SUPREME COURT OF KENTUCKY
FILE NO. 90-SC-558-TG

COMMONWEALTH OF KENTUCKY — MOVANT

On Transferred Motion for Discretionary
V. Review In the Kentucky Court of Appeals (90-CA-1483-D)
From Fayette Circuit Court (86-X-48)
An Appeal From the Fayette District Court (86-M-859)

JEFFREY WASSON — RESPONDENT

BRIEF OF AMICI CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION, KENTUCKY PSYCHOLOGICAL ASSOCIATION, KENTUCKY PSYCHIATRIC ASSOCIATION, KENTUCKY CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND KENTUCKY SOCIETY FOR CLINICAL 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 100,000 members, 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

mental health. The Kentucky Psychiatric Association has over 300 member psychiatrists in the Commonwealth of Kentucky, and is interested in public issues involving human behavior. The Kentucky Chapter of the National Association of Social Workers is a two thousand member organization of social workers who have completed a Bachelor of Arts or Master of Arts degree program from an accredited college or university. The Association focuses on human services, public policy, general welfare, and mental health issues. The Kentucky Society for Clinical Social Workers is a membership association of licensed clinical social workers in Kentucky, and is concerned with mental health issues including education and treatment of all Kentucky residents.

Amici submit this brief to bring to this Court's attention the principal body of scientific knowledge pertinent to the fundamental constitutional questions posed in this case.

Introduction

Under the Kentucky sodomy statute, KRS 510.100, a person may be charged with and convicted of a crime for simply engaging in noncommercial and consensual nonviolent intimate conduct with another adult in the privacy of the home. The lower courts found that the statute "clearly seeks to regulate the most profoundly private conduct and in so doing impermissibly invades the privacy of the citizens of this state." Commonwealth v. Wasson, No. 86M859, slip op. at 3 (Ky. D.Ct. Oct. 31, 1986). The Circuit Court further held

orientation has been shown not to impair the ability of individuals to contribute to society; is the subject of prejudicial stereotypes; and in most cases is involuntarily acquired and highly resistant or impervious to attempts to change it. (Point II.) The statute is thus arbitrary and unjust, and violates this Commonwealth's constitutional guarantees of equal protection of the law.

Finally, the scientific and clinical data discussed below show that the statute does not further individual mental health or the public health, but actually disserves these goals in important ways. The statute does not provide 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

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2/ (...continued)
to persons whose social identity or sexual orientation is based upon such a pattern. See generally Gonsiorek & Weinrich, The Definition and Scope of Sexual Orientation, in Homosexuality: Research Implications for Public Policy [hereafter Homosexuality] 1-12 (J. Gonsiorek & J. Weinrich eds. 1991).

50, 117 S.W. 383, 385 (1909). Privacy expectations and entitlements are at their highest in the home. E.g., Hershberg v. City of Barbourville, 142 Ky. 60, 133 S.W. 985 (1911).

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.[4/] A more stark violation of the Commonwealth's constitutional guarantee of privacy can scarcely be imagined than such a law, regulating the private sexual intimacies of adults.

A. The Relationships of Homosexual Couples are Psychologically Important.

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

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[4/] KRS 510.100 provides:

> (1) A person is guilty of sodomy in the fourth degree when he engages in deviate sexual intercourse with another person of the same sex.

KRS 510.010 provides:

> (1) Deviate sexual intercourse means any act of sexual gratification between persons not married to each other involving the same organs of one person and the mouth or anus of another.

[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 & (continued...)

Gay, lesbian, and heterosexual couples usually do not differ on standard indices of relationship satisfaction[10/] or social support[11/] 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."[12/] 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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[10/] 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. Homosexuality 23-35 (1982) [hereafter Peplau, Padesky & Hamilton].

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

[12/] Peplau, Lesbian and Gay Relationships, in Homosexuality supra n. 2, 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."[17/] For all couples, "a good sex life is central to a good overall relationship."[18/] 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.[19/] There can be no doubt that a substantial percentage of all adult American men and women, heterosexual

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17/ Blumstein & Schwartz, supra n. 9, at 193.

18/ Blumstein & Schwartz, supra n. 9, at 201, 205-06; see McWhirter & Mattison, supra n. 8, at 262.

19/ 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.[23] 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.[24] It can reasonably be assumed, therefore, that much of the sexual behavior occurring in Kentucky -- among heterosexuals and gay people, men and women, young and old, married and unmarried -- involves oral or anal sex.[25]

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.[26]

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[23] Hunt, supra n. 20, at 204. Six percent of the sample reported engaging in anal intercourse "sometimes" or "often."

[24] 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).

[25] 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].

[26] 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. 9, 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 (continued...)

does not include as pathological sexual syndromes either oral or anal sex between persons of different sexes or the same sex.[28/]

Indeed, mental health clinicians consider diverse sexual expressions between consenting adults as indicating mental health.[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 benefits both heterosexual and gay relationships. As with heterosexual couples, lesbian and gay male couples who engage

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

29/ A substantial majority of Americans consider oral-genital contact to be "a part of normal sex," a recent study found. Callen & Planco, Attitudes Towards Oral-Genital Sexuality, 42 Conn. Med. 500, 502 (1978) [hereafter Callen & Planco] (91% of persons under 35, and 78% of all persons, said they consider oral sex normal).

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. 14, 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. 2, at 161-176 [hereafter Gonsiorek & Rudolph].

essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary" and unconstitutional. Sanitation Dist. No. 1 of Jefferson County v. City of Louisville, 308 Ky. 368, 375, 213 S.W.2d 995, 1000 (1948).

As discussed in this section, the 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 individuals lack a substantial degree of control. To punish an individual for an essentially "immutable" characteristic, based upon false stereotypes, when that characteristic is in no meaningful sense detrimental or harmful to society, is arbitrary. Because it does just this, KRS 510.100 is unconstitutional.

A. Sexual Orientation Does Not Affect a Person's Ability to Contribute to Society.

The mental health profession does not consider homosexual orientation to be a disorder.[36/] Nearly twenty

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35/ (...continued)

> 2. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.
>
> 3. All men, when they form a social compact, are equal . . . .

36/ A mental disorder is "a clinically significant behavioral or psychological syndrome or pattern that occurs in a person and that is associated with present distress (a painful symptom) or disability (impairment in one or more (continued...)

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 the subject demonstrates that "theories contending that the existence of differences between homosexuals and heterosexuals implies maladjustment are irresponsible, uninformed, or both."[42/] Indeed, extensive psychological research conducted over almost three decades has conclusively established that "homosexuality in and of itself bears no necessary relationship to psychological adjustment."[43/]

[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. 2, 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, Walston & McKee Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature, 39 J. Clinical Psychiatry 604 (1978) [hereafter Hart].

[42/] Gonsiorek, supra n.41, at 136.

[43/] Id. See also, Psychological Testing, supra n. 41, at 385, 394; Reiss, supra n. 41, at 296-311; Hart, supra n. 41, at 604 ("findings to date have not demonstrated that the

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child custody.[46] Indeed, discrimination against gay people appears to be indefensible.[47]

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[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 National Association of Social Workers (NASW), Policy Statement on Gay Issues (1977), adopted by NASW Delegate Assembly ("The Association deplores and will continue to 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."); 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.")

[47] The history of proscriptions of homosexual conduct is a sad and tortured one. The victory of Christian doctrine may have led to the repression of the freer sexual attitudes of the Greeks and Romans. M. Goodich, The Unmentionable Vice: Homosexuality in the Later Medieval Period (1979). In the first thousand years of Christianity there was a considerable range of tolerance for homosexual conduct. J. Boswell, Christianity, Tolerance & Homosexuality, chs. 1 & 2 (1980) In the Thirteenth Century, however, St. Thomas Aquinas in effect defined homosexual conduct as more "unnatural" than other "unnatural" sex, such as masturbation, nonprocreative or nonmarital heterosexual conduct, and procreative heterosexual intercourse in other than the approved position. Gilbert, Conceptions of Homosexuality and Sodomy in Western History, 6 J. Homosexuality 57, 62 (1981). Aquinas' hierarchy was first embodied in canon law, V. Bullough, Sexual Variance in Society and History 380-81 (1976), and these ecclesiastical proscriptions later became part of the criminal codes or common law of England and other European countries. P. Conrad & J. Schneider, Deviance and Medicalization: From Badness to Sickness 172-79 (1980). What had been a sin became a crime. With the Eighteenth Century Age of Enlightenment, "science' constructed a concept of health based largely on earlier concepts of morality. Conduct regarded as morally excessive -- such as oral and anal sex, masturbation, and other nonprocreative sexual

(continued...)

basing their attitudes on popular beliefs and misconceptions, not on accurate information or personal experience.[50]

One leading researcher has summarized the nature of negative stereotypes towards gay people:

> Most common stereotypes are related to cross-sex characteristics. Additionally, significant numbers of individuals characterize male homosexuals as mentally ill, promiscuous, lonely, insecure, and likely to be child molesters, while lesbians have been described as aggressive and hostile toward men.[51]

The same researcher explains that "[l]abeling itself can lead people to perceive stereotypical behaviors, whether nor not they occur," and that stereotypes can be so influential that those gay people "who violate stereotypical expectations (e.g., masculine gay men and feminine lesbians) may actually be disliked" for that reason.[52] Another study reached

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[50] Herek, Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men, 10 J. Homosexuality 1, 6 (1984) [hereafter Herek, Beyond "Homophobia"] (summarizing research). Similarly, several studies indicate that exposure to truthful information about lesbians and gay men often leads to a reduction in homophobia. See, id.; cf. Amir, The Role of Intergroup Contact in Change of Prejudice and Ethnic Relations in Towards the Elimination of Racism 73 (D. Katz ed. 1976). Public opinion research also demonstrates that people who are acquainted with someone who does not conceal her/his homosexual orientation have, in general, significantly more favorable attitudes toward lesbians and gay men. Schneider & Lewis, The Straight Story on Homosexuality and Gay Rights, 7 Pub. Opinion 16-20, 59-60 (Feb./Mar. 1984) [hereafter Schneider & Lewis].

[51] Herek, Beyond "Homophobia", supra n. 50, at 9 (citations omitted).

[52] Id.

in question "exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group." Id. at 638 (emphasis added). Gay people as a group certainly meet the criterion of discreteness. See L. Tribe, American Constitutional Law 1616 (1988). Nevertheless, the degree to which an individual controls his or her acquisition of a trait and the relative ease or difficulty with which a trait can be changed are relevant to a determination whether a classification is constitutionally suspect. See, e.g., Mathews v. Lucas, 427 U.S. 495, 505 (1976).

Sexual orientation is acquired at an early age, and thus it makes little sense to argue that the trait is voluntarily acquired. For some, adult homosexual orientation is predictable by early childhood.[54/] Childhood precursors of homosexual orientation in adulthood have not been reliably identified for the population as a whole. There may be biological as well as socio-environmental factors; these factors may differ substantially within the population.[55/]

[54/] See, R. Green, The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis, 16 J. Psychiatry & Law 537 (1988); R. Green, The "Sissy Boy Syndrome" and the Development of Homosexuality 370 (1987) [hereafter Green].

[55/] See, A. Bell, M. Weinberg & S. Hammersmith, Sexual Preference: Its Development in Men and Women 183-186 (1981) [hereafter Sexual Preference]; Green, supra n. 54; 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

(continued...)

such changes were more likely to occur among bisexuals who were highly-motivated to adopt a heterosexual behavior pattern. Many interventions aimed at changing sexual orientation have succeeded only in reducing or eliminating homosexual behavior rather than in creating or increasing heterosexual attractions.[59/]

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.[60/] Indeed, because psychologists generally agree that psychological adjustment is positively correlated with acceptance and integration of one's sexual orientation, and maladjustment is positively

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[59/] Haldeman, Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination, in Homosexuality, supra n. 2, 149-160; A. Martin, Innovations in Psychotherapy with Homosexuals 24-57 (1984) [hereafter Martin].

In January 1990, Dr. Bryant Welch, Executive Director for Professional Practice of amicus APA, stated that "no scientific evidence exists to support the effectiveness of any of the conversion therapies that try to change one's sexual orientation." "[R]esearch findings," he explained, "suggest that efforts to 'repair' homosexuals are nothing more than social prejudice garbed in psychological accouterments." Statement of Bryant L. Welch, J.D., Ph.D., American Psychological Association, January 26, 1990.

[60/] See, Davison, Constructionism and Morality in Therapy for Homosexuality, in Homosexuality, supra n. 2, 137-148 [hereafter Davison]; Silverstein, Psychological and Medical Treatments of Homosexuality, in Homosexuality, supra n. 2, 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].

age 20.[63/] Although data were not reported concerning adult American females, earlier studies by Alfred Kinsey and his associates suggest that the number of American females who have engaged in homosexual behavior may be slightly lower than for American males.[64/] One representative national sample including both sexes found that 11.6% of respondents reported same-sex sexual behavior within the prior five years.[65/] Turning from self-reported homosexual behavior to 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.[66/] 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.

[63/] Fay, Turner, Klassen, & Gagnon, Prevalence and Patterns of Same-Gender Sexual Contact Among Men, 243 Science, 338-348 (1989).

[64/] See Male Sexual Behavior, supra n. 19; Female Sexual Behavior, supra n. 25.

[65/] Sell, Wells, Valleron, Will, Cohen, and Umbel, Homosexual and Bisexual Behavior in the United States, the United Kingdom and France, Paper presented at the Sixth International Conference on AIDS, San Francisco, California (June 1990).

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

anal intercourse and fellatio.[68/] Heterosexuals who have been exposed to HIV can transmit the virus through vaginal intercourse, heterosexual anal intercourse, and fellatio; yet those activities are not forbidden by the statute.[69/] Accordingly, the statute is grossly underinclusive, and obviously cannot be justified as an AIDS-related public health measure.

The statute is also overinclusive. It prohibits all homosexual 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.[70/] Use of a condom during oral or anal intercourse greatly reduces or eliminates the risk of

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[68/] Recommendations for Preventing Transmission of Infection With Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace, 34 Morbidity & Mortality Weekly Rep. 681, 682 (Nov. 15, 1985); Krim, AIDS: The Challenge to Medicine and Science, in AIDS: The Emerging Ethical Dilemmas: A Hastings Center Report Special Supplement 2, 4 (1985).

[69/] See, e.g., Heterosexual Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus, 34 Morbidity & Mortality Weekly Rep. 561 (Sept. 20, 1985) [hereafter Heterosexual Transmission], reprinted in MMWR Reports, supra n. 67, at 112.

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

sexual conduct is not criminal seems to be that the prevalence of homosexuality is about the same as in jurisdictions in which it is illegal.[74/] Thus, consensual sodomy laws deter, at most, a negligible amount of overt homosexual behavior. As a result, even with respect to that subset of sexual conduct prohibited by the statute that does pose a risk of spreading AIDS, the statute has no beneficial public health effect.

2. The statute interferes with health education efforts designed to encourage safer sexual practices.

By interfering with efforts intended to advise the public how to minimize the danger of contracting the disease, the statute again may interfere with public health goals. Public health officials and private groups have been actively encouraging people to follow "safe sex" guidelines.[75/] 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."[76/]

[74/] See, Weinberg & Williams, supra n. 5.

[75/] Understanding AIDS, supra n. 70; Confronting AIDS, supra n. 70. 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).

[76/] 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).

All the evidence suggests, then, that the statute does much to harm the public health and virtually no good.

B. The Statute Does Not Further Any Mental Health Objectives, and Injures the Mental Health of Many Members of Society, with Harmful Repercussions for Individual Physical Health.

1. The statute is psychologically damaging to gay men and lesbians.

When evaluated from the standpoint of mental health goals, the statute is again counterproductive. Because homosexual behavior and orientation are not pathological, individual mental health is not served by official attempts at "deterrence." Moreover, freedom to choose whether to engage in the prohibited conduct benefits, rather than harms, individual mental health. Thus, any effort to deter individuals from engaging in the specified sexual conduct -- even assuming, contrary to fact, that criminal laws could accomplish that end -- cannot be defended as positive to individuals' mental health.

Indeed, although the statute probably deters none of the conduct it criminalizes, see supra, at 30-33, it does substantial psychological harm. In part because their behavior is punishable by criminal law,[79/] lesbians and gay

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[79/] 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.

her sexual orientation, thereby fostering higher levels of self-esteem.

A small group of gay people, however, fail to come to terms with the prejudice against their sexuality, and are more troubled and dysfunctional.[84] This clinically-observed psychological condition is known as "internalized homophobia."[85] By stigmatizing gay people, the statute fosters internalized homophobia and its self-destructive effects, and thereby does serious psychological harm.[86]

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,[87] interpersonal prejudice,[88] and

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[84] Gonsiorek & Rudolph, supra n. 31; Gonsiorek, Mental Health Issues, supra n. 81; Bell & Weinberg, supra n. 5; Hammersmith & Weinberg, supra n. 81; Weinberg & Williams, supra n. 5; Pilard, Psychotherapeutic Treatment for the Invisible Minority in Issues, supra n. 14, at 99; Martin, supra n. 59.

[85] See Gonsiorek, Psychotherapeutic Issues with Gay and Lesbian Clients, in 3 Innovations in Clinical Practice: A Sourcebook 73-76 (Keller et al., eds. 1984) [hereafter Gonsiorek, Gay and Lesbian Clients]; Malyon, supra n. 60; Gonsiorek, Mental Health Issues, supra n. 81.

[86] See Gonsiorek, Gay and Lesbian Clients, supra n. 85, at 73-76; Malyon, supra n. 60, at 56-59.

[87] 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].

[88] Herek, Beyond "Homophobia", supra n. 50, at 1, 1-21; Herek, Stigma, supra n. 48.

convey social disapproval for those behaviors to all citizens. They reinforce individual hostility against the people who practice such behaviors, namely, in this case, gay and bisexual people.[92/]

A second way in which sodomy laws affect individual attitudes is by restricting opportunities for interaction between gay and heterosexual people. Empirical research has consistently demonstrated that having a close relationship with an openly gay person is one of the most powerful influences on heterosexuals' acceptance of and tolerance for gay people.[93/] In order for such interaction to occur, the gay man or lesbian must disclose his or her sexual orientation to the heterosexual person. Such disclosure is inhibited most often by fears concerning the stigmatization that might follow such exposure.[94/] By reinforcing such stigmatization, sodomy laws inhibit disclosure by gay people of their sexual orientation. This, in turn, prevents

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[92/] Herek, The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism, 5 J. of Interpersonal Violence 316-333 (1990).

[93/] Herek, Beyond "Homophobia", supra n. 50, at 1, 1-21; Scheinder & Lewis, supra n. 50, 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).

[94/] Bell & Weinberg, supra n. 5; Levine, supra n. 87, at 151; Levine & Leonard, supra n. 87, 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).

from law enforcement officials and others who learn about the victim's sexual orientation.[97/]

In terms of both physical and mental health, the statute is counterproductive.

Conclusion

For the foregoing reasons, amici respectfully urge this Court to affirm the decisions of the courts below.

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97/ Victimization, supra n. 96, at 401, 401-413.