

IN THE COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION  
AT NASHVILLE

PENNY CAMPBELL, JOHN DOE, )  
JANE DOE, JAMES TALLENT, and )  
CHRISTOPHER SIMIEN, )

*Plaintiffs-Appellees,* )

v. )

DON SUNDQUIST, Governor of )  
the State of Tennessee, )  
CHARLES W. BURSON, Attorney )  
General of the State of )  
Tennessee, and VICTOR S. )  
JOHNSON, III, District )  
Attorney for Davidson County, )  
each in his official capacity, )

*Defendants-Appellants.* )

Court of Appeals  
No. 01A01-9507-CV-00321

Davidson County Circuit  
No. 93C-1547

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ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF  
THE DAVIDSON COUNTY CIRCUIT COURT

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

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IN THE COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION  
AT NASHVILLE

PENNY CAMPBELL, JOHN DOE,	)	
JANE DOE, JAMES TALLENT, and	)	
CHRISTOPHER SIMIEN,	)	
	)	
<i>Plaintiffs-Appellees,</i>	)	
	)	
v.	)	Court of Appeals
	)	No. 01A01-9507-CV-00321
	)	
DON SUNDQUIST, Governor of	)	Davidson County Circuit
the State of Tennessee,	)	No. 93C-1547
CHARLES W. BURSON, Attorney	)	
General of the State of	)	
Tennessee, and VICTOR S.	)	
JOHNSON, III, District	)	
Attorney for Davidson County,	)	
each in his official capacity,	)	
	)	
<i>Defendants-Appellants.</i>	)	

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

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**INTEREST OF AMICI CURIAE**

The American Psychological Association ("APA"), a nonprofit scientific and professional organization, is the major association of psychologists in the United States, with more than 130,000 members and affiliates. Among APA's major functions are promoting psychological research and promulgating the results of this research as it applies to important human concerns. A substantial number of APA's members are concerned with research and provision of therapy pertaining to human sexuality, the nature of prejudice and its impact on individuals and groups, and the dynamics of behavior change and persuasive communications to induce and maintain preventive behaviors.

The National Association of Social Workers, Inc. ("NASW"), a nonprofit professional association with over 160,000 members, is the largest association of social workers in the United States. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession and to improving the quality of life through utilization of social work knowledge and skill. The Association is deeply committed to the principle of self-determination and to the protection of individual rights and personal privacy. Amicus the Tennessee Chapter of the NASW, which has over two thousand members statewide, shares these goals and concerns.

Amici submit this brief to bring to this Court's attention the principal body of scientific knowledge pertinent to the constitutional issues this case presents.<sup>1/</sup>

#### INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Tennessee "Homosexual Acts" statute, T.C.A. § 39-13-510, a person may be charged with and

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<sup>1/</sup> This brief reviews empirical research from the social and behavioral sciences pertaining to sexuality, sexual orientation, and the social psychology of discrimination. Amici describe data from studies conducted using the scientific method, which requires that data be collected through procedures that minimize the likelihood that a particular researcher's personal biases and values will influence the observation he or she makes. Thus, for example, in a valid study, research subjects should be unaware of the study's hypotheses because such knowledge might influence their responses or behavior. In addition, scientific studies typically are subject to critical review by outside experts, usually during the peer review process preceding publication in a scholarly journal.

convicted of a crime for engaging in noncommercial and consensual nonviolent intimate conduct with another adult in the privacy of the home.<sup>2/</sup> The lower court held that privacy rights guaranteed by the Tennessee Constitution protect private sexual conduct between consenting adults from government regulation or interference.

A substantial body of empirical research and expert opinion about human sexuality and sexual orientation is relevant to the issues before the court. This knowledge demonstrates that homosexual orientation is not a voluntary choice, is highly resistant to change, and does not affect one's ability to contribute to society.

Furthermore, the conduct prohibited by the statute is not harmful to health or social functioning. To the contrary, research shows that the prohibited conduct is normal in Americans' most intimate and profound relationships. Prohibiting such conduct does not further individual mental health or the public health. The prohibition actually undermines various public health goals,

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<sup>2/</sup> T.C.A. § 39-13-510 provides:

Homosexual acts. - It is a Class C misdemeanor for any person to engage in consensual sexual penetration, as defined in § 39-13-501(7), with a person of the same gender.

T.C.A. § 39-13-501(7) provides:

"Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required . . . .

such as combatting the spread of acquired immunodeficiency syndrome (AIDS). Similarly, the statute does not contribute to, but actually harms, individual mental health.

Finally, if the court reaches the equal protection issue in this case, it should be attentive to the research relevant to the determination whether gay people constitute a "discrete and insular minority" that deserves heightened equal protection scrutiny. As amici discuss, gay people are subject to prejudicial stereotypes and share many of the characteristics of other groups that receive heightened constitutional protection.

#### ARGUMENT

##### I. THE NATURE OF SEXUAL ORIENTATION.

A brief overview of the extensive social scientific literature concerning sexual orientation may assist the Court in its consideration of this case.

##### A. The Definition Of Sexual Orientation.

Behavioral and social scientists commonly identify sexual orientation as one of several distinct but related components of human sexuality.<sup>3/</sup> Sexual orientation refers

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<sup>3/</sup> Other components of human sexuality are biological sex, gender identity (the psychological sense of being male or female), and social sex role (adherence to cultural norms for masculine or feminine behaviors and attitudes). See Money & Earhardt, Man & Woman, Boy & Girl: Differentiation and Dimorphism of Gender Identity from Conception to Maturity 1-23 (1972); Shively & De Cecco, Components of Sexual Identity, 3 J. Homosexuality 41, 41-48 (1977), reprinted in Psychological Perspectives on Lesbian and Gay Male Experiences 84-87 (L. Garnets & D. Kimmel eds., 1993)

(continued...)

to the tendency to experience erotic or romantic responses to men, women, or both, and the resulting sense of oneself.<sup>4/</sup> Sexual orientation is generally classified as heterosexual, bisexual, or homosexual, with the range sometimes viewed as a continuum.<sup>5/</sup> Sexual orientation has a number of aspects, including experiencing an ongoing attraction to persons of a particular gender; developing a private personal identity or self-concept as heterosexual, gay, lesbian, or bisexual; establishing a public identity based on sexual orientation; and identifying with a community of those who share the same sexual orientation.<sup>6/</sup>

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<sup>3/</sup> (...continued)  
[hereinafter Psychological Perspectives]; Stein, Overview, supra, at 10-11.

<sup>4/</sup> See Gonsiorek & Weinrich, The Definition and Scope of Sexual Orientation, in Homosexuality: Research Implications for Public Policy 1-12 (Gonsiorek & Weinrich eds. 1991) [hereinafter Homosexuality]; Shively & De Cecco, supra; Stein, Overview, supra, at 11; Byne & Parsons, Human Sexual Orientation: The Biologic Theories Reappraised, 50 Archives Gen. Psychiatry 228, 229 (1993).

<sup>5/</sup> See, e.g., Shively & De Cecco, supra; Byne & Parsons, supra. The following terms are used in this brief: (a) heterosexual describes sexual behavior between people of different sexes, as well as men and women whose social identity or sexual orientation is based on their primary sexual, affectional, and romantic attraction to members of the opposite sex; (b) homosexual describes sexual behavior between people of the same sex; (c) gay describes men and women whose social identity or sexual orientation is based on their primary sexual, affectional, and romantic attraction to members of their own sex; (d) lesbian describes women who are gay; (e) bisexual refers both to a pattern of behavior that includes homosexual and heterosexual attractions, as well as to persons whose social identity or sexual orientation is based upon such a pattern. See generally Gonsiorek & Weinrich, supra.

<sup>6/</sup> See Herek, Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 Law & Sexuality 133, 134 (1991).

Sexual orientation is distinct from sexual conduct.<sup>7/</sup> The fact that a person engages in same-sex sexual activity, other-sex sexual activity, both, or neither is not sufficient to determine his or her sexual orientation; indeed, "[a]ny definition of sexuality based solely on behavior is bound to be deficient and misleading."<sup>8/</sup> Thus, many individuals who identify themselves as gay or lesbian, or who are predominantly attracted to members of the same sex, nonetheless engage in other-sex sexual behavior.<sup>9/</sup> Similarly, many persons who identify themselves as heterosexual engage in same-sex sexual behavior.<sup>10/</sup> As in the case of heterosexuals, some people who identify themselves as gay or lesbian do not engage in any sexual

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<sup>7/</sup> See, e.g., Money, Sin, Sickness, or Status? Homosexual Gender Identity and Psychoneuroendocrinology, 42 Am. Psychologist 384 (1987), reprinted in Psychological Perspectives, supra, at 133-34; Stein, Afterword to Section I, 12 Rev. Psychiatry 127, 127 (1993); Byne & Parsons, supra, at 229.

<sup>8/</sup> Haldeman, The Practice and Ethics of Sexual Orientation Conversion Therapy, 62 J. Consulting & Clinical Psychol. 221, 221 (1994); see also E. Laumann, J. Gagnon, R. Michael & S. Michaels, The Social Organization of Sexuality: Sexual Practices in the United States 311-12 (1994). The Laumann study, based on a survey of a representative sample of American adults between the ages of 18 and 60 and conducted by the National Opinion Research Center at the University of Chicago, is hereinafter referred to as the "NORC Study."

<sup>9/</sup> See NORC Study, supra, at 311-12.

<sup>10/</sup> See id. at 310-12; Doll, Petersen, White, Johnson, Ward & The Blood Donor Study Group, Homosexually and Nonhomosexually Identified Men Who Have Sex with Men: A Behavioral Comparison, 29 J. Sex Res. 1, 1-14 (1992); A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male 623-30 (1948); A. Kinsey, W. Pomeroy, C. Martin & P. Gebhard, Sexual Behavior in the Human Female 474-75 (1953).

activity at all.<sup>11/</sup> Some gay male and lesbian relationships, again like their heterosexual counterparts, do not include an overtly sexual component.<sup>12/</sup>

B. The Prevalence Of Homosexual Orientation.

Few generalizable estimates exist of the prevalence of homosexual orientation in the United States.<sup>13/</sup> Among existing surveys on sexuality, estimates differ substantially depending upon (among other things) whether the researcher inquires into same-sex sexual conduct, sexual orientation measured in terms of enduring attraction, or self-reported sexual identity. The renowned study of sexuality recently released by the National Opinion Research Center at the University of Chicago is illustrative. In that survey, 4.9% of men and 4.1% of women reported having had sex with a same-sex partner since age eighteen.<sup>14/</sup> A larger proportion of

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<sup>11/</sup> See NORC Study, supra, at 312 n.29; Diamond, Homosexuality and Bisexuality in Different Populations, 22 Archives Sexual Behav. 291 (1992).

<sup>12/</sup> See Peplau & Cochran, Value Orientations in the Intimate Relationships of Gay Men, 6 J. Homosexuality 1 (1990).

<sup>13/</sup> This scarcity is due in part to practical research problems, particularly many individuals' unwillingness to acknowledge homosexual orientation even in anonymous surveys, which compound the usual difficulties of eliciting accurate survey data on sexual matters. See, e.g., NORC Study, supra, at 284 (noting that, due to social stigma attached to same-sex sexual activity and homosexual orientation, survey data on these subjects are "no doubt lower-bound estimates"); id. at 301 ("[T]he measurement of same-gender practices and attitudes is crude at best, with unknown levels of underreporting for each . . .").

<sup>14/</sup> Id. at 303; see also Fay, Turner, Klassen & Gagnon, Prevalence and Patterns of Same-Gender Sexual Contact Among Men, 243 Science 338 (1989).

respondents -- 7.7% of the men and 7.5% of the women -- reported experiencing attraction to persons of their own sex, considering the prospect of sex with a same-sex partner appealing, or both.<sup>15/</sup> When respondents were asked whether they thought of themselves as "heterosexual, homosexual, bisexual, or something else," 2.8% of the male respondents and 1.4% of the female respondents identified themselves as "homosexual" or "bisexual."<sup>16/</sup> The Chicago researchers found a significantly higher prevalence of self-reported homosexual or bisexual identity (9.2% for men, 2.6% for women) among residents of the twelve largest American cities.<sup>17/</sup>

C. The Development Of Sexual Orientation.

Current professional understanding is that the core feelings and attractions that form the basis for adult sexual orientation typically emerge by early adolescence.<sup>18/</sup> For some people, adult homosexual orientation is predictable by

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<sup>15/</sup> NORC Study, supra, at 305.

<sup>16/</sup> Id. at 300-01, 305. Other studies have found a somewhat greater prevalence of self-reported gay or lesbian identity. See Elliott, A Sharper View of Gay Consumers, N.Y. Times, June 9, 1994, at D-1, D-17 (reporting results of nationwide Yankelovich Monitor survey finding that 5.7% of respondents identified themselves as gay or lesbian); Edelman, Understanding the Gay and Lesbian Vote in '92, Pub. Persp., Mar.-Apr. 1993 (reporting exit poll research by the University of Connecticut's Roper Center, finding that between 2.4% and 3.0% of voters in 1992 elections reported that they were lesbian, gay, or bisexual); Results of Poll, S.F. Examiner, June 6, 1989, at A-19, A-20 (6% of nationwide sample self-reported as gay or lesbian in random telephone survey).

<sup>17/</sup> See NORC Study, supra, at 305-07.

<sup>18/</sup> See A. Bell, M. Weinberg & S. Hammersmith, Sexual Preference: Its Development in Men and Women (1981).

early childhood.<sup>19/</sup> Developmental precursors of adult homosexual orientation, however, have not been consistently identified for the population as a whole.<sup>20/</sup>

A number of researchers have found familial patterns and biological correlates of adult homosexual orientation, suggesting that genetic, congenital, or anatomical factors may contribute to its development. For example, recent studies have indicated a linkage between certain aspects of DNA and sexual orientation.<sup>21/</sup> Studies of identical twins have found that "heritabilities were substantial under a wide range of assumptions."<sup>22/</sup> Another

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<sup>19/</sup> See Bailey & Zucker, Childhood Sex-Typed Behavior and Sexual Orientation: A Conceptual Analysis and Quantitative Review, 31 Developmental Psychol. 43 (1995); Green, The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis, 16 J. Psychiatry & L. 537 (1988); Green, The "Sissy Boy Syndrome" and the Development of Homosexuality 370 (1987).

<sup>20/</sup> See Bell et al., supra, at 193-211.

<sup>21/</sup> See Hamer, Hu, Magnuson, Hu & Pattatuci, A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation, 261 Science 321 (1993); see also Turner, Homosexuality, Type 1: An Xq28 Phenomenon, 24 Archives Sexual Behav. 109 (1995).

<sup>22/</sup> Bailey & Pillard, A Genetic Study of Male Sexual Orientation, 48 Archives Gen. Psychiatry 1089, 1089 (1991). Bailey and Pillard's study, which has since been replicated, found that, where one monozygotic ("identical") twin was gay, the other was also gay in 52% of the cases; where one dizygotic ("fraternal") twin was gay, the other was also gay in 22% of the cases; and where one brother by adoption was gay, his adoptive brother was gay in just 11% of the cases. Id.; see also Bailey, Pillard, Neale & Agyei, Heritable Factors Influence Sexual Orientation In Women, 50 Archives Gen. Psychiatry 217 (1993); Bailey & Benishay, Familial Aggregation of Female Sexual Orientation, 150 Am. J. Psychiatry 272 (1993); Whitam, Diamond & Martin, Homosexual Orientation in Twins: A Report of 61 Pairs and Three Triplet Sets, 22 Archives Sexual Behav. 187 (1993).

study, as yet unrepeated, reported differences between heterosexual and gay men in the volume of a cell group in the anterior hypothalamus, a brain structure that is involved in sexual behavior.<sup>23/</sup> A study published earlier this year suggests that women who had been exposed to certain prenatal estrogens are more likely to be lesbian or bisexual.<sup>24/</sup> Another study has suggested an "interactionist" model, under which "genetic factors can be conceptualized as indirectly influencing the development of sexual orientation."<sup>25/</sup>

The available studies of gay experience indicate that same-sex attractions generally emerge by early or mid-adolescence.<sup>26/</sup> "By the time boys and girls reach adolescence, their sexual preference is likely to be already determined, even though they may not yet have become sexually very active."<sup>27/</sup> The scientific literature thus strongly

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<sup>23/</sup> See LeVay, A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men, 253 *Science* 1034 (1991); see also LeVay, The Sexual Brain (1993).

<sup>24/</sup> See Meyer-Bahlburg, Ehrhardt, Rosen & Gruen, Prenatal Estrogens and the Development of Homosexual Orientation, 31 *Developmental Psychol.* 12 (1995).

<sup>25/</sup> Byne & Parsons, supra, at 237; see also Blanchard, Zucker, Bradley & Hume, Birth Order and Sibling Sex Ratio in Homosexual Male Adolescents and Probably Prehomosexual Feminine Boys, 31 *Developmental Psychol.* 22 (1995).

<sup>26/</sup> See Troiden, The Formation of Homosexual Identities, 17 *J. Homosexuality* 43, 43-73 (1989) (reviewing research literature); Bell et al., supra, at 186-87.

<sup>27/</sup> Bell et al., supra, at 186.

indicates that sexual orientation is far from being a voluntary choice.<sup>28/</sup>

D. Can Sexual Orientation Be Changed?

The research and clinical experience of amici's members indicates that, once established, sexual orientation is resistant to change. Although there are some reports of therapy leading to changed sexual orientation, there is little evidence that treatment actually changes sexual attractions, as opposed to reducing or eliminating same-sex sexual behavior. Upon reviewing reports on "conversion therapy," one scholar concluded that -- entirely aside from the ethical concerns relating to any such therapy -- there is no reliable evidence that "sexual orientation is amenable to redirection or significant influence from psychological intervention."<sup>29/</sup>

E. Homosexuality Is Not A Disorder And Does Not Affect One's Ability To Contribute To Society.

The psychiatric, psychological, and social-work professions do not consider homosexual orientation to be a

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<sup>28/</sup> See Money, supra, reprinted in Psychological Perspectives, supra, at 131 ("The concept of voluntary choice is as much in error here as in its application to handedness or native language.").

<sup>29/</sup> Haldeman, Practice and Ethics, supra, at 224; see Haldeman, Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination, in Homosexuality, supra, at 149, 149-60; cf. Isay, Dynamic Psychotherapy With Gay Men: Developmental Considerations, 12 Rev. Psychiatry 85, 86 (1993) ("efforts to change core sexuality are futile").

disorder.<sup>30/</sup> More than twenty years ago, the American Psychiatric Association 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."<sup>31/</sup> In 1975, amicus American Psychological Association took the same position, and urged all mental health professionals to help dispel the stigma of mental illness that had long been associated with homosexual orientation.<sup>32/</sup> Amicus National Association of Social Workers has a similar policy.<sup>33/</sup>

The declassification of homosexual orientation as a mental disease reflects the results of extensive research, conducted over three decades, showing that homosexual orientation is not a psychological maladjustment.<sup>34/</sup> A

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<sup>30/</sup> A mental disorder is "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) at xxi (1st prtg. 1994).

<sup>31/</sup> Resolution of the American Psychiatric Association (Dec. 15, 1973), reprinted in 131 Am. J. Psychiatry 497 (1974).

<sup>32/</sup> See American Psychological Association, Minutes of the Annual Meeting of the Council of Representatives, 30 Am. Psychologist 620, 633 (1975).

<sup>33/</sup> See NASW, Policy Statement on Lesbian and Gay Issues (approved by NASW Delegate Assembly, Aug. 1993), reprinted in NASW, Social Work Speaks: NASW Policy Statements 162, 162-65 (3d ed. 1994).

<sup>34/</sup> See Gonsiorek, The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Homosexuality, supra, at (continued...)

comprehensive literature on the subject demonstrates that "theories contending that the existence of differences between homosexuals and heterosexuals implies maladjustment are irresponsible, uninformed, or both."<sup>35/</sup> It is well established that "homosexuality in and of itself bears no necessary relationship to psychological adjustment."<sup>36/</sup> The social and other circumstances in which lesbians and gay men live, including exposure to widespread and intense prejudice and discrimination, often cause acute distress; but there is no reliable evidence that homosexual orientation per se

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<sup>34/</sup> (...continued)  
115, 115-36; Reiss, Psychological Tests in Homosexuality, in Homosexual Behavior: A Modern Reappraisal 296 (Judd Marmor ed., 1980); Hart, Roback, Tittler, Weitz, Walston & McKee, Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature, 39 J. Clinical Psychiatry 604 (1978).

<sup>35/</sup> Gonsiorek, Empirical Basis, supra, in Homosexuality, supra, at 136.

<sup>36/</sup> Id.; see also Gonsiorek, Results of Psychological Testing on Homosexual Populations, 25 Am. Behavioral Sci. 385, 394 (1982); Reiss, supra, in Homosexual Behavior: A Modern Reappraisal, supra, at 296; Hart et al., supra.

impairs psychological functioning<sup>37/</sup> or workplace functioning.<sup>38/</sup>

The literature also undermines negative assumptions about gay men and lesbians as parents. One study commented: "The most striking feature of the research on lesbian mothers, gay fathers, and their children is the absence of pathological findings. The second most striking feature is how similar the groups of gay and lesbian parents and their

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<sup>37/</sup> As one research psychologist explained:

[M]any lesbians and gay men face difficult situations in their day-to-day lives as a result of the stigma attached to their sexual orientation. . . . [S]ome lesbians and gay men experience these situations as stressful and develop psychological problems as a consequence. In particular, the pressure to hide one's sexual orientation and the threat of physical assaults and other hate crimes can have many negative effects, including psychological and physical pain. However, empirical data do not indicate that lesbians and gay men, as a group, show a greater propensity to psychological dysfunction than do heterosexuals.

Herek, Myths, supra, at 145 (citing M. Freedman, Homosexuality and Psychological Functioning (1971)); Gonsiorek, Results, supra; Gonsiorek, Empirical Basis, supra, in Homosexuality, supra; Hart et al., supra; Hooker, The Adjustment of the Male Overt Homosexual, 21 J. Projective Techs. 18 (1957); Reiss, supra, in Homosexual Behavior: A Modern Reappraisal, supra).

<sup>38/</sup> See, e.g., Snyder & Nyberg, Gays and the Military: An Emerging Policy Issue, 8 J. Pol. & Mil. Soc. 71, 77-79 (1980) (summarizing research and finding that gay people and heterosexuals score about the same in job stability and job satisfaction); A. Bell & M. Weinberg, Homosexualities: A Study of Diversity Among Men and Women 141-48 (1978). Many major corporations and other organizations have implemented nondiscrimination policies as to sexual orientation. See, e.g., Swisher, Area Firms Lauded on Gay Bias Policies, Wash. Post, Oct. 11, 1994, at C2, C2 (reporting that 31 of metropolitan Washington's 50 largest publicly-held companies have such policies).

children are to the heterosexual parents and their children that were included in the studies."<sup>39/</sup> And being raised by gay parents does not appear to cause homosexual orientation.<sup>40/</sup>

## II. THE PROSCRIBED SEXUAL CONDUCT IS A NORMAL PART OF THE INTIMATE RELATIONSHIPS OF AMERICANS.

The effect of T.C.A. § 39-13-510 is to ban the primary forms of sexual expression for those persons who have a homosexual orientation. The impact of this provision upon the privacy of individuals is difficult to overestimate. Scientific, demographic, and clinical knowledge support the conclusion that the conduct proscribed by the challenged Tennessee statute is a normal part of most American adults' intimate sexual lives. Thus, the statute puts at risk of prosecution adult homosexual persons who engage in private,

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<sup>39/</sup> Green & Bozett, Lesbian Mothers and Gay Fathers, in Homosexuality, *supra*, at 197, 213; see also, e.g., Patterson, Children of Lesbian and Gay Parents, 63 *Child Dev.* 1025 (1992); Flaks, Ficher, Masterpasqua & Joseph, Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children, 31 *Developmental Psychol.* 105 (1995); Green, Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents, 135 *Am. J. Psychiatry* 692 (1978); Kirkpatrick, Smith & Roy, Lesbian Mothers and Their Children: A Comparative Study, 51 *Am. J. Orthopsychiatry* 545 (1981).

<sup>40/</sup> See Herek, Myths, *supra*, at 157-61 (summarizing research); Bozett, Gay Fathers: A Review of the Literature, 18 *J. Homosexuality* 137 (1989), reprinted in Psychological Perspectives, *supra*, at 442; Bailey, Bobrow, Wolfe & Mikach, Sexual Orientation of Adult Sons of Gay Fathers, 31 *Developmental Psychol.* 124, 124-29 (1995) (finding that, of the gay fathers' sons whose sexual orientations could be rated, more than 90% were heterosexual, and that the sons' sexual orientation was unrelated to the amount of time they had spent living with their fathers).

consensual sexual expression. Efforts to punish such a deeply rooted means of expressing individual autonomy are striking in light of the body of scientific data demonstrating that the sexual conduct in question is normal for many men and women, no matter what their sexual orientation.

A. Most Gay Men and Lesbians, Like Most Heterosexuals, Form Long-Lasting Relationships in Which Sexuality Is Important.

Empirical studies have found that between 40% and 71% of gay men<sup>41/</sup> and between 45% and 80% of lesbians<sup>42/</sup> are involved in steady relationships at a given time.<sup>43/</sup> Because convenience samples tend to underrepresent older persons (who are more likely to be coupled) these figures are probably

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<sup>41/</sup> M. Weinberg & C. Williams, Male Homosexuals: Their Problems and Adaptations (1974); Bell & Weinberg, supra; Harry, Gay Male and Lesbian Relationships, in Contemporary Families and Alternative Lifestyles: Handbook on Research & Theory 216-34 (Macklin & Rubin eds. 1983); K. Jay & A. Young, The Gay Report (1977); Peplau & Cochran, Value Orientations in the Intimate Relationships of Gay Men, 6 J. Homosexuality 1-19 (1981); J. Spada, The Spada Report (1979).

<sup>42/</sup> Bell & Weinberg, supra; Jay & Young, supra; Peplau, Cochran, Rook & Padesky, Women in Love: Attachment and Autonomy in Lesbian Relationships, 34 J. Soc. Issues 7-27 (1978); Raphael & Robinson, The Older Lesbian: Love Relationships and Friendship Patterns, 3 Alternative Lifestyles 207-30 (1980); Schafer, Sociosexual Behavior in Male and Female Homosexuals: A Study in Sex Differences, 6 Archives Sexual Behav. 355-64 (1977).

<sup>43/</sup> In one representative national survey, 60% of gay and bisexual men and 64% of lesbian and bisexual women reported that they were currently in a relationship. Hatfield, Gays Say Life Getting Better, S.F. Examiner, June 30, 1989, at A-15.

conservative.<sup>44/</sup> The longevity of gay and lesbian relationships is impossible to ascertain because no records or representative samples exist. Studies that have included older persons in the samples, however, report relationships lasting decades.<sup>45/</sup> One study found comparable rates of breakup over an 18-month period for gay, lesbian, and unmarried heterosexual couples.<sup>46/</sup>

Gay, lesbian, and heterosexual couples usually do not differ on standard indices of relationship satisfaction<sup>47/</sup> or social support<sup>48/</sup> when comparison samples

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<sup>44/</sup> Peplau, Lesbian and Gay Relationships, in Homosexuality supra, at 180.

<sup>45/</sup> See, e.g., Bryant & Demian, Relationship Characteristics of American Gay and Lesbian Couples: Findings from a National Study, 1 J. Gay & Lesbian Soc. Sci. 101 (1994); D. McWhirter & A. Mattison, The Male Couple: How Relationships Develop (1984); Raphael & Robinson, supra; Schafer, supra.

<sup>46/</sup> P. Blumstein & P. Schwartz, American Couples (1983).

<sup>47/</sup> See Cardell, Finn & Marecek, Sex-Role Identity, Sex Role Behavior, and Satisfaction in Heterosexual, Lesbian and Gay Male Couples, 5 Psychology of Women 488-94 (1981); Dailey, Adjustment of Heterosexual and Homosexual Couples in Pairing Relationships: An Exploratory Study, 15 J. Sex Research 143-57 (1979); Duffy & Rusbult, Satisfaction and Commitment in Homosexual and Heterosexual Relationships, 12 J. Homosexuality 1-24 (1986); Kurdek, The Nature and Correlates of Relationship Quality in Gay, Lesbian, and Heterosexual Cohabiting Couples: A Test of the Individual Difference, Interdependence and Discrepancy Models in B. Greene & G. Herek, eds., Lesbian and Gay Psychology: Theory, Research and Clinical Applications (1994); Kurdek & Schmitt, Relationship Quality of Partners in Heterosexual Married, Heterosexual Cohabiting, and Gay and Lesbian Relationships, 5 J. Personality & Soc. Psychology 711-720 (1986); Kurdek & Schmitt, Relationship Quality of Gay Men in Closed or Open Relationships, 12 J. Homosexuality 85-99 (1986); Kurdek & Schmitt, Partner Homogamy in Married, Heterosexual Cohabiting, Gay and Lesbian Couples, 23 J. Sex Research 212-32 (1987); Peplau, Padesky & Hamilton, Satisfaction in Lesbian Relationships, 8 J. Homosexuality 23-35 (1982).

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."<sup>49/</sup>

Social science research demonstrates that these non-marital relationships share principal elements of the marital relationship. Like married people, gay couples form deep emotional attachments and commitments.<sup>50/</sup> Married heterosexual couples, gay male couples, and lesbian couples face similar issues -- such as equity, loyalty, stability, intimacy, and love -- and deal with these issues in similar

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<sup>48/</sup> (...continued)

<sup>48/</sup> Kurdek, Perceived Social Support in Gays and Lesbians in Cohabiting Relationships, 54 J. Personality & Soc. Psychology 504-509 (1988).

<sup>49/</sup> Peplau, Lesbian and Gay Relationships, in Homosexuality supra, at 195. 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 an aspiration, is as strong among gay people as it is among heterosexuals." Blumstein & Schwartz, supra, at 45; see also Peplau, Padesky & Hamilton, supra; Peplau & Cochran, supra. Researchers found that gay male couples "form family units just as stable, dependable, and contributing to the commonwealth as any traditional nuclear family. Many participate actively in civic, church, neighborhood, and political life, most often alongside their non-gay neighbors and friends." McWhirter & Mattison, supra, at 286.

<sup>50/</sup> See Blumstein & Schwartz, supra; Peplau, Research on Homosexual Couples: An Overview, 8 J. Homosexuality 3, 5 (1982); Peplau, Padesky & Hamilton, supra, at 27-28, 34-35; Larson, Gay Male Relationships, in Issues, supra, at 233-47; Peplau & Amaro, Understanding Lesbian Relationships, in Issues, supra; Peplau & Cochran, supra.

ways.<sup>51/</sup> Gay couples, like married couples, frequently make substantial commitments to each other that endure for decades.<sup>52/</sup>

One important aspect of most enduring gay relationships is sexuality. For gay couples, just as for heterosexual 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."<sup>53/</sup> For most couples, "a good sex life is central to a good overall relationship."<sup>54/</sup> Gay and heterosexual couples are thus similar in such fundamental respects as their emotional makeup, the importance of the

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<sup>51/</sup> See generally Kurdek, Areas of Conflict for Gay, Lesbian and Heterosexual Couples: What Couples Argue About Influences Relationship Satisfaction, 56 J. Marr. & Family 923 (1994); Kurdek, Conflict Resolution Styles in Gay, Lesbian, Heterosexual Non-parent and Heterosexual Parent Couples, 56 J. Marr. & Family 705 (1994); McWhirter & Mattison, supra; Blumstein & Schwartz, supra; Peplau & Amaro, supra, at 237-39; Peplau, supra, at 4-5; Cardell, Finn & Marecek, supra.

<sup>52/</sup> See, e.g., Kurdek, Assessing Multiple Determinants of Relationship Commitment in Cohabiting Gay, Cohabiting Lesbian, Dating Heterosexual and Married Heterosexual Couples, 44 Family Relations 261 (1995); McWhirter & Mattison, supra, at 285-86; Peplau, supra, at 4; Raphael & Robinson, supra; C. Silverstein, Man to Man: Gay Couples in America (1981).

<sup>53/</sup> Blumstein & Schwartz, supra, at 193.

<sup>54/</sup> Blumstein & Schwartz, supra, at 201, 205-06; see also Kurdek, Sexuality in Homosexual and Heterosexual Couples, in K. McKinney & S. Sprecher, eds., Sexuality in Close Relationships 177-91 (1991); McWhirter & Mattison, supra, at 262.

relationship to the individual, and the role of sexuality in the relationship.

B. The Proscribed Sexual Conduct is an Important Aspect of Private Sexual Expression for Gay Men and Women.

A very substantial percentage of all adult American men and women engage in the intimate conduct that T.C.A. § 39-13-510 proscribes when engaged in by persons of the same gender. Thus, in 1994, a major study of sexual behavior in the United States found that the 76.6 percent of adult males had performed oral sex, while 78.7 percent had received oral sex.<sup>55/</sup> The corresponding figures for adult females were 67.7 percent and 73.1 percent.<sup>56/</sup> And, although less information is available on the incidence of anal intercourse between men and women, research indicates that significant numbers of heterosexuals engage in that activity as well.<sup>57/</sup>

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<sup>55/</sup> NORC Study, supra, at 98. In the same study, 26.8 percent of men and 18.8 percent of women reported that they had performed active oral sex in their most recent sexual experience. Id. Another study found that 90 percent of the heterosexual couples studied had engaged in oral sex. See Blumstein & Schwartz, supra, at 236. This national study of 12,000 people compared married couples, unmarried heterosexual couples, gay male couples, and lesbian couples currently living together. The researchers also reported that 72% of married and unmarried heterosexual couples engaged in fellatio, and 74% engaged in cunnilingus, every time they had sex, frequently, or sometimes. Id.; see also C. Tavris & S. Sadd, The Redbook Report on Female Sexuality (1977) (85% of married couples engaged in cunnilingus, and over 83% engaged in fellatio, often or occasionally); M. Hunt, Sexual Behavior in the Seventies 198-99 (1974) (90% of married couples under 25 years old engaged in oral sex).

<sup>56/</sup> NORC Study, supra, at 98.

<sup>57/</sup> The University of Chicago researchers found that 25.6 percent of men and 20.4 percent of women had engaged in anal  
(continued...)

Just as they are normal to many heterosexual relationships, oral and anal sex are among the primary forms of sexual expression for gay people. 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.<sup>58/</sup>

The prohibited sexual conduct is not considered by mental health professionals to be "pathological" -- that is, it is not detrimental to an individual's happiness or

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<sup>57/</sup> (...continued)  
intercourse. NORC Study, supra, at 99. See also International Survey of AIDS Educational Messages and Behavior Change (1988 data collected by Louis Harris & Associates for Project Hope, Center for Health Affairs, 2 Wisconsin Circle, Chevy Chase, Maryland); Hunt, supra, at 204; Reinisch, Sanders & Ziemba-Davis, The Study of Sexual Behavior in Relation to the Transmission of Human Immunodeficiency Virus: Caveats & Recommendations, 43 Am. Psychologist 922 (1988).

<sup>58/</sup> In the University of Chicago survey, 89.5 percent of the male respondents who identified themselves as either homosexual or bisexual having engaged in oral sex. NORC Study, supra, at 318. Among that same group, 75.7 percent had engaged in active anal sex at least once since puberty and 81.6 percent had engaged in receptive anal sex at least once since puberty. Id. In the NORC survey, 71.4 percent of female respondents who reported same-gender encounters during the previous five years had engaged in active oral sex; 82.1 percent of that group had engaged in receptive oral sex. Id. at 318. Another study reported that 89% of gay 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, at 236. 17% of male couples and 12% of lesbian couples reported engaging in oral sex every time they had sexual relations. Id. Another major study, limited to male couples, found that about 95% of the sample reported engaging in fellatio and about 71% reported engaging in anal intercourse at some time during the preceding year. McWhirter & Mattison, supra, at 277. See also P. Gebhard & A. Johnson, The Kinsey Data: Marginal Tabulations of the 1938-1963 Interviews Conducted by the Institute for Sex Research (1979); Bell & Weinberg, supra, at 328-30.

functioning. As discussed above, see supra part I, for over two decades homosexual orientation has itself not been considered a disorder by the mental health professions. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994), which provides the authoritative diagnostic descriptions of mental disorders used by health care practitioners and the insurance industry, does not include as pathological sexual syndromes either oral or anal sex between persons of different sexes or the same sex.<sup>59/</sup> Engaging in a variety of forms of sexual expression, including oral and anal sex, does not result in mental or physical dysfunction.<sup>60/</sup> To the contrary, T.C.A. § 39-13-510 deprives gay and lesbian couples of forms of sexual expression that often enhances the quality of their lives and give expression to their most intimate relationships.<sup>61/</sup>

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<sup>59/</sup> DSM-IV, supra, at 493-538.

<sup>60/</sup> 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, at 115-19.

<sup>61/</sup> See Blumstein & Schwartz, supra, at 239-40 (finding that, among lesbian and gay male couples, engaging in oral sex was positively correlated with relationship satisfaction). The same study found that men in heterosexual couples who engage in oral sex were likewise more satisfied both with their sex lives and with their relationships in general than those who did not. Id. at 231. Only for heterosexual women did engaging in oral sex not correlate -- positively or negatively -- with relationship satisfaction. Id. at 233-37.

III. T.C.A. § 39-13-510 IS HARMFUL TO THE HEALTH AND WELL-BEING OF THIS STATE'S CITIZENS.

The statute at issue does not promote public health. Rather, it is more likely to have detrimental effects on the health and well-being of Tennesseans.

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

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

T.C.A. § 39-13-510 cannot be justified generally as advancing the public health or specifically as combatting AIDS or any other sexually transmitted disease. To begin with the statute lacks any clear relationship to public health goals. It fails to proscribe activities associated with transmission of the AIDS virus (HIV), yet prohibits other activities not associated with such transmission. HIV is transmitted through exchange of semen or blood, as can occur during vaginal or anal intercourse and fellatio.<sup>62/</sup> Heterosexual acts among those who have been exposed to HIV can transmit the virus through such activities, yet they are not covered by the statute.<sup>63/</sup> Accordingly, the statute is

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<sup>62/</sup> See, e.g., Recommendations for Preventing Transmission of Infection With Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace, 34 Morbidity & Mortality Wkly. 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).

<sup>63/</sup> See, e.g., Heterosexual Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus, 34 Morbidity & Mortality Wkly. Rep. 561 (Sept. 20, 1985), reprinted in Public Health Service, Department of Health and (continued...)

grossly underinclusive and cannot be explained as an AIDS-related public health measure.

The statute is also overinclusive with respect to possible transmission of HIV. 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.<sup>64/</sup> Use of a condom during oral or anal intercourse greatly reduces or eliminates the risk of transmission of HIV.<sup>65/</sup> Yet the statute proscribes oral and anal sex with a condom along with behavior more likely to transmit the virus. Overly broad prevention efforts are not only likely to fail,

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<sup>63/</sup> (...continued)  
Human Services, Reports on AIDS Published in the Morbidity and Mortality Weekly Report June 1981 through September 1985, at 112 [hereinafter MMWR Reports].

<sup>64/</sup> Understanding AIDS, HHS Publication No. (CDC) HHS-88-8404; see also Institute of Medicine, Confronting AIDS: Update 1988.

<sup>65/</sup> See Confronting AIDS, supra; Detels et al., Seroconversion, Sexual Activity, and Condom Use Among 2915 HIV Seronegative Men Followed For Up to 2 Years, 2 J. Acquired Immuno Deficiency Syndromes 77-83 (1989); Heterosexual Transmission, supra, reprinted in MMWR Reports, supra note 59, at 113; Questions and Answers, 252 J. Am. Med. Ass'n 826 (1984). Condoms appear to be effective so long as they do not rupture. The results of research conducted at the University of California indicate that HIV cannot penetrate the fine membranes of condoms. See Conant et al., Letter to the Editor, Condoms Prevent Transmission of the AIDS-Associated Retrovirus, 255 J. Am. Med. Ass'n 1706 (1986).

but may decrease the success of other carefully tailored efforts to prevent the spread of the AIDS virus.<sup>66/</sup> Furthermore, it is unlikely that the fear of criminal prosecution effectively deters private, noncommercial sexual behavior between consenting adults. The experience of the many jurisdictions in which consensual sexual conduct is not criminal appears to be that the prevalence of homosexuality is about the same as in jurisdictions in which it is illegal.<sup>67/</sup>

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 AIDS, 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.<sup>68/</sup> It is still the case, as one government official has stated, that "the best chance of controlling the AIDS epidemic at present

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<sup>66/</sup> Gonsiorek & Shernoff, AIDS Prevention and Public Policy: The Experience of Gay Males, in Homosexuality, supra, at 230-43.

<sup>67/</sup> See Weinberg & Williams, supra.

<sup>68/</sup> Understanding AIDS, supra; Confronting AIDS, supra. 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. 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).

is through education and counseling to enhance behavioral change and personal responsibility."<sup>69/</sup>

Researchers report dramatic changes in sexual behavior reducing the risk of AIDS in areas where major educational efforts are underway, demonstrating the urgency of such efforts.<sup>70/</sup> A recent review suggests "that a positive self-image with regard to homosexuality is a foundation upon which gay men successfully participate in and implement HIV infection prevention strategies."<sup>71/</sup> By undermining the positive self-image that may be necessary for successful behavior change the statute hampers the effectiveness of health education programs.

The statute further interferes with AIDS public education efforts by putting health educators in the untenable position of having to facilitate unlawful behavior. Under the Tennessee law, educators who encourage "safe sex" practices as proven alternatives to risky behavior are likely to be advocating criminal behavior, and individuals who

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<sup>69/</sup> 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).

<sup>70/</sup> Becker & Joseph, AIDS and Behavioral Change to Reduce Risk: A Review, 78 Am. J. Pub. Health 394, 394-410 (1988); see also, e.g., McKusick et al., Longitudinal Predictors of Reductions in Unprotected Anal Intercourse Among Gay Men in San Francisco: The AIDS Behavioral Research Project, 80 Am. J. Pub. Health 978-83 (1990); Martin, Dean, Garcia & Hall, The Impact of AIDS on a Gay Community: Changes in Sexual Behavior, Substance Use, and Mental Health, 17 Am. J. Community Psychology 269-93 (1989).

<sup>71/</sup> Gonsiorek & Shernoff, supra, at 240.

attend educational presentations on risk reduction may fear that they are admitting to engaging in criminal activity.

B. The Statute is Harmful in Other Ways as Well.

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

When evaluated from the standpoint of mental health goals, the Tennessee statute is counterproductive. By criminalizing core aspects of their intimate sexual lives,<sup>72/</sup> the statute serves to stigmatize gay people as "deviants"<sup>73/</sup> and reinforces unfounded but widely held stereotypes about them. This process results in prejudice -- often called "homophobia" -- against lesbians and gay men.<sup>74/</sup>

The great majority of gay people successfully cope with the stresses created by societal stigma and develop a positive identity based upon their sexual orientation. Studies demonstrate that these gay people are the most psychologically well-adjusted.<sup>75/</sup> As with other stigmatized

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<sup>72/</sup> As courts and psychologists alike have long recognized, see Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954); J. Jones, Prejudice and Racism 138-40 (1972), legal restrictions imposed on a disfavored minority group can place considerable stress on members of that group.

<sup>73/</sup> The term "deviant" as used in the social sciences refers to the social reaction to behavior, not to the intrinsic characteristics of the behavior itself. H. Becker, Outsiders: Studies in the Sociology of Deviance (1963).

<sup>74/</sup> See generally Meyer, Minority Stress and Mental Health in Gay Men, 36 J. Health & Soc. Behav. 38 (1995).

<sup>75/</sup> Gonsiorek & Rudolph, supra; Gonsiorek, Mental Health Issues of Gay and Lesbian Adolescents, 9 J. Adolescent Health Care 117 (1988) [hereinafter Mental Health Issues]. Gay people who have been able openly to acknowledge their homosexuality are psychologically healthier than those who

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minorities,<sup>76/</sup> gay men and lesbians maintain self-esteem most effectively when they identify with and are integrated into the larger community of persons with similar characteristics -- here the gay community.<sup>77/</sup> Support from heterosexual friends and family members also can play an important role in a gay person's successful adjustment to the social stigma, prejudice, and discrimination against his or her sexual orientation, thereby fostering higher levels of self-esteem.

A small group of gay people, however, do not successfully cope with the prejudice against their sexuality,

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<sup>75/</sup> (...continued)  
have repressed or hidden it. Bell & Weinberg, supra; Hammersmith & Weinberg, Homosexual Identity: Commitment, Adjustment, and Significant Others, 36 Sociometry 56 (1973); Weinberg & Williams, supra; Pilard, Psychotherapeutic Treatment for the Invisible Minority in Issues, supra note 23, at 99; Martin, supra. A cross-cultural study of young gay men from Sweden, Finland, Ireland, and Australia concluded "that mental health consequences of antihomosexual environments are most negative where homosexuality is most severely stigmatized." The study also concluded "that homosexual adolescents are likely to have more problems in the more antihomosexual countries." The study also found that lack of acceptance of homosexuality was associated with higher rates of sexually transmitted diseases and unsafe sexual practices. Ross, Gay Youth in Four Cultures: A Comparative Study, 17 J. Homosexuality, 299, 313 (1989). Environments accepting of homosexuality promote both mental health and public health in gay males, and hence for the body politic.

<sup>76/</sup> See generally Crocker & Major, Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma, 96 Psychological Rev. 608-30 (1989).

<sup>77/</sup> Lesserman, DiStostefano, Perkins, and Evans, Gay Identification and Psychological Health in HIV+ and HIV- Gay Men, 24 J. Applied Soc. Psych. 2193 (1994); Gonsiorek & Rudolph, supra.

and are more troubled and dysfunctional.<sup>78/</sup> This clinically observed psychological condition is known as "internalized homophobia."<sup>79/</sup> By stigmatizing gay people, the statute under review tends to foster internalized homophobia and its self-destructive effects.

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

Lesbians and gay men in the United States are the victims of extensive discrimination,<sup>80/</sup> interpersonal prejudice,<sup>81/</sup> and violence<sup>82/</sup> because of their sexual

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<sup>78/</sup> Gonsiorek & Rudolph, supra; Gonsiorek, Mental Health Issues, supra; Bell & Weinberg, supra; Hammersmith & Weinberg, supra; Weinberg & Williams, supra; Pilard, Psychotherapeutic Treatment for the Invisible Minority in Issues, supra, at 99; Martin, supra.

<sup>79/</sup> See Gonsiorek, Psychotherapeutic Issues with Gay and Lesbian Clients, in 3 Innovations in Clinical Practice: A Sourcebook 73-76 (Keller et al. eds. 1984); Malyon, supra, at 59; Gonsiorek, Mental Health Issues, supra.

<sup>80/</sup> See, e.g., Badgett, The Wage Effects of Sexual Orientation Discrimination, Indust. & Labor Rel. Rev. (forthcoming 1995); Levine & Leonard, Discrimination Against Lesbians in the Work Force, 9 Signs 700 (1984); Levine, Employment Discrimination Against Gay Men, 9 Int'l Rev. Modern Sociology 151 (1977).

<sup>81/</sup> Herek, Assessing Heterosexuals' Attitudes, in Lesbian and Gay Psychology: Theory, Research, and Clinical Applications 216 (Green & Herek eds. 1994) (in 1991-92 nationwide survey, 59.9% of respondents agreed with the statement "I think male homosexuals are disgusting," and the same percentage agreed when the question was asked regarding lesbians); see also Herek, Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men, 10 J. Homosexuality 1, 1-21 (1984) [hereinafter Beyond "Homophobia"]; Herek, Stigma, Prejudice, and Violence Against Lesbians and Gay Men, in Homosexuality, supra, at 60-80 [hereinafter Stigma].

orientation. The stigmatization of gay people has been exacerbated by the AIDS epidemic.<sup>83/</sup> Although the specific forms of prejudice against various minority groups, the psychological processes underlying heterosexuals' prejudices against gay people are similar to those underlying racial, ethnic, and religious whites' prejudices against blacks and Christians' prejudices against Jews. Social scientists have used similar theories and methods to understand all of these forms of prejudice.<sup>84/</sup>

As with racism and anti-semitism, anti-gay attitudes are influenced by societal norms and values. Society communicates particular values and attitudes to its

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<sup>82/</sup> (...continued)

<sup>82/</sup> Herek, Stigma, supra; Herek & Berrill, Violence Against Lesbians and Gay Men: Issues for Research, Practice, and Policy, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men 289-305 (Herek & Berrill eds. 1992). A recent study of hate crimes in Los Angeles found that "gay men were not only the largest victim group in 1993, but they were the group victimized most violently." Los Angeles County Commission on Human Relations, Report to the Los Angeles County Board of Supervisors, at 17 (May 1994).

<sup>83/</sup> Herek, Stigma, supra; Herek, Illness, Stigma, and AIDS, in Psychological Aspects of Serious Illness 103-50 (Costa & VandenBos eds. 1990); Herek & Glunt, An Epidemic of Stigma: Public Reactions to AIDS, 43 Am. Psychologist 886, 886-91 (1988); Herek, Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy, 44 Am. Psychologist 948, 948-55 (1989) [hereinafter Hate Crimes].

<sup>84/</sup> See, e.g., Herek, Stigma, supra, at 60-80; Bierly, Prejudice Towards Contemporary Out Groups as a Generalized Attitude, 15 J. Applied Soc. Psychology 189-99 (1985); Herek, Religious Orientation and Prejudice: A Comparison of Racial and Sexual Attitudes, 13 Personality & Soc. Psychology Bull. 34 (1987); Herek, Can Functions be Measured?, 50 Soc. Psychology Q. 285 (1987). The commonalities between anti-gay attitudes and other forms of prejudice are also noted in standard textbooks. See S. L. Franzoi, Social Psychology 382-427 (1995); K. Gergen & M. Gergen, Social Psychology 140-41 (1981).

members in many ways, including through its laws. In addition to their specific impact on individuals, laws serve a symbolic function by codifying the values of the society. Thus, laws that penalize specific forms of sexual expression convey social disapproval for those behaviors to all citizens. They reinforce individual hostility against the people who practice such behaviors -- in this case gay people.<sup>85/</sup>

Empirical research consistently demonstrates that having personal contact with an openly gay person is one of the most powerful influences on heterosexuals' tolerance and acceptance of gay people.<sup>86/</sup> 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

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<sup>85/</sup> Herek & Berrill, supra.

<sup>86/</sup> See Herek & Capitanio, "Some of My Best Friends": Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians, 22 Personality & Soc. Psychol. Bull. (forthcoming 1995); Herek & Glunt, Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey, 30 J. Sex Research 239 (1993); Herek, Beyond "Homophobia", supra, at 6 (people holding negative attitudes toward gay people "are less likely to have had personal contact with lesbians or gay men") (summarizing research); Schneider & Lewis, The Straight Story on Homosexuality and Gay Rights, 7 Pub. Opinion 16, 16-20, 59-60 (Feb.-Mar. 1984). Only one in three Americans has a friend, relative, or acquaintance who is known by the person to be gay. Anti-gay attitudes have been found to be significantly less common among that one-third of the population. See Herek, Assessing Heterosexuals' Attitudes, in Lesbian and Gay Psychology: Theory, Research, and Clinical Applications 216, 219 (Green & Herek eds. 1994).

stigmatization that might follow.<sup>87/</sup> By reinforcing such stigmatization, sodomy laws inhibit disclosure by gay people of their sexual orientation. This prevents heterosexuals from interacting with openly gay people which, in turn, reinforces anti-gay prejudice.

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

The Hate Crimes Statistics Act,<sup>88/</sup> originally enacted in 1990, mandates the collection of data by the federal government for crimes based on race, ethnicity, religion, disability, and sexual orientation. This law, and the enactment of statutes enhancing penalties for crimes motivated by group bias,<sup>89/</sup> reflect the government's response to a nationwide upsurge in the incidence of violent crimes against minority groups.<sup>90/</sup> In order for these laws to be effective, however, victims must volunteer information about the bias-related nature of an attack to law enforcement authorities. In many cases, gay male and lesbian victims of

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<sup>87/</sup> Bell & Weinberg, supra; Levine, supra, at 151; Levine & Leonard, supra, at 700; Schneider, Coming Out at Work: Bridging the Private/Public Gap, 13 Work & Occupations 463, 463-487 (1986); Wells & Kline, Self-Disclosure of Homosexual Orientation, 127 J. Soc. Psychology 191, 191-97 (1987).

<sup>88/</sup> Pub. L. No. 101-275, codified at 28 U.S.C. § 534 (note), as amended, Pub. L. No. 103-322 (Sept. 13, 1994).

<sup>89/</sup> See, e.g., Pub. L. No. 103-322, codified at 28 U.S.C. § 994 (note) (Sept. 13, 1994) (mandating enhanced sentences for federal hate crimes, including crimes based on victim's actual or perceived sexual orientation).

<sup>90/</sup> Herek & Berrill, supra; Herek, Hate Crimes, supra, at 948-55.

anti-gay assaults are unlikely to report the crime; surveys reveal that the vast majority of gay people who are victimized do not inform the police.<sup>21/</sup> In states with sodomy laws, such self-identification is likely to be perceived by victims as subjecting themselves to the risk of "secondary victimization" from law enforcement officials and others who learn about the victim's sexual orientation.<sup>22/</sup> In terms of both physical and mental health, the statute under review is counterproductive.

**IV. GAY PEOPLE SHARE MANY OF THE CHARACTERISTICS OF OTHER GROUPS ACCORDED HEIGHTENED PROTECTION UNDER EQUAL PROTECTION DOCTRINE.**

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Plaintiffs also have argued that T.C.A. § 39-13-510 violates the equal protection guarantee of the Tennessee Constitution. In determining what level of scrutiny to apply, the court may consider whether gay people constitute a "discrete and insular minority." As discussed previously, research shows that homosexual orientation is not a voluntary choice, is highly resistant to change, and bears no relation to one's ability to perform in or contribute to society. See supra part I. In addition, gay people have been subjected to prejudice and inaccurate stereotypes. For these reasons,

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<sup>21/</sup> Herek & Berrill, Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy, 5 J. Interpersonal Violence 401, 401-13 (1990); Herek, Hate Crimes, supra, at 948-55.

<sup>22/</sup> Herek & Berrill, supra, at 401-13.

this group has much in common with other minorities that receive heightened constitutional protection.

Sexual orientation (whether heterosexual, homosexual, or bisexual) not only is a fundamental facet of one's experience and sense of self, but has long had immense social consequences. In a society in which the vast majority of people are not gay, and often intensely disapprove of those who are, homosexual orientation that is or might be readily known to other people has enormous social implications. Homosexual orientation often becomes the predominant social identifier of gay people.<sup>93/</sup> Particularly in places in which openly gay people are few, a gay man or lesbian is likely to be thought of distinctly in terms of his or her sexual orientation, even in settings in which sexual orientation is not demonstrably relevant.<sup>94/</sup> As a result, "the experience of being gay, lesbian, [or] bisexual in American society today continues, to a large extent, to be

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<sup>93/</sup> This has been a chief premise of the Department of Defense's rationale for excluding openly gay people from military service, namely, that heterosexual soldiers would be so disturbed by the presence of openly gay people that their presence would pose a threat to military order and morale. See, e.g., Watkins v. United States Army, 875 F.2d 699, 728 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment) (Army argued that exclusion is justified because it avoids "'tensions between known homosexuals and other members . . . who despise/detest homosexuality'" (quoting the Army's brief)), cert. denied, 498 U.S. 957 (1990).

<sup>94/</sup> See, e.g., Herek, Stigma, Prejudice, and Violence Against Lesbians and Gay Men, in Homosexuality, *supra*, at 60, 66-72 (describing process of anti-gay stereotyping); *id.* at 61 (discussing 1987 Roper poll in which 25% of respondents stated they would object strongly to working around gay people, and another 27% stated they would prefer not to do so).

defined by the requirement to cope with the negative effects of prejudice against homosexuality."<sup>95/</sup>

A. The History And Prevalence Of Prejudice And Discrimination Against Gay People.

Gay people historically have been subject to intense prejudice and discrimination, both public and private. Extreme prejudice and even persecution were common in Europe from at least the Middle Ages.<sup>96/</sup> In the United States, social prejudice and discrimination against lesbians and gay men have been widespread since colonial times.<sup>97/</sup> Indeed, "lesbians and gay males have been the object of some of the deepest prejudice and hatred in American society."<sup>98/</sup>

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<sup>95/</sup> Stein, Afterword, supra, at 127.

<sup>96/</sup> See R. Posner, Sex and Reason 346 (1992) ("[H]omosexuals -- who, like Jews, are despised more for what they are than for what they do -- were frequently bracketed [with Jews] in medieval persecutions."); J. Boswell, Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century (1980). Thousands of gay people were exterminated along with Jews and Gypsies in Nazi concentration camps. See, e.g., H. Heger, The Men with the Pink Triangle (David Fernbach trans., 1980).

<sup>97/</sup> See G. Chauncey, Jr., Gay New York: Gender, Urban Culture and the Making of the Gay Male World, 1890-1940 (1994); L. Faderman, Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America (1991); A. Berube, Coming Out Under Fire: The History of Gay Men and Women in World War Two (1990); J. D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970 (1983); J. Katz, Gay American History: Lesbians and Gay Men in the U.S.A. (1976).

<sup>98/</sup> G. Melton, Public Policy and Private Prejudice, 44 Am. Psychologist 933, 934 (1989); see Posner, supra, at 291 ("In the United States . . . , not only is there a strong residue of hostility to homosexuals, but they labor under a series of legal disabilities.").

In the early and mid-twentieth century, the mental health professions' adherence to the "illness model" of homosexual orientation -- developed at least partly in an effort to displace the depravity/immorality model<sup>99/</sup> -- probably encouraged the development of bizarre, inhumane, and sometimes brutal "treatments" and "aversion therapies" for homosexual orientation.<sup>100/</sup> In the 1940s and 1950s, gay people were often viewed and sometimes targeted as "sexual psychopaths."<sup>101/</sup> And, until 1990, gay people were frequently excluded from the United States under an immigration statute denying entry to persons "afflicted with psychopathic personality, or sexual deviation."<sup>102/</sup>

Intense prejudice against lesbians and gay men remains prevalent in contemporary American society. Public opinion studies of attitudes towards lesbians and gay men indicate that, among large segments of the public, gay people

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<sup>99/</sup> See Berube, supra, at 136-37; Gonsiorek, Empirical Basis, supra, in Homosexuality, supra, at 116 ("homosexuality first evolved into a medical 'illness' in the late 19th or early 20th century depending on the country"); Stein, Overview, supra, at 14-15.

<sup>100/</sup> See Haldeman, Sexual Orientation Conversion Therapy, supra, in Homosexuality, supra, at 152; Silverstein, Psychological and Medical Treatments of Homosexuality, in Homosexuality, supra, at 106-11.

<sup>101/</sup> See Berube, supra, at 258-59; cf. S. Brakel, J. Parry & B. Weiner, The Mentally Disabled and the Law 739-43 (3d ed. 1985).

<sup>102/</sup> 8 U.S.C. § 1182(a)(4) (1988); see Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 122 (1967).

are the subject of strong antipathy.<sup>103/</sup> Verbal abuse is common.<sup>104/</sup> Discrimination against gay people in such critical areas as employment and housing remains lawful in most jurisdictions, and appears to be widespread.<sup>105/</sup> High

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<sup>103/</sup> In a representative nationwide survey of Americans conducted in late 1991 and early 1992, 59.9% of the respondents agreed with the statement, "I think lesbians are disgusting," and roughly the same percentage agreed when the question was asked regarding gay males. See Herek & Capitanio, "Some of My Best Friends": Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians, 22 Personality & Soc. Psychol. Bull. (forthcoming 1995); Kite, When Perceptions Meet Reality: Individual Differences in Reactions to Lesbians and Gay Men, in Lesbian and Gay Psychology: Theory, Research, and Clinical Applications 25-53 (Beverly Greene & Gregory M. Herek eds., 1994) [hereinafter Lesbian and Gay Psychology].

<sup>104/</sup> See Berrill, Anti-Gay Violence and Victimization in the United States: An Overview, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men 19, 20 (Gregory M. Herek & Kevin T. Berrill eds., 1992) [hereinafter Hate Crimes] (across 24 separate studies, an average of 80% of lesbian, gay, and bisexual respondents reported having been verbally harassed about their sexual orientation).

<sup>105/</sup> A survey published by the National Gay and Lesbian Task Force Policy Institute of 20 employment discrimination studies conducted between 1980 and 1991 found that between 16% and 44% of lesbians and gay men had experienced employment discrimination. The survey's authors noted that discrimination also was common in such other areas as housing, public accommodations, and health care, and that fear of discrimination forces many gay men and lesbians to remain "closeted." M. Badgett, C. Donnelly & J. Kibbe, Pervasive Patterns of Discrimination against Lesbians and Gay Men: Evidence from Surveys Across the United States (1992) (on file with the American Psychological Association); see also Levine, Employment Discrimination Against Gay Men, 9 Int'l Rev. Mod. Soc. 151 (1979); Levine & Leonard, Discrimination Against Lesbians in the Work Force, 9 Signs: J. Women Culture & Soc. 700 (1984).

rates of specifically anti-gay violence or "hate crimes" have been consistently documented.<sup>106/</sup>

B. The Nature Of Anti-Gay Prejudice.

Most heterosexuals' negative attitudes toward lesbians and gay men are not based on personal experience with gay people. Only one in three Americans has a friend, relative, or acquaintance who is known by them to be lesbian or gay. Anti-gay attitudes have been found to be significantly less common among that one-third of the population.<sup>107/</sup> Several studies indicate that correction of inaccurate assumptions about lesbians and gay men often leads to a reduction in antipathy.<sup>108/</sup>

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<sup>106/</sup> See, e.g., Berrill, supra, in Hate Crimes, supra, at 20 (across 24 separate studies, an average of 44% of lesbian, gay, and bisexual respondents reported having been threatened with violence because of their sexual orientation); Herek, Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy, 44 Am. Psychologist 948, 949 (1989) (because of stigma, gay people under-report bias crimes motivated by anti-gay prejudice). See generally G. Comstock, Violence Against Lesbians and Gay Men (1991); Special Issue, Violence Against Lesbians and Gay Men: Issues for Research, Practice, and Policy, 5 J. Interpersonal Violence 267-543 (1990).

<sup>107/</sup> See Herek & Capitanio, "Some of My Best Friends", supra; Herek & Capitanio, Black Heterosexuals' Attitudes Toward Lesbians and Gay Men in the United States, 32 J. Sex Res. 95 (1995); Herek & Glunt, Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey, 30 J. Sex Res. 239 (1993); Herek, Beyond "Homophobia", supra, at 1, 6 (summarizing research). Dislike toward gay and lesbian people tends to be higher among people who believe that homosexual orientation is learned or chosen. See Schneider & Lewis, The Straight Story on Homosexuality and Gay Rights, Pub. Opinion, Feb.-Mar. 1984, at 16-20, 59-60; Agüero, Bloch & Byrne, The Relationships Among Sexual Beliefs, Attitudes, Experience, and Homophobia, 10 J. Homosexuality 95, 102 (1984).

<sup>108/</sup> See Herek, Beyond "Homophobia", supra, at 6.

Likewise, research has shown that many people base their opinions about gay people on an entrenched set of negative assumptions. Both gay men and lesbians are often associated with 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."<sup>109/</sup>

These images represent crude stereotypes. For example, although gay men have been stigmatized with the allegation that they are disproportionately responsible for child sexual abuse, there is no evidence of any positive correlation between homosexual orientation and child molestation.<sup>110/</sup> Similarly, despite stereotypes to the contrary, gay men and lesbians often form committed relationships that share principal elements of heterosexual

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<sup>109/</sup> Herek, Beyond "Homophobia", *supra*, at 9; see also Kite, *supra*, in Lesbian and Gay Psychology, *supra*, at 25-53; Hetrick & Martin, Developmental Issues and Their Resolution for Gay and Lesbian Adolescents, 14 *J. Homosexuality* 25, 27 (1987) (describing variety of social ills falsely attributed to gay men and lesbians by publicists, including high crime rates, low SAT scores, and anorexia).

<sup>110/</sup> See Freund, Watson & Rienzo, Heterosexuality, Homosexuality, and Erotic Age Preference, 26 *J. Sex. Res.* 107, 115 (1989); Groth & Birnbaum, Adult Sexual Orientation and Attraction to Underage Persons, 7 *Archives Sexual Behav.* 175, 180-81 (1978); Jenny, Roesler & Poyer, Are Children At Risk for Sexual Abuse by Homosexuals?, 94 *Pediatrics* 41 (1994).

marital relationships,<sup>111/</sup> that are based on deep emotional attachments,<sup>112/</sup> and that endure for decades.<sup>113/</sup>

C. The Effects Of Prejudice and Discrimination.

When prejudice against lesbians and gay men takes the form of violence or discrimination, it can have such tangible consequences as physical injury or loss of employment. See supra, notes 105-106. The harmful effects of prejudice, discrimination, and violence, however, are not limited to such bodily or pecuniary consequences. Amici's members have long experience with the adverse psychological effects suffered by people who have an immediate and personal confrontation with anti-gay prejudice -- whether in the form

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<sup>111/</sup> See Kurdek, The Nature and Correlates of Relationship Quality in Gay, Lesbian and Heterosexual Cohabiting Couples: A Test of the Individual Difference, Interdependence, and Discrepancy Models, in Lesbian and Gay Psychology, supra, at 133-55; McWhirter & Mattison, The Male Couple: How Relationships Develop (1984); Peplau & Amaro, Understanding Lesbian Relationships, in Homosexuality: Social, Psychological, and Biological Issues 237-39 (W. Paul, J. Weinrich, J. Gonsiorek & M. Hotvedt eds., 1982) [hereinafter Issues]. Gay men and lesbians do not appear to differ from heterosexuals in their frequency of sexual intercourse. Researchers at the University of Chicago found "practically no difference between the rates of sex per month" for heterosexuals and for homosexuals and bisexuals: "The mean rates for [gay] men . . . are consistently, but not significantly, lower than the rates for [heterosexual] men. The rates for women hardly differ at all between the two groups." NORC Study, supra, at 317.

<sup>112/</sup> See Peplau, Lesbian and Gay Relationships, in Homosexuality, supra, at 179-83; Peplau, Research on Homosexual Couples: An Overview, 8 J. Homosexuality 3, 5 (1982); Larson, Gay Male Relationships, in Issues, supra, at 233-47.

<sup>113/</sup> See, e.g., McWhirter & Mattison, supra, at 285-86; Peplau, Research on Homosexual Couples, supra, at 5; C. Silverstein, Man to Man: Gay Couples in America (1981).

of verbal harassment from strangers, derision from family or coworkers, physical threats, or violent attack. The effects can include depression, a persistent sense of vulnerability, and efforts to rationalize the experience by viewing one's victimization as just punishment.<sup>114/</sup> Like members of other groups that are subject to social prejudice, gay people also frequently come to internalize society's negative stereotypes. Psychologists, psychiatrists, and social workers are particularly concerned about the harms that internalized social stigma can produce in gay adolescents who are newly becoming aware of their sexual orientation.<sup>115/</sup>

The stigma and ill treatment that attach merely to acknowledging homosexual orientation lead many gay people to remain "in the closet."<sup>116/</sup> Concealing one's sexual

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<sup>114/</sup> See Garnets, Herek & Levy, Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences, 5 J. Interpersonal Violence 366 (1990), reprinted in Psychological Perspectives, supra, at 583; Herek, Stigma, Prejudice, and Violence, supra, in Homosexuality, supra, at 73-75; Meyer, Minority Stress and Mental Health in Gay Men, 36 J. Health & Soc. Behav. 38 (1995); cf. M. Bard & D. Sangrey, The Crime Victim's Book (1986).

<sup>115/</sup> See, e.g., Remafedi, Farrow & Deisher, Risk Factors for Attempted Suicide in Gay and Bisexual Youth, 87 Pediatrics 869 (1991); Gonsiorek, Mental Health Issues of Gay and Lesbian Adolescents, 9 J. Adolescent Health Care 114 (1988); Hershberger & D'Augelli, The Impact of Victimization on the Mental Health and Suicidality of Lesbian, Gay, and Bisexual Youths, 31 Developmental Psychol. 65 (1995); Rotheram-Borus, Rosario, Rossem, Reid & Gillis, Prevalence, Course, and Predictors of Multiple Problem Behaviors Among Gay and Bisexual Male Adolescents, 31 Developmental Psychol. 75 (1995); see also Gay and Lesbian Youth (Gilbert Herdt ed., 1989); G. Herdt & A. Boxer, Children of Horizons: How Gay and Lesbian Teens Are Leading a New Way Out of the Closet (1993).

<sup>116/</sup> See Bell & Weinberg, supra, at 62-68.

orientation, or attempting to avoid association with other gay people, commonly tends to compound psychological distress. As explained in one recent review of the research literature,

[p]sychological adjustment appears to be highest among men and women who are committed to their gay identity and do not attempt to hide their homosexuality from others. As with other stigmatized minorities, gay men and lesbians probably maintain self-esteem most effectively when they identify with and are integrated into the larger gay community. Conversely, people with a homosexual orientation who have not yet come out, who feel compelled to suppress their homoerotic urges, who wish that they could become heterosexual, or who are isolated from the gay community may experience significant psychological distress, including impairment of self-esteem. Chronically hiding one's sexual orientation can create a painful discrepancy between public and private identities, feelings of inauthenticity, and social isolation.<sup>117/</sup>

The "daily need to hide an important aspect of . . . personal and social identity" operates as a "corrosive denial[] of self-respect and self-worth."<sup>118/</sup> For some, social stigma turns into feelings of personal inferiority or self-

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<sup>117/</sup> Garnets *et al.*, supra, reprinted in Psychological Perspectives, supra, at 582-83 (citations omitted); see also id. at 593 n.2 (noting danger of blackmail); United States v. Lallemand, 989 F.2d 936, 940 (7th Cir. 1993) (Posner, J.) (same).

<sup>118/</sup> Hetrick & Martin, supra, at 28; see also Martin, Learning to Hide: The Socialization of the Gay Adolescent, 10 Adolescent Psychiatry: Developmental & Clinical Studies 52, 58 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky, eds., 1982); Malyon, The Homosexual Adolescent: Developmental Issues and Social Bias, 60 J. Child Welfare 321, 327 (1981).

hatred.<sup>119/</sup> Measures such as T.C.A. § 39-13-510 affirmatively foster such stigma and exacerbate the resulting harms to gay people.

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<sup>119/</sup> See, e.g., Gonsiorek, Mental Health Issues, *supra*; J. Gonsiorek & J. Rudolph, Homosexual Identity: Coming Out and Other Developmental Events, in Homosexuality, *supra*, at 161, 166.

CONCLUSION

For the foregoing reasons, amici urge this Court to affirm the decision of the court below.

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