

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW YORK,
v. *Petitioner,*

ROBERT UPLINGER and SUSAN BUTLER,
Respondents.

On Writ of Certiorari to the
New York State Court of Appeals

**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
AND BRIEF OF *AMICI CURIAE*
AMERICAN PSYCHOLOGICAL ASSOCIATION,
AMERICAN PSYCHIATRIC ASSOCIATION
AND
AMERICAN PUBLIC HEALTH ASSOCIATION
IN SUPPORT OF RESPONDENTS**

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**ALTERNATIVE STATEMENT
OF QUESTION PRESENTED**

Amici believe that the sole question presented by the facts in *People v. Uplinger* is the following:

May the state criminally punish an individual for engaging in a private conversation, not intended or likely to be overheard by others, in which he solicited another adult to engage, voluntarily and without payment, in private sexual conduct which, though not illegal, has been termed "deviant" by the state, simply because that private conversation occurred in a public place?

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 36.3 of the Rules of this Court, the American Psychological Association, the American Psychiatric Association and the American Public Health Association, hereby move for leave to file the attached brief *amici curiae*.

The reasons supporting the granting of this motion and the issues which *amici* are uniquely qualified to address are set forth in the statement of interest of *amici* and in the attached brief. The brief will be of value to the Court in its deliberations, and will contain material not otherwise presented.

Recently, the American Psychological Association filed *amicus curiae* briefs in this Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982) (the rights of mentally retarded inmates); *Blue Shield v. McCready*, — U.S. —, 102 S.Ct. 2540 (1982) (the standing of an insured patient receiving psychotherapy to sue under the Clayton Act); *Mills v. Rogers*, 457 U.S. 291, — S.Ct. — (1982) (the right of a competent committed mental patient to refuse psychotropic drugs); *Metropolitan Edison Co. v. People Against Nuclear Energy*, — U.S. —, 103 S.Ct. 1556 (1983) (the cognizability of psychological harm under the National Environmental Policy Act); and *City of Akron v. Akron Center for Reproductive Health, Inc.*, — U.S. —, 103 S.Ct. 2481 (1983) (abortion).

The American Psychiatric Association has participated as *amicus curiae* in numerous cases involving mental health issues, including *Barefoot v. Estelle*, — U.S. —, 103 S.Ct. 3383 (1983); *Youngberg v. Romeo*, *supra*; *Estelle v. Smith*, — U.S. —, 101 S.Ct. 1866 (1981); *Parham v. J.R.*, 442 U.S. 584 (1979); *Addington v. Texas*, 441 U.S. 318 (1979); *O'Connor v. Donald-*

son, 442 U.S. 563 (1975); and *United States v. Byers*, No. 78-1451 (D.C. Cir. 1983) (*en banc*).

The American Public Health Association has filed *amicus curiae* briefs in many cases involving public health issues, including *City of Akron v. Akron Center for Reproductive Health*, *supra*, a recent case involving abortion. The APHA has also filed briefs *amicus curiae* in product safety cases involving the drug Oraflex, warning labels on aspirin, and enforcement of the Food and Drug Administration drug efficacy requirements; and environmental cases, including cases concerning the regulation of formaldehyde and benzene.

Respondents have consented to the filing of this brief, and their letters are being filed with the clerk of this Court. Consent was requested of petitioner, but has been denied. *Amici* respectfully submit that they have important, relevant expertise and information to contribute to the Court for its consideration in deciding these cases.

Respectfully submitted,

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On Writ of Certiorari to the
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**BRIEF OF AMICI CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION,
AMERICAN PSYCHIATRIC ASSOCIATION
AND
AMERICAN PUBLIC HEALTH ASSOCIATION
IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICI

The American Psychological Association (hereafter "Psychological Association"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The Psychological Association has more than 55,000 members and includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.

Some of the Psychological Association's major functions have been to promote psychological research, to improve research methods and to disseminate information regarding human psychological behavior through meet-

ings, scientific publications and special reports. A substantial number of the Psychological Association's members are concerned with the collection of data, development of research, and provision of therapy pertaining to human sexuality. The Psychological Association wishes to inform the Court about the professional knowledge concerning sexual practices that may be relevant in deciding these cases.

The American Psychiatric Association (hereafter "Psychiatric Association"), with approximately 29,000 members, is the nation's leading organization of physicians who specialize in psychiatry. The Psychiatric Association has expert knowledge relevant to the issues in these cases and wishes to provide such information to this Court.

The American Public Health Association (hereafter "APHA") was founded in 1872 with the goal of improving public health and bringing about a higher quality of health care. The APHA works to promote personal and environmental health by setting standards for alleviating health problems, launching public campaigns about specific health dangers, and publishing numerous materials reflecting the latest findings and developments in public health. APHA represents all disciplines and specialties in public health. Together with its affiliated associations, the APHA is the largest public health association in the world. The multidisciplinary membership of approximately 50,000 includes physicians, nurses, immunologists, administrators, laboratory scientists, educators, biomedical researchers, and other health care professionals.

The APHA is particularly able to address the non-deviate nature of the behavior proscribed by the statutes involved in these cases and the absence of a public health rationale to support such statutes.

SUMMARY OF ARGUMENT

These cases involve the validity of New York's Penal Code § 240.35-3 which criminalizes the act of loitering or remaining in a public place for the purpose of engaging in or soliciting another to engage in certain specified, legal, sexual conduct. These cases do not present the question whether the state may criminalize the same sexual conduct between consenting adults in private. The latter question was decided by the New York Court of Appeals in *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), which held that New York Penal Code § 130.38, which criminalized such conduct, violated the participants' rights of privacy and equal protection secured by the due process clause of the Fourteenth Amendment. Nevertheless, the New York Penal Code § 130.00-2 still provides that anal and oral sex between persons of the same sex or different sexes, except for people married to each other, is "deviant sexual intercourse." And, section 240.35-3, involved in these cases, makes loitering for the purpose of engaging in such sexual conduct a crime. In order to avoid perjorative and misleading labels, these sex acts will be referred to herein as "variant" sex.

Amici urge the Court to decide only the narrow question before it, not the broader issues presented by *Onofre*. The record in these cases was not developed in response to the questions presented in *Onofre*, and therefore lacks important facts that would be necessary to a decision of the *Onofre* issues.

If the Court should decide, nevertheless, that the nature and prevalence of variant sexual conduct are relevant to these cases, *amici* respectfully request the Court to take into consideration scientific, demographic and clinical information concerning them, as well as the known consequences of criminalizing such acts. Regardless of what moral or theological objections there may be to oral or anal sex, the sexual conduct termed "deviant" by the New York statute is common among heterosexuals, mar-

ried or not, and homosexuals.¹ Mental health professionals, including psychologists and psychiatrists, have found, and the preponderance of current scientific evidence from a variety of disciplines demonstrates, that the variant sexual practices proscribed by New York are not pathological, whether engaged in by persons of different sexes or of the same sex. Rather, clinical research indicates that such sexual conduct can be beneficial to the psychological well-being of participants.

To the extent that laws such as those in New York are intended to deter the development of homosexuality, they are unjustified, because sexual orientation is determined at a very early age, perhaps six years old or younger, apparently independent of homosexual experiences. Once established, sexual orientation is difficult or impossible to alter through therapy or societal pressures. Indeed, homosexuality has been part of almost every culture throughout history, regardless of cultural sanctions.

Furthermore, there is little support for the proposition that criminalizing variant sexual practices deters such practices. For example, there is no greater incidence of

¹ In this brief, the term "homosexual" will refer to people who have a sexual orientation and emotional attraction for and engage in sexual conduct with persons of the same sex. The term "homosexual" should not be confused with "social sex role," the role prescribed by society according to sex; "gender identity," a person's identification of him or herself as male or female; or "gender role," whether a person acts so as to be taken for a male or female. The term "gay" has come to mean a person who identifies himself or herself as homosexual and who may or may not hide the fact. Paul and Weinrich, *Whom and What We Study*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* 23 (W. Paul *et al.* ed. 1982) [hereafter *HOMOSEXUALITY*]. This anthology was the final report of the Task Force on Sexual Orientation of Division 9 of the American Psychological Association (The Society for the Psychological Study of Social Issues). The report was a four-year national research and education project commissioned in 1978 and completed in 1982 which produced a comprehensive body of empirical evidence contributed by twenty-two authors and subjected to several independent reviews.

homosexuality in the major European countries which do not criminalize variant sexual practices than there is in jurisdictions in which such conduct is illegal. But the threat of criminal punishment does have a harmful psychological effect upon both heterosexuals and homosexuals who wish to engage in such practices—producing feelings of fear, self-loathing and alienation. Moreover, criminalizing variant sexual conduct stigmatizes transgressors as “deviants” and provides ostensible justification for discrimination against them in employment and civil rights. Criminalizing behavior which is not harmful does little except produce contempt for self and for the law.

Amici respectfully urge this Court to affirm the lower court decision in these cases.

ARGUMENT

I. THE COURT SHOULD NOT REVIEW THE *ONOFRE* DECISION ON THE BASIS OF THE RECORD IN THESE CASES.

A. These Cases Do Not Present the Constitutional Issue of Whether the State May Criminalize Non-Commercial Sexual Conduct Between Consenting Adults in Private—the Issue in *Onofre*.

People v. Uplinger presents this Court with the question of whether the state may criminally punish respondent Uplinger for engaging in a private conversation, not intended to or likely to be overheard by others, in which he solicited another adult to engage, voluntarily and without payment, in private sexual conduct which is not illegal but is termed “deviant” by the state, solely because that private conversation occurred in a public place.² It

² The state apparently does not contend that it can constitutionally criminalize such a conversation occurring in a private place. *People v. Uplinger* was consolidated on appeal with *People v. Butler*. *People v. Uplinger*, 58 N.Y.2d 936, 460 N.Y.S.2d 514 (N.Y. 1983). Susan Butler, a previously convicted prostitute, was arrested after a police officer saw her stopping cars and subsequently engaging in fellatio

has already been determined that the state may not constitutionally punish the conduct itself. In *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.Y.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981), the New York Court of Appeals held that a section of the New York Penal Code, which criminalized consensual, non-commercial, "deviant" sexual conduct in private, violated the participants' rights to both privacy and equal protection secured by the Fourteenth Amendment. Thus, it is the constitutionality of the state's loitering laws that is at issue in these cases—not the constitutionality of its consensual sodomy statute, which has already been struck down.

The majority below held that because the state could not constitutionally criminalize noncommercial consensual sodomy in private, it could not prohibit remaining in a public place for the purpose of soliciting another to engage in such conduct—at least not in the absence of a statutory requirement that the public conduct be annoying or offensive to others. The dissent, however, found the statute to be a legislative determination that such solicitations are inherently offensive, and therefore can be regulated by the state along with other kinds of disorderly public conduct. The dissent found the statute an exercise of the state's authority to regulate public nuisances, not an effort to proscribe sexual practices.³

with the driver of one of the cars. (Joint Appendix 2) [hereafter J.A.]. Butler was charged under § 240.35-3 of the New York Penal Code, with loitering to engage in deviant sexual intercourse. Because it is not clear from the record whether Butler is accused of soliciting deviant sexual intercourse or of loitering for the purpose of engaging in such conduct, and because it is not clear whether the public conduct engaged in by Butler was intended to or likely to be observed or overheard by members of the public (see J.A. 6), *amici* will confine their arguments to the facts in the *Uplinger* case.

³ 58 N.Y.2d 936, 937; 460 N.Y.S.2d 514, 515 (1983).

B. The Factual Record in These Cases Is Not Sufficiently Developed to Determine the Constitutional Issues Presented by *Onofre*.

Amici respectfully urge the Court to confine its review to the lower court decision in these cases and not to undertake a review of the *Onofre* decision. Because it is loitering and solicitation of sex which is at issue in these cases, the record below has not been developed to determine the constitutional issues presented and decided in *Onofre*. The record submitted to this Court contains the testimony of various witnesses concerning the character of the neighborhood in which respondents were arrested, and the extent to which the public, merchants and residents of the area had been annoyed in the past by offensive solicitations and public sexual conduct. Witnesses also testified to the use of the loitering act to control prostitution and homosexual conduct. See, e.g., J.A. 6-11, 24. In addition, legislative history was introduced to show that the legislature intended to suppress public nuisances when it enacted the loitering laws by eliminating solicitations which affront the public's moral and aesthetic sensibilities and are a source of annoyance and harassment. 460 N.Y.S.2d 514, 516 citing *Model Penal Code* § 251.3 comment, 476 (Proposed Draft 1962).

If this Court were to review the issues in *Onofre*, it would have to decide whether the acts declared to be "deviant" fall within the zone of privacy protected by the Constitution, whether the state has a legitimate interest in regulating deviant sexual practices, whether the state interest is sufficient to override liberty and privacy interests, and whether there was at least a rational relationship between the means chosen by the state and the legitimate interest of the state to be furthered. The record below does not contain evidence relevant to the determination of those issues.

No expert testimony was presented concerning the nature and extent of the sexual conduct declared "deviant" by New York Penal Code § 130.00-2. Unlike the record

in *Onofre* and other cases in which the constitutionality of sodomy statutes has been challenged, no expert witnesses testified regarding the ostensible benefits of such statutes, either to the general public or to people who might wish to engage in the proscribed conduct.⁴ Nor was there any expert testimony concerning the harmful psychological effects of criminalizing variant sexual practices on people who wish to engage in them. Finally, no legislative history was introduced suggesting the state interests intended by the New York legislature to be furthered by the consensual sodomy laws or the purposes of the "deviant sexual intercourse" provisions. Instead, the parties developed the record and submitted legal briefs wholly in response to the charge of loitering and solicitation.

II. IF THIS COURT FINDS THE NATURE AND EXTENT OF "DEVIANT SEXUAL INTERCOURSE" TO BE RELEVANT IN THE PRESENT CASES, IT SHOULD TAKE INTO ACCOUNT SCIENTIFIC INFORMATION ABOUT SUCH CONDUCT.

A. The Variant Sexual Conduct Declared "Deviant" by the New York Penal Code Is Natural and Common Among Both Heterosexuals and Homosexuals.

The New York Penal Code defines "deviant sexual intercourse" as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." New York Penal Code § 130.00-2. Despite the fact that the statute declares such conduct to be "deviant", suggesting that it deviates from some norm and is thus abnormal, research demonstrates that, in fact, such sexual expression is biologically natural and extremely common among both heterosexuals and homosexuals.

⁴ See, e.g., *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), appeal docketed, No. 82-1590 (5th Cir. 1982).

Statistical studies on the number of predominantly heterosexual people who engage in sexual conduct termed "deviant" by New York show that such conduct is commonplace. For example, Kinsey's statistics indicate that 54% of exclusively or predominantly heterosexual men and 49% of exclusively or predominantly heterosexual women engage frequently in the sexual conduct declared deviant by the New York Penal Code.⁵ Kinsey also reported that 60% of married, college-educated people engaged in oral-genital sex on a fairly regular basis.⁶ A more recent study reports approximately 80% of single men and women between the ages of 25 and 34 and 90% of married couples under the age of 25 engaged in oral-genital sex regardless of their educational level.⁷ A very recent study of unmarried university women reported that 61% had performed oral sex on their partners and 68% had experienced their partner performing oral sex on them.⁸

Fewer data exist on the incidence of anal intercourse between men and women. However, one researcher found that 25% of the subjects under 35 years old had experienced anal intercourse in the year preceding the study, with 6% reporting "sometimes" or "often" to the question of frequency of anal intercourse.⁹ Another study found that 30% of the female samples said they enjoyed anal intercourse.¹⁰

⁵ A. KINSEY, W. POMEROY, C. MARTIN, AND P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953); A. KINSEY, W. POMEROY, C. MARTIN, AND P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 368-370 (1948).

⁶ *Id.* Many researchers have consistently reported that oral-genital sex is most common in this country among the highly educated. J. GAGNON, *HUMAN SEXUALITY* 174 (1978); McCARY, *McCARY'S HUMAN SEXUALITY* 12 (1978).

⁷ M. HUNT, *SEXUAL BEHAVIOR IN THE SEVENTIES* (1974).

⁸ Harold and Way, *Oral-Genital Sexual Behavior in a Sample of University Females*, 19 *J. OF SEX RESEARCH* 327-338 (1983).

⁹ M. HUNT, *supra* note 7.

¹⁰ S. HITE, *THE HITE REPORT: A NATIONWIDE STUDY ON FEMALE SEXUALITY* 76 (1976).

Although oral-genital and anal-genital sex are engaged in by people of different sexes as well as by people of the same sex, statutes prohibiting such conduct are generally regarded as directed primarily against sexual conduct by homosexuals.¹¹ Indeed, the record shows that New York's loitering statute was used by the police to control homosexual behavior. (J.A. 6-11, 24).

In the 1940's, when homosexuality was seldom a topic for public discussion and scientific research, Kinsey and associates undertook to learn more about its prevalence in their study of 15,000 subjects. These researchers realized that there is no strict dichotomy between homosexual and heterosexual people, but rather a continuum of more and less physical and emotional attraction for and sexual activity with persons of the same sex. Therefore, Kinsey conceived of a scale which begins with category 0 (exclusively heterosexual) to category 6 (exclusively homosexual).¹² Category 5 included individuals who were almost entirely homosexual in their psychological responses and activities but who had incidental heterosexual experiences. In 1948, Kinsey found that at least 10% of the males in his study were homosexuals (categories 5 and 6) for at least three years between the ages of 16 and 55.¹³ He estimated that 25% of the American white male population had more than incidental homosexual ex-

¹¹ See, e.g., Gallo, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643-832 (1966); M. WEINBERG AND C. WILLIAMS, *MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS* (1974), and see generally, Stivison, *Homosexuals and the Constitution* in *HOMOSEXUALITY*, *supra* note 1, at 303-321.

¹² A. KINSEY, W. POMEROY, C. MARTIN, AND P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953) [hereafter A. KINSEY (1953)]. Kinsey used both emotional attraction (fantasies) and behaviors to assign ratings of sexual orientation. Object preference is only one important variable in defining sexual expression, along with intensity of feeling, frequency, and length of activity.

¹³ A. KINSEY, W. POMEROY, C. MARTIN, AND P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948).

perience or reactions for the same three year periods.¹⁴ Kinsey also estimated that 50% of all adult men and 28% of all adult women in the United States experienced sexual attraction to members of their own sex, and that about one out of three adult men (37%) and one out of eight adult women (12.5%) had had at least one sexual experience involving orgasm with a member of their own sex.¹⁵

More recent research has not shown that the incidence of homosexuality has measurably increased since the Kinsey studies were conducted over thirty years ago, despite greater tolerance and awareness of homosexual lifestyles.¹⁶ These data cannot be precise because of the social stigma attached to homosexual behavior and the consequent difficulty of obtaining representative samples of people to study. Nonetheless, a recent conservative study estimates that over 5 million persons in the United States are *exclusively* homosexual.¹⁷ A much larger number of people engage in occasional homosexual acts. Thus, some researchers have estimated that the non-exclusive homosexual population, with varying degrees of homosexual orientation, is 25 million men and women.¹⁸

¹⁴ *Id.*

¹⁵ A. KINSEY, *supra* note 12, at 474-475.

¹⁶ Gebhard, *Incidence of Overt Homosexuality in the U.S. and Western Europe*, NIMH TASK FORCE ON HOMOSEXUALITY, DHEW Publication No. (HSM) 9116 (J. Livingood ed. 1972); P. GEBHARD AND A. JOHNSON, *THE KINSEY DATA: MARGINAL TABULATIONS OF THE 1938-1963 INTERVIEWS CONDUCTED BY THE INSTITUTE FOR SEX RESEARCH* (1979); M. HUNT, *SEXUAL BEHAVIOR IN THE SEVENTIES* (1974); H. KATCHADOURIAN AND D. LUNDE, *FUNDAMENTALS OF HUMAN SEXUALITY* (1975).

¹⁷ R. FRANCOEUR, *BECOMING A SEXUAL PERSON* (1982).

¹⁸ Paul, *Social Issues and Homosexual Behavior: A Taxonomy of Categories and Themes in Anti-Gay Argument in HOMOSEXUALITY*, *supra* note 1, at 25-26.

Homosexuality is widely practiced in a variety of societies around the world.¹⁹ Anthropological and historical evidence indicates that homosexuality and other variant sexual practices have been tolerated by most societies throughout the ages. Several historians have traced the social and cultural treatment of homosexual conduct from the ancients to the present.²⁰ Their findings are that homosexuality has been ubiquitous regardless of whether a particular culture admired or vilified it. It was widespread in some ancient classical periods when it was idealized,²¹ and it was "abundant" during the Victorian

¹⁹ Carrier, *Homosexual Behavior in Cross-Cultural Perspective*, in *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL* (J. Marmor ed. 1980); C. FORD AND F. BEACH, *PATTERNS OF SEXUAL BEHAVIOR* (1951) [hereafter C. FORD and F. BEACH].

²⁰ In the first thousand years of Christianity there was a considerable range of tolerance for homosexual people. J. BOSWELL, *CHRISTIANITY, TOLERANCE & HOMOSEXUALITY*, Chs. 1 and 2 (1980). However, in the Thirteenth Century, St. Thomas Aquinas' concept of homosexual conduct as "unnatural" was embodied in canon law. V. BULLOUGH, *SEXUAL VARIANCE IN SOCIETY AND HISTORY* 380-381 (1976). These ecclesiastical proscriptions against unnatural sex were enforced by the civil authority of the state. As the influence of the Church waned, "sins against nature" became part of the criminal codes of England, Italy and other European countries. P. CONRAD AND J. SCHNEIDER, *DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS* 172-179 (1980). What had been sin became a crime. With the Eighteenth Century Age of Enlightenment a spirit of tolerance and investigation was brought to bear on the question of variant sexual conduct. It yielded a concept of health based on earlier concepts of morality. Conduct regarded as moral excesses, such as variant sexual conduct, was believed to make extraordinary demands on the body and lead to disease. What had been made a crime also became an illness, and homosexuality was viewed as pathological. As discussed at notes 28 to 36, *infra*, there is no empirical support for the concept of homosexuality as pathology and it is no longer regarded as such by the vast majority of mental health practitioners or scientific researchers. However, the criminal laws of many states are still based on the disproven concept of "unnatural acts." See discussion below at notes 50 to 56.

²¹ V. BULLOUGH, *supra* note 20; J. BOSWELL, *supra* note 20. Contrary to popular beliefs, no serious classical historian has con-

era when it was condemned.²² Thus, there is no evidence that homosexual conduct is limited to a small group of persons, or that its prevalence increases or decreases significantly as a result of cultural conditions.

Nor does same-sex intercourse, including oral and anal intercourse, deviate from any biological norm. Although such intercourse is sometimes referred to as "abnormal" or "unnatural," this conduct is found throughout the natural animal world. Researchers have found considerable homosexual conduct among domestic and wild animals in captivity.²³ Even in the wild, scientists have observed animals such as lizards, mountain sheep, shore birds and monkeys engage in efforts to copulate with members of the same sex. These activities have been variously interpreted to be demonstrations of dominance, of a need for cooperation in rearing young, of ability to copulate, and of playfulness.²⁴ At the very least, these data show that same-sex behavior is not uniquely human and that it arises spontaneously in nature.²⁵

cluded that the downfall of Greek and Roman civilizations was caused or evidenced by tolerance for homoerotic love. See e.g., GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* (1776); A. ROWSE, *HOMOSEXUALS IN HISTORY* (1977); V. BULLOUGH, *HOMOSEXUALITY, A HISTORY* (1979); J. BOSWELL, *supra* note 20. Some historians find that tolerance and validation of homoerotic love have flourished during some of the highest points of civilization. E. WESTERMARCK, *THE ORIGIN AND DEVELOPMENT OF MORAL IDEAS* (1908).

²² Karlen, *Homosexuality in History*, in *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL* (J. Marmor ed. 1980).

²³ A. KINSEY (1953), *supra* note 12, Ch. 11; C. FORD and F. BEACH, *supra* note 19, at 125-143.

²⁴ Weinrich, *Is Homosexuality Biologically Natural?* in *HOMOSEXUALITY*, *supra* note 1, at 197-208.

²⁵ Some researchers believe that homosexual behavior in the natural world may serve biologically adaptive purposes. See Kirsch and Rodman, *Selection and Sexuality: The Darwinian View of Homosexuality* in *HOMOSEXUALITY*, *supra* note 1, at 183-185; Evans, *A Conversation With Konrad Lorenz*, 8 *PSYCHOLOGY TODAY* 83-94 (June 1974). Lorenz notes that the aversive emotional reaction of

Finally, research does not suggest that same-sex orientation and sexual activity is the product of abnormal physiology. Although some researchers have postulated that homosexuality may result from hormonal imbalance,²⁶ a series of studies has failed to establish that homosexual people are characterized by abnormal hormone levels.²⁷

Amici submit that statistical and biological research does not support the propositions that same-sex orientation and variant sexual conduct are uncommon, are not found in nature, or are the result of abnormal physiological characteristics. Therefore, it is not scientifically accurate to characterize same-sex oral or anal intercourse as "deviant," if that term is used to imply that such conduct deviates from some statistical, biological or physiological norm.

B. Variant Sexual Conduct by Heterosexuals or by Homosexuals Is Not Pathological or Harmful.

Nor does sexual conduct defined by § 130.00-3 of the New York Penal Code deviate from any psychological

many people to homosexual behavior is really aesthetic rather than logical, for from an ethological perspective in an overpopulated world, more, rather than less, homosexuality would be beneficial.

²⁶ *E.g.*, Kolodny, Masters, Kolodner and Toro, *Plasma Testosterone and Semen Analysis in Male Homosexuals*, 16 NEW ENG. J. MED. 1170-1174 (1971).

²⁷ *See, e.g.*, Barlow, Abel, Blanchard, and Mavissakalian, *Plasma Testosterone Levels and Male Homosexuality: A Failure to Replicate*, 3 ARCHIVES OF SEXUAL BEHAVIOR 571 (1974); Doerr, Kockott, Bogt, Pirke, and Dittmar, *Plasma Testosterone, Estradiol, and Semen Analysis in Male Homosexuals*, 29 ARCHIVES OF GENERAL PSYCHIATRY 829 (1973); and Parks, Korth-Schütz, Penny, Hilding, Dumars, Farasier, and New, *Variation in Pituitary-gonadal Function in Adolescent Male Homosexuals and Heterosexuals*, 39 J. OF CLINICAL ENDOCRINE METABOLISM 796 (1974). *But see*, Doerr, Pirke, Kockott and Kittmar, *Further Studies on Sex Hormones in Male Homosexuals*, 33 ARCHIVES OF GENERAL PSYCHIATRY 611 (1976); Gatrell, Loriaux and Chase, *Plasma Testosterone in Homosexual and Heterosexual Women*, 134 AM. J. OF PSYCHIATRY 1117 (1977); and Tournay, Petrilli and Hatfield, *Hormonal Relationships in Homosexual Men*, 132 AM. J. OF PSYCHIATRY 288 (1975).

norm. *Amicus* American Psychiatric Association's *Diagnostic and Statistical Manual* (Third Edition) which is used as an authoritative description of diagnostic categories of mental disorders by health care practitioners and in the insurance industry, does not include in its definitions of pathological sexual syndromes either oral or anal sex between persons of the same sex or of the opposite sex.²⁸ Mental health clinicians have long observed that diverse expressions of sexual feelings between consenting adults are not symptoms of mental disorder, but rather of mental health. Mental problems *associated* with variant sexual expression, whether engaged in by heterosexual or homosexual people, are usually the product of internalized social condemnation or of external pressure and ostracism of those who practice it. Thus, the pathologies sometimes associated with variant sexual practices can be viewed as social pathology rather than as personal pathology.²⁹ In any event, there are few or no data which show that engaging in a variety of sexual expressions, including oral and anal sex, results in mental or physical dysfunction. Indeed, repression of desires for such expression can lead to dysfunction and pathology.³⁰

The fact that variant sexual conduct, such as oral-genital sex, takes place between persons of the same sex does not make such conduct harmful or the participants pathological. Although in the past, there was consider-

²⁸ AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL*, 261-283 (3rd ed. 1980) [hereafter *DSM-III*]. The *DSM-III* lists "ego-dystonic homosexuality" as a mental disorder consisting of a desire of a homosexually behaving person to acquire or increase heterosexual arousal. *DSM-III* at 281.

²⁹ Gonsiorek, *Social Psychological Concepts in the Understanding of Homosexuality in HOMOSEXUALITY*, *supra* note 1, at 115-119 (1980).

³⁰ Coleman, *Developmental Stages of the Coming-Out Process in HOMOSEXUALITY*, *supra* note 1, at 150-151 (1982); P. FISHER, *THE GAY MYSTIQUE, THE MYTH AND REALITY OF MALE HOMOSEXUALITY* 249 (1972).

able debate whether people who engaged in sexual conduct with members of the same sex were suffering from a mental disorder, the majority of mental health professionals no longer consider homosexuality to be a mental disorder.³¹ In 1973, *amicus* American Psychiatric Association passed a resolution which removed homosexuality from its list of mental disorders, stating that "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities." The Psychiatric Association declared that "[i]n the reasoned judgment of most American psychiatrists today, homosexuality per se does not constitute any form of mental disease."³² In 1975, *amici* Psychological Association and *amici* American Public Health Association passed resolutions supporting the Psychiatric Association's removal of homosexuality from its list of mental disorders and urging all mental health professionals to help dispel the stigma of mental illness that had long been associated with homosexual orientation.³³

³¹ A mental disorder is defined in *DSM-III* as "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is typically associated with either a painful symptom (distress) or impairment in one or more important areas of functioning (disability)." *DSM-III* at 6.

³² Resolution of the American Psychiatric Association, December 15, 1973. The rationale for the removal of homosexuality from the list of mental disorders in *DSM-II* is supported as follows:

A significant proportion of homosexuals are apparently satisfied with their sexual orientation, show no significant signs of manifest psychopathology (unless homosexuality, by itself, is considered psychopathology), and are able to function socially and occupationally with no impairment. If one uses the criteria of *distress* or *disability*, homosexuality per se is not a mental disorder. If one uses the criterion of *inherent* disadvantage, it is not at all clear that homosexuality is a disadvantage in all cultures or subcultures.

DSM-III at 380.

³³ Resolution of the Council of Representatives of the American Psychological Association (1975); Resolution No. 7514 of the American Public Health Association (1975).

This official declassification of homosexuality as a mental disease was the result of a long process of re-evaluation of the illness model of homosexuality and was based on extensive scientific findings by a large number of independent researchers. The first major challenge to the illness model came in 1957 when Evelyn Hooker determined that homosexual and heterosexual men could not be distinguished from one another on the basis of standard psychological tests.³⁴ These findings stimulated a flood of psychological research over the next two decades which overwhelmingly demonstrated that homosexuality is not related to psychopathology or psychological maladjustment.³⁵ Of course, some homosexuals are psychologically disturbed, just as some heterosexuals are psychologically disturbed. But homosexuality bears no necessary relationship to psychological adjustment.³⁶

³⁴ Evelyn Hooker's research studied 30 homosexual and 30 heterosexual men, neither group being involved in the legal system or undergoing psychotherapy. She gave them each a battery of projective psychological tests and then gave all 60 test protocols to a 3 person panel of psychological test experts. When asked to differentiate the two groups using these testing protocols, the experts were unable to do so. Hooker concluded that homosexuality *per se* did not constitute a psychiatric entity, and that there was no reason to believe that homosexuality *per se* was pathological. Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. OF PROJECTIVE TECHNIQUES 17-31 (1957).

³⁵ Gonsiorek, *Results of Psychological Testing in Homosexual Populations*, AM. BEHAV. SCIENTIST 385, 394 (1982) [hereafter Gonsiorek].

³⁶ One commentator who reviewed the psychological studies of homosexual people concluded "[u]ntil the findings cited here are overturned by psychological test data of equal or better research design, breadth and numbers, theories contending that the existence of differences between homosexuals and heterosexuals implies maladjustment are irresponsible, uninformed, or both." Gonsiorek, *supra* note 35. See also, Meredith and Riester, *Psychotherapy, Responsibility and Homosexuality: Clinical Examination of Socially*

Although it is clear that same-sex orientation and activity do not indicate mental disorder and illness, it is not so clear why some people have a same-sex orientation. Science does know that sexual orientation is developed at a very early age, perhaps by the age of six and certainly by adolescence, and that it develops independent of isolated sexual experiences. Various theories have been postulated to explain the formation of sexual orientation, but few are supported by reliable data. Several popular theories have been largely disproven.

One such theory is that homosexuality is caused by disturbed family relationships. Thus, it has been suggested that a boy who grows up with a dominating, overintimate mother and an absent or rejecting father is more likely to be homosexual than a boy who has experienced other parenting patterns.³⁷ This theory, first suggested in 1962, was based on clinical studies.³⁸ However, it has not been substantiated by later studies which indicate that there is no necessary relationship between parenting patterns and homosexual offspring.³⁹

Other researchers have postulated that homosexuality is caused by fear or hatred of the other sex. However, research on the origins of sexual orientation has shown that these factors do not cause homosexuality.⁴⁰ Further, such studies showed that homosexual men and women

Deviant Behavior, 11 PROFESSIONAL PSYCHOLOGY 174-193 (1980); Riess, *Psychological Tests in Homosexuality* in HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL (J. Marmor ed. 1980).

³⁷ I. BIEBER, H. DAIN, H. DINCE, P. DRELLICH, M. GRAND, H. GUNDLACK, R. KREMER, A. RIFKIN, C. WILBUR AND T. BIEBER, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* (1962).

³⁸ See, e.g., A. BELL, M. WEINBERG AND S. HAMMERSMITH, *SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN* (1981) [hereafter A. BELL].

³⁹ J. Gonsiorek, *supra* note 35; Coleman, *Changing Approaches to the Treatment of Homosexuality* in HOMOSEXUALITY, *supra* note 1, at 81-82.

⁴⁰ See e.g., A. BELL, *supra* note 38.

were not particularly lacking in heterosexual experiences during their childhood and adolescent years. The data do not support the idea that early childhood homosexual activity has any direct relationship to later sexual orientation.⁴¹ Indeed, there are no empirical data from these studies to support the popular myth that the development of homosexual orientation or behavior results from "contagion" by other homosexuals. The only consistent findings seem to be that homosexuals have many more and much stronger sexual fantasies about members of their own sex, and that these fantasies appear during childhood and early adolescence.⁴² Therefore, either encouraging or discouraging adult homosexual behavior is not likely to have any significant effect on the development of that individual's sexual orientation.⁴³

C. Variant Sexual Conduct Is Beneficial to Many Heterosexuals, Homosexuals, and Disabled People.

As noted, variant sexual conduct is not harmful or pathological. In fact, it is believed by many psychotherapists to be of positive benefit to some people, both

⁴¹ A. BELL, *supra* note 38. One research study showed that 62% of the heterosexual men reported that their first sexual encounter was with another male, while only 39% of the homosexual men reported such experience. However, homosexual men reported more enjoyment in their homosexual activities. These studies support the idea that temporal sequence is not important in the development of sexual orientation. *Id.* at 97-113; Stephan, *Parental Relationships and Early Social Experiences of Activist Male Homosexuals and Male Heterosexuals*, 3 J. OF ABNORMAL PSYCHOLOGY 82 (1973).

⁴² Storms, *Theories of Sexual Orientation*, J. OF PERSONALITY AND SOC. PSYCHOLOGY 783-792 (1980).

⁴³ Kimmel, *Psychotherapy and the Older Gay Man*, 14 PSYCHOTHERAPY: THEORY, RESEARCH AND PRACTICE 386 (1977). This commentator suggests that the preference for homosexual or heterosexual behavior is so deeply embedded that it may be maintained even in the case of considerable pressure and contrary experience. This phenomenon may explain why people with strong homosexual fantasies often lead a life of extended periods of exclusive homosexuality but have alternating periods of heterosexuality when circumstances require it.

heterosexuals and homosexuals. The theme of sexual flexibility appears throughout the scientific literature on sex therapy. Virtually every expert in the field has recognized the importance of sexual and even orgasmic contact through behaviors other than vaginal intercourse. The underlying theme of Masters and Johnson's once-innovative sex therapy was one of abstinence from intercourse and use of "sensate focus" exercises to expand a couple's sensitivity and sexual repertoire.⁴⁴

Other internationally known experts, such as Helen Singer Kaplan and the thousands of practitioners in sex therapy, work from the assumptions that reliance on vaginal intercourse as a sole sexual outlet is not healthy, and that couples need to expand their behavior options. Oral-genital contact, in fact, has been specifically recommended for inorgasmic women, since it is only a minority of women who respond orgasmically to intercourse without other stimulation.⁴⁵ Other writers of popularly used human sexuality texts for college students consistently support the concept of non-vaginal sexual contact to enhance sexual functioning and health.⁴⁶ Thus, sexual expression through a variety of conducts can be a step toward more intimate sharing within a conventional heterosexual or homosexual relationship, having positive,

⁴⁴ W. MASTERS AND V. JOHNSON, *HUMAN SEXUAL RESPONSE* (1966); W. MASTERS AND V. JOHNSON, *HUMAN SEXUAL INADEQUACY* (1970).

⁴⁵ L. BARBACH, *FOR YOURSELF, THE FULFILLMENT OF FEMALE SEXUALITY* (1975) [hereafter BARBACH].

⁴⁶ Furthermore, even among married couples seeking fertility counseling and wanting to reproduce, behaviors other than vaginal intercourse are commonly recommended as a way to ease the pressure and perhaps increase sexual arousal and frequency of orgasm, which is known to increase the probability of conception in women. J. GAGNON, *HUMAN SEXUALITIES* 131, 193-214 (1977). See also, R. KOLODNY, W. MASTERS AND V. JOHNSON, *TEXTBOOK ON SEXUAL MEDICINE* (1979); H. KATCHEDOURIAN AND D. LUNDE, *FUNDAMENTALS OF HUMAN SEXUALITY* (1975); McCARY, *McCARY'S HUMAN SEXUALITY* (1978).

long-term effects on the individual's mental health and contribution to society.

In addition, heterosexual people who are unable to engage in vaginal intercourse because of age or physical handicap also benefit from the intimate sexual contact that is provided by non-coital sexual behavior. Such individuals are encouraged by their therapists and rehabilitation specialists to use such behaviors as oral-genital contact to insure the continuation of a physical relationship with their loved ones. Such contact, in fact, has been shown to be a crucial determinant of survival itself for certain patients who may not be able to have intercourse and would otherwise terminate physical contact relationships.⁴⁷ Similarly, persons experiencing sexual dysfunction benefit from therapy that requires the use of non-coital sexual techniques.⁴⁸ These techniques improve mental health by increasing feelings of sexual competence, intimacy and self-esteem. Also, heterosexual couples who do not desire to produce a pregnancy may choose to engage in non-coital sexual behavior in addition to, or instead of, using contraception. Finally, homosexual persons benefit by engaging in behavior that affirms their self-concept, provides emotional satisfaction and allows the formation of long-term bonds.⁴⁹

⁴⁷ J. LYNCH, *THE BROKEN HEART: THE MEDICAL CONSEQUENCES OF LONELINESS* (1977).

⁴⁸ L. BARBACH, *supra* note 45.

⁴⁹ Peplau, *What Homosexuals Want In Relationships*, 15 *PSYCHOLOGY TODAY* 28-30 (1981).

III. CRIMINALIZATION OF PRIVATE, CONSENSUAL, VARIANT SEXUAL PRACTICES DOES NOT BENEFIT SOCIETY OR PEOPLE WHO WOULD ENGAGE IN SUCH PRACTICES.

A. Criminalization Does Not Deter Variant Sexual Practices Or Affect the Prevalence of Homosexuality.

Given what we know about the fundamental nature and strength of the sex drive in humans, it is unrealistic to think that fear of criminal sanction will effectively deter forbidden sexual conduct in private between consenting adults, whether they are heterosexual or homosexual. Indeed, if the threat of social ostracism, humiliation, loss of job, friends and salvation, as well as the threat of venereal disease, does not deter variant sexual conduct, surely the slim possibility of an arrest and prosecution for private conduct would not effectively deter proscribed sexual practices.⁵⁰

The authors of the famous *Wolfenden Report*, based on a ten-year study by Great Britain's Committee on Homosexual Offenses and Prostitution, predicted that decriminalizing homosexual acts would have little effect. Noting the argument that decriminalization would be seen as condoning homosexual acts and might result in a great increase in such conduct, the authors stated:

This expectation seems to us to exaggerate the effect of the law on human behavior. It may well be true that the present law deters from homosexual acts some who would otherwise commit them, and to that extent an increase in homosexual behavior can be expected. But it is no less true that if the amount

⁵⁰ There are data indicating that criminalizing sodomy not only does not deter variant practices but results in secretiveness and repression of homosexual desires and causes some homosexuals to seek out anonymous partners in public places. R. HUMPHREYS, *THE TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES* (1970); Miller and Humphreys, *Lifestyles and Violence: Homosexual Victims Assault and Murder*, 3 *QUALITATIVE SOCIOLOGY* 169-185 (1980).

of homosexual behavior has, in fact increased in recent years, the law has failed to act as an effective deterrent. It seems to us that the law itself probably makes little difference to the amount of homosexual behavior which actually occurs; whatever the law may be there will always be strong social forces opposed to homosexual behavior.

The Wolfenden Report, para. 58 (1957).

In addition, criminalization of homosexual conduct will not affect the prevalence of homosexual orientation. As discussed above, homosexual orientation is not a matter of choice. It is a set of emotions and proclivities established early in life and, once established, is not easily modified. All researchers agree that the sexual orientation of only a small fraction of homosexual people who are highly motivated to change has been or can be modified through therapy.⁵¹ Thus, consensual sodomy laws deter only a marginal amount of overt homosexual behavior and can have little or no effect on the prevalence of homosexual orientation.

The futility and inappropriateness of criminalizing consensual sexual practices, both heterosexual and homo-

⁵¹ Nevertheless, some homosexual persons, and some psychotherapists, desire to bring about change in sexual orientation. Studies of the effectiveness of therapy to bring about this change indicate it is dependent upon the strength of desire to become heterosexual and the extent and intensity of heterosexual experience and fantasy, regardless of the type of therapy used. One researcher estimated that only 20-50% of "highly motivated" homosexuals shift from avoiding to enjoying heterosexual relations. Marmor, *Clinical Aspects of Homosexuality*, in *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL* 277 (J. Marmor ed. 1980). It is also apparent that changing sexual behavior does not necessarily change an individual's sexual orientation or fantasy life. C. TRIPP, *THE HOMOSEXUAL MATRIX* 252 (1975). Moreover, for many homosexuals, seeking to change sexual orientation would be an inappropriate goal of psychotherapy. Davison, *Politics, Ethics and Therapy for Homosexuality* in *HOMOSEXUALITY* *supra* note 1, at 89-98; A. BELL, M. WEINBERG AND S. HAMMERSMITH, *HOMOSEXUALITIES, A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 221 (1978).

sexual, has been widely recognized. *The Wolfenden Report*, mentioned above, recommended decriminalization of England's consensual sodomy laws in 1957.⁵² Most European countries have either never had laws against consensual sodomy, or have repealed them.⁵³ On the other hand, the Soviet Union and several of its satellite countries continue to punish private sexual acts between consenting adults.⁵⁴

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 which criminalize any non-commercial sexual con-

⁵² COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, *THE WOLFENDEN REPORT* (1957).

⁵³ 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, Czechoslovakia, England, Wales, East Germany, West Germany, Finland, Austria and Norway have repealed their sodomy laws in this century, while the Soviet Union, Rumania, Bulgaria, Yugoslavia, Ireland and Scotland have retained their criminal sexual conduct statutes. H. KATCHADOURIAN AND D. LUNDE, *FUNDAMENTALS OF HUMAN SEXUALITY* 511 (2nd ed. 1975).

duct between consenting adults in private. Among them are *amicus* American Psychological Association, *amicus* American Public Health Association, the American Bar Association, the American Medical Association, and the National Association of Social Workers.⁵⁵ In addition, many major religious groups have opposed criminalization of consensual, private homosexual conduct, even though some of them continue to regard such behavior as sinful or immoral.⁵⁶

In response, many states have re-evaluated their interest in keeping consensual sodomy laws on the books, and have determined that they serve no legitimate purpose. Twenty-three states have now repealed their laws criminalizing oral-genital sex and other private sexual conduct between consenting adults. Criminal consensual sodomy

⁵⁵ 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); and Resolution adopted in lieu of Report I by the American Medical Association House of Delegates, Annual Meeting Report, p. 84 (1975). Cf. American Sociological Association (ASA), Resolution of ASA Council, (January 1978) ("the American Sociological Association affirms its opposition to oppressive action against homosexuals and its commitment to their civil rights"); National Association of Social Workers (NASW), Policy Statement on Gay Issues, adopted by NASW Delegate Assembly (1977) (The Association deplores and will work to combat archaic laws, discriminatory employment practices, and any of the forms of discrimination which serve to impose something less than equal status upon homosexually oriented members of the human family).

⁵⁶ These groups include the United Church of Christ, the Lutheran Church of America, the Methodist General Conference, the United Presbyterian Church, the Society of Friends, the Episcopal Church, American Baptists, the Unitarian Universalists and the National Council of Churches. Hiltner, *Homosexuality and the Churches* in HOMOSEXUALITY: A MODERN REAPPRAISAL (1980); PRESBYTERIAN BLUE BOOK I & II, REPORT ON THE CHURCH AND HOMOSEXUALITY (1978).

laws have been declared unconstitutional by the highest courts in four additional states.⁵⁷

The experience of the jurisdictions in which consensual sexual conduct is not criminal, including oral and anal sex between consenting adults of the same-sex, seems to be that the prevalence of homosexuality is about the same as jurisdictions in which it is illegal. Thus, the prevalence of homosexuality in the United States, where until recently a majority of states criminalized homosexual acts, has not been appreciably less than it has been in countries in Europe where consensual sodomy has not been criminal for many years.⁵⁸ Nor are *amici* aware of any data indicating that the incidence of public lewdness, child molestation, rape or prostitution varied significantly when consensual sodomy laws were repealed in various states.

Amici respectfully submit that because the desire to engage in variant sex is a strong and fundamental drive, efforts to punish private variant sexual conduct will be unenforceable. Moreover, because homosexuality is neither acquired nor eliminated voluntarily, punishment of that status is irrational. It is not surprising, then, that the experience of other countries and states which have eliminated consensual sodomy laws makes it clear that such laws do not significantly deter variant sexual conduct or decrease the incidence of homosexuality.

⁵⁷ Rivera, *Our Straight Laced Judges: The Legal Position of Homosexual Persons In The United States*, 30 HASTINGS L.J. 799 (1979) and Massachusetts, *Commonwealth v. Balthazar*, 366 Mass. 298, 318 N.E.2d 478 (1974); New Jersey, 1978 N.J. Laws, Ch. 95, § 2C:98-2 (effective Sept. 1, 1979); 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); Pennsylvania, *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980); Texas, *Baker v. Wade*, 533 F. Supp. 1121 (N.D. Tex. 1982), *appeal docketed* No. 82-1590 (5th Cir. 1982); Wisconsin, 1983 Assembly Bill 250, Wisconsin Act, 17, § 4 (effective date, May 12, 1983).

⁵⁸ M. WEINBERG AND C. WILLIAMS, *MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS* (1974).

B. Criminalization of Variant Sexual Conduct between Consenting Adults Is Psychologically Harmful to Them.

Criminal laws outlawing variant sexual behavior do not deter the conduct they are intended to eliminate, but they do cause substantial psychological harm. The existence and occasional enforcement of consensual sodomy statutes harm homosexuals by stigmatizing them as deviants. In fact, 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:

Deviance is not a quality of the act a person commits, but rather a consequence of the application by others of rules and sanctions to an offender. The deviant is one to whom that label has been successfully applied; deviant behavior is behavior that people so label.⁵⁹

Data from sociological studies of deviance indicate that, once the deviant is so labeled, society will misperceive his or her behavior so that all his or her behavior will be construed as manifesting deviancy.⁶⁰

This process occurs in the case of homosexuals in part because of the criminalization of their behavior by the state. Because the behavior of homosexuals is labeled "deviant" and punishable by criminal law, they become stigmatized and are viewed as undesirable stereotypes. People who entertain the stereotype will interpret actions of the stigmatized person to fit the stereotype and will act toward the person in ways which would be ap-

⁵⁹ H. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963). The term "stigma" is used to refer to an attribute possessed by a person which actually or potentially causes society to label and treat that person as deviant. See generally, K. PLUMMER, *SEXUAL STIGMA: AN INTERACTIONIST ACCOUNT* (1975); Gonsiorek, *Social Psychological Concepts in the Understanding of Homosexuality*, 25 AM. BEHAVIORAL SCIENTIST 483, 485 (1982) [hereafter Gonsiorek].

⁶⁰ *Id.*

appropriate, if at all, only if that person actually were the stereotype.⁶¹ In the case of homosexuals, stigma and stereotyping results in discrimination against them in jobs, and other essential aspects of life.⁶²

In addition, stigma and stereotyping affect the personality of the person so stigmatized. Thus, homosexuals who are treated as deviants develop coping mechanisms in response to the resulting prejudice. These coping mechanisms are common traits in most persecuted groups, including ethnic and racial minorities. The traits include excessive concern with the minority group membership, feelings of insecurity, denial of membership in the group, withdrawal, self-derision, self-hatred, militancy, neuroticism, and acting out self-fulfilling prophecies about one's own inferiority.⁶³ These undesirable personality traits experienced by some homosexuals have been described

⁶¹ Gonsiorek, *supra* note 59.

⁶² See e.g., *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (due process required where dismissal from federal employment is based on employee's homosexuality); *Morrison v. State Board of Education*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (state required to find teacher's homosexual conduct made him unfit to teach before revoking his teacher's license); *People v. Brown*, 49 Mich. App. 358, 212 N.W.2d 55 (1973) (lesbian relationship not sufficient to render a home unfit for children); *Owles v. Lomenzo*, 38 App. Div. 2d 981, 329 N.Y.S.2d 181 (1972), *aff'd per curiam*, *sub. nom. Gay Activists Alliance v. Lomenzo*, 31 N.Y.2d 965, 293 N.E.2d 255, 341 N.Y.S.2d 108 (1973) (secretary of state required to accept articles of incorporation of a gay rights organization despite his finding its name "inappropriate"); *Kerma Restaurant Corp. v. State Liquor Authority*, 27 App. Div. 2d 918, 278 N.Y.S.2d 951 (1967) (mere congregation of homosexuals in bar found insufficient grounds for suspension of liquor license for maintaining "disorderly premises"); *Ganduxey Marino v. Murff*, 183 F. Supp. 565 (S.D.N.Y. 1959), *aff'd mem.*, 278 F.2d 330 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960) (alien convicted of violating New York's law against loitering to solicit deviant sexual intercourse found barred from immigration because of conviction for crime of "moral turpitude").

⁶³ G. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

by psychoanalysts.⁶⁴ These data support the conclusion that homosexuality *per se* is not a mental disorder but that life in a hostile society may generate stress and anxiety which result in neuroticism and mental disorders. Those homosexuals who come to terms with their sexual orientation and integrate it into their personal lives are the most psychologically well-adjusted of this group.⁶⁵ Those homosexuals who repress their homosexual orientation have been shown to be the most troubled and dysfunctional.⁶⁶

In summary, *amici* respectfully submit that there are sound psychological data indicating that engaging in the sexual conduct termed "deviant" by New York is not uncommon, unnatural, pathological or harmful, and may be an indication of mental health. Further, *amici* submit that criminalization of variant sexual conduct does not deter it significantly or reduce the incidence of homosexuality, but does cause serious psychological harm.

⁶⁴ E. BERGLER, *HOMOSEXUALITY: DISEASE OR A WAY OF LIFE* (1956); L. HATTERER, *CHANGING HOMOSEXUALITY IN THE MALE* (1970); and see, Coleman, *Changing Approaches to the Treatment of Homosexuality: A Review* in *HOMOSEXUALITY*, *supra* note 1, at 81.

⁶⁵ Coleman, *supra* note 64.

⁶⁶ A. BELL, AND M. WEINBERG, *HOMOSEXUALITY: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* (1978); Hammersmith and Weinberg, *Homosexual Identity: Commitment, Adjustment, and Significant Others*, *SOCIOMETRY* 36, 56-57 (1973); M. WEINBERG AND C. WILLIAMS, *MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS* (1974).

CONCLUSION

The judgment below should be affirmed.

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