] Herek, Beyond "Homophobia", supra n. 51, at 1, 1-21; Scheinder & Lewis, supra n. 51, at 16, 16-20, 59-60. See generally G. Allport, The Nature of Prejudice (1954); Amir, Contact Hypothesis in Ethnic Relations, 71 Psychological Bull. 319, 319-342 (1969).

[96] Bell & Weinberg, supra n. 5; Levine, supra n. 89, at 151; Levine & Leonard, supra n. 89, at 700; Schneider, Coming Out at Work: Bridging the Private/Public Gap, 13 Work and Occupations 463, 463-487 (1986); Wells & Kline, Self-Disclosure of Homosexual Orientation, 127 J. of Soc. Psychology 191, 191-197 (1987).

[97] See Herek & Berrill, Violence, supra n. 91, at 948-955.

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