STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

STATE OF RHODE ISLAND	)	
	)	
vs.	)	No. 94-342 M.P.
	)	
JORGE LOPES	)	

On Writ of Certiorari From A Judgment Entered in
Providence County Superior Court

BRIEF OF AMICI CURIAE GAY & LESBIAN ADVOCATES & DEFENDERS, RHODE ISLAND ALLIANCE FOR LESBIAN AND GAY CIVIL RIGHTS, [redacted], OCEAN STATE ACTION, DIRECT ACTION FOR RIGHTS AND EQUALITY, RHODE ISLAND PROJECT AIDS, PARENTS AND FRIENDS OF LESBIANS AND GAYS, AND STRAIGHT BUT NOT NARROW COALITION, IN SUPPORT OF RESPONDENT LOPES

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INTEREST OF THE AMICI CURIAE

Gay and Lesbian Advocates and Defenders (GLAD), incorporated in Massachusetts in 1978 as Park Square Advocates, is a non-profit, public interest law firm which represents gay men, lesbians and persons with HIV infection in impact litigation throughout New England. GLAD's AIDS Law Project conducts both education and litigation on HIV and AIDS related issues. GLAD has filed dozens of amicus curiae briefs in connection with the constitutional rights of lesbians, gay men and persons with HIV/AIDS in state and federal courts, and is thus well qualified to file an amicus brief with this Court.

Since its founding in 1986, **Direct Action for Rights and Equality** (DARE) has served as a vehicle for low income families in communities of color to work together to gain control over the conditions that affect everyday life. A non-profit organization with over 700 members, DARE has an interest in the dignity and protection of individuals, and freedom from undue police harassment.

The Rhode Island Chapter of the **National Association of Social Workers** (NASW) is a 1,100 member organization of social workers. The Association maintains credentials for its members and focuses on human services, public policy, general welfare, and mental health issues. NASW believes that the adult consensual sexual activity prohibited by this statute is not harmful to health or social functioning, but is an important part of sexuality for most people. NASW submits this brief in keeping with its position that

the statute undermines public health goals by criminalizing consensual sexual conduct between adults.

Since 1986, **Rhode Island Project AIDS** has been an AIDS service organization that provides client services, education and advocacy on HIV/AIDS related issues. Project AIDS believes strongly that by criminalizing consensual sexual activity this statute interferes with health education efforts designed to encourage safer sexual practices. Project AIDS also believes the statute does not deter behavior through which HIV or other sexually transmitted diseases may be spread.

Parents and Friends of Lesbians and Gays (PFLAG) of Rhode Island is an organization that promotes the health and well-being of families and friends of gay, lesbian and bisexual persons by providing support, education and advocacy. PFLAG respects human diversity and the rights of individuals to form intimate relationships. PFLAG submits this brief in support of its position that the State should not prescribe morality and impose criminal sanctions based on consensual sexual activity.

Ocean State Action is a coalition of seventeen member organizations such as National Education Association and civil rights organizations. Ocean State Action believes that the State may not constitutionally intrude on the private decisions of sexual intimacy made by consenting adults regardless of marital status.

The Straight But Not Narrow Coalition is a Rhode Island Non-profit corporation dedicated to demonstrating heterosexual support for non-discrimination against any Rhode Island citizen based on

sexual orientation. Our organization believes that as long as the "Abominable and Detestable Crimes Against Nature" statute exists in Rhode Island, it has the potential of being used to discriminate against same-sex couples in private and intimate consensual relations.

The Rhode Island Alliance for Lesbian and Gay Civil Rights is an educational and advocacy organization with 1,000 members. The Alliance believes that the "Abominable and Detestable Crimes Against Nature" statute is used to discriminate and is used as the basis for denying lesbian and gay civil rights. The Alliance believes that the State must have respect for the dignity of individual choice and the rights of all adults, regardless of marital status and sexual orientation, to make private decisions regarding consensual intimate relations.

Facts and Travel

Amici accept the description of the facts provided by Defendant Lopes.

Summary of Argument

The Legislature's repeal of the fornication statute in 1989 struck at the heart of any justification for prohibiting non-marital consensual, private sexual relations between adults. In light of that repeal, application of the Abominable and Detestable Crime Against Nature, G.L. sec. 11-10-1 ("the statute", or "sec. 11-10-1") to the private sexual behavior of unmarried persons violates settled principles of statutory construction.

In addition, the same repeal renders the statute violative of

equal protection to the extent the State tries to enforce it against unmarried persons. The statute fails even the minimal scrutiny required under rational basis review, and cannot be justified as a pregnancy or disease prevention measure, or as an articulation of morality. Any attempt to construe the statute to apply to same-sex sexual conduct only would also violate equal protection by requiring discrimination without any legitimate governmental interest.

Finally, Justice Wiley's opinion is not unique, but rather falls within the mainstream of judicial opinions invalidating similar statutes on federal or state constitutional grounds.

Argument

I. APPLICATION OF THE STATUTE FORBIDDING "THE ABOMINABLE AND DETESTABLE CRIME AGAINST NATURE" TO PRIVATE CONSENSUAL BEHAVIOR BETWEEN UNMARRIED ADULTS IS FORBIDDEN BY SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION AND BY STATE AND FEDERAL CONSTITUTIONAL PRINCIPLES OF EQUAL PROTECTION.

In the present case, the trial justice held that application of R.I. Gen. Laws § 11-10-1 ("the abominable and detestable crime against nature") to the defendant's conduct violated the Equal Protection Clauses of the Federal and State Constitutions. The trial justice reasoned that married couples and unmarried persons are "similarly situated" insofar as application of § 11-10-1 is concerned and that the statute, as he construed it, applied to unmarried persons but not married couples. Slip Opinion at 9-10. This disparate treatment, the trial justice concluded, violated equal protection principles. Id. Amici do not disagree with the persuasive analysis of the trial justice. Amici, however, submit

that there is a more direct route leading to the same ultimate conclusion, and that this Court should take that route. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1984) (holding that courts should "never . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied"); cf. Brough v. Foley, 525 A.2d 919, 922 n.1 (R.I. 1985) (affirming court below on grounds other than those relied on by trial justice).

A. After Repeal of the Criminal Statute Against Fornication, Construction of § 11-10-1 to Reach Consensual Private Behavior Between Unmarried Adults Would Violate Settled Principles of Statutory Construction.

It is an elementary principle of statutory construction that "[s]tatutes are not to be so construed as to reach meaningless or absurd results." State v. Milne, 95 R.I. 315, 321, 187 A.2d 136 (1962). In Milne, this Court construed §11-10-1 to make unlawful all forms of "unnatural copulation whether or not such would have constituted sodomy at common law." Id. at 320-21 (citation omitted). In reaching that conclusion, this Court was guided by the then obvious intent of the Legislature, which was to proscribe all forms of extramarital sex. Id. at 321. Subsequent events have made it clear that the Legislature has abandoned that intention. In 1989, the Legislature repealed the criminal statute against fornication. See P.L. 1989, ch.214. §§ 1-2. It is now legal in Rhode Island for unmarried persons to engage in private consensual vaginal intercourse. To continue to construe § 11-10-1 to forbid the same persons who are permitted to engage in vaginal intercourse

from engaging in other forms of private consensual intercourse would be "meaningless or absurd."[1] Milne, 95 R.I. at 321.

There are three conceivable reasons to ban all sexual intercourse between unmarried persons. Such activity (1) can lead to illegitimate children; (2) can spread disease; and (3) is arguably immoral. None of these reasons supports a ban on some but not all forms of private consensual intercourse between unmarried persons. Every known sexually transmitted disease can be spread through vaginal intercourse, and the State has not argued otherwise (see discussion at section I B (4), infra). Non-procreative forms of intercourse do not create a danger of illegitimate offspring. There is a tradition in our society of regarding extramarital sex as immoral, but that tradition has never recognized a distinction between extramarital vaginal intercourse and other kinds of extramarital copulation. Indeed, one cannot imagine a way to articulate such a moral distinction. See Commonwealth v. Wasson, 842 S.W.2d 487, 499 (Ky. 1992)(noting all sex outside of marriage violates notions of traditional morality). In light of the

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[1] Although not strictly applicable to the present case, the doctrine of **in pari materia** governing construction of statutory provisions relating to the same or similar subjects also supports the Defendant's position. Stated differently, the repeal of the fornication statute cannot be harmonized with the continued vitality of sec. 11-10-1 because non-marital sexual relations are either permissible or not. Blanchette v. Stone, 591 A.2d 785, 786 (R.I. 1991)(requiring harmonization of differing statutes whenever possible). Moreover, legislative intent is determined by the more recent of the enactments, or in this case the repeal of the fornication statute. Surber v. Pearce, 97 R.I. 40, 195 A.2d 541, 543 (1963). Finally, equal protection principles discussed below at section I. B also demonstrate that the repeal of the fornication statute is irreconcilably repugnant to the ongoing force of sec. 11-10-1. Blanchette, 591 A.2d at 787.

legislative repudiation of the rationale articulated in Milne, it would lead to an absurd result to continue to construe § 11-10-1 to reach the forms of extramarital intercourse not proscribed by the former law against fornication.

This Court can best further the intent of the Legislature as expressed in the 1989 repeal by construing § 11-10-1 not to reach private consensual adult intercourse. See State v. Haggerty, 89 R.I. 158, 161, 151 A.2d 158 (1959) (statutes should be construed to avoid inconsistency); cf. Milne, 95 R.I. at 321 (Legislature is presumed to know effect of its enactments). In addition, such a construction of § 11-10-1 would avoid the equal protection problems that will be discussed below. See Town of Barrington v. Blake, 532 A. 2d 955, appeal after remand, 568 A. 2d 1015 (1987)(Court will not decide constitutional question when there is another state ground upon which matter can be decided); McElroy v. Hawksley, 97 R.I. 100, 196 A.2d 172, 176 (1963)(same); cf. Commonwealth v. Balthazar, 366 Mass. 298, 301-02, 318 N.E.2d 478 (1974) (departing from previous judicial construction of statute forbidding unnatural acts and construing statute not to apply to private, consensual, adult behavior, so as to avoid constitutional question).

Thus, as a matter of sound statutory construction,[2] this Court should construe § 11-10-1 to be inapplicable to the conduct of the defendant in this case.

B. Section 11-10-1 Fails to Pass Muster Under the

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[2] While the Legislature did not expressly repeal sec. 11-10-1 in 1989, the repeal of the fornication law struck at the heart of any justification for sec. 11-10-1.

Equal Protection Clause's Minimum Requirement of "Rationality."

1. The statute cannot be applied to married persons because of the well-established right to marital privacy.

Despite all that has been written about the contours and soundness of the Supreme Court rulings in the privacy realm, no court has expressed doubt that the Constitution protects the right of marital privacy. Because of both the intensely private nature of the marital relationship and the central importance of the institution of marriage to our other social structures, marital privacy has been the paradigm against which all other claims to privacy have been measured. It is a "widely accepted conclusion" that the right of marital privacy defeats any interest a state may have in regulating sexual intimacy in a marriage.[3] That was indeed the judgment of the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965). The Court held that the specter of law officers invading the marital bedroom was repugnant to the intimacy that defines marriage. No later case has questioned this central holding of Griswold. It has become a fixed feature of our constitutional landscape. To the extent that the State purports by enactment of Gen. Laws sec. 11-10-1 to ban anal and oral sex between married persons, it is powerless to do so. Indeed, the

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[3] Janet E. Halley, Reasoning about Sodomy: Act and Identity in and After Bowers v. Hardwick, 79 Va. L. Rev. 1721, 1779 (1993) (Appendix C); see e.g. Lovisi v. Slayton, 539 F.2d 349, 351 (4th Cir. 1976) (assuming that constitutional right to privacy protects marital fellatio); Buchanan v. Bachelor, 308 F.Supp. 729, 723-33, 735 (N.D. Tex. 1970) (finding a Texas statute overbroad because it applied to married couples), vacated on other grounds sub nom. Wade v. Buchanan, 401 U.S. 989 (1971).

State has not claimed otherwise before this Court. Hence, the law must stand, if at all, as a ban on oral and anal sex between unmarried persons only.

2. The Equal Protection issues presented here have never been decided by the United States or Rhode Island Supreme Courts.

It should be emphasized at the outset that (1) the question of whether the application of § 11-10-1 violates equal protection has never been decided by this Court and (2) the United States Supreme Court's decision in Bowers v. Hardwick, 478 U.S. 186 (1986) foreclosed neither state or federal equal protection challenges, nor state constitutional privacy challenges to the statute.

In State v. Santos, 122 R.I. 799, 413 A.2d 58 (1980), this Court held that the right of privacy under the state and federal constitutions does not extend to anal and oral sex between unmarried adults. Neither in Santos nor in any other case has this Court had occasion to examine whether § 11-10-1 violates the Equal Protection Clause of the federal and state constitutions. As the trial justice held below in granting defendant's motion in arrest of judgment, analysis of the statute under equal protection principles presents very different questions from those addressed by this Court in Santos. This is particularly so, in light of the Legislature's action, subsequent to Santos, in repealing the fornication statute.

In the same vein, Bowers v. Hardwick, 478 U.S. 186 (1986), rejecting a claim that gay persons have a fundamental right under the Due Process Clause of the United States Constitution to engage

in acts of consensual sodomy, is irrelevant to the equal protection analysis at issue here. 478 U.S. at 196, n.8 ("Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.").

Finally, as a matter of state constitutional jurisprudence, this Court may hold the statute violative of the Rhode Island Constitution as a matter of equal protection or privacy. The majority opinion in Hardwick clearly indicated its opinion did not affect "state court decisions invalidating those laws on state constitutional grounds." Hardwick, 478 U.S. at 190. States are free to give different interpretations to various clauses in their own constitutions, even when worded similarly to clauses in the United States Constitution. "A state may, of course, apply a more stringent standard of review as a matter of state law under the state's equivalent to the Equal Protection or Due Process Clauses." Minnesota v. Clover Leaf Creamery, Co., 449 U.S. 456, 461 (1981). See also Brennan, The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U.L. Rev. 535, 548 (1986)(State Courts possess right and responsibility to determine the meaning of their own constitutions independently of Supreme Court interpretations of federal law). Cf. Kleczek v. Rhode Island Interscholastic League, 612 A.2d 734, 740 (RI 1992)(the equal protection clause of the state constitution proposed by the convention and ratified by the voters was intended to fill a void in the Rhode Island Constitution).

3. It is impossible to rationalize any meaningful moral distinction between vaginal sex between unmarried persons

on the one hand and anal or oral sex between unmarried persons on the other hand.

The most basic aspect of the constitutional guarantee of equal protection of the laws is that the state will not irrationally treat similarly situated classes of persons in a different way. The Equal Protection Clause prohibits disparate treatment by the state "between classes of individuals whose situations are arguably indistinguishable." Ross v. Moffitt, 417 U.S. 600, 609 (1974). Arbitrary and irrational discrimination violates equal protection even under the most deferential standard of review. Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 83 (1988). If this Court construes § 11-10-1 to reach the private consensual sexual behavior of unmarried adults, this bedrock principle of the Fourteenth Amendment and Art. I, sec. 2, of the Rhode Island Constitution will be violated.

At a minimum, and in every case, the Equal Protection Clause requires that there be a "rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller v. Doe, __ U.S. __, 113 S.Ct. 2637, 2642 (1993). This means that the "fit" between the legislative purpose and the statutory means selected to effectuate that purpose "must find some footing in the realities of the subject matter addressed by the legislation." Id. 113 S.Ct. at 2643. Under this standard, application of § 11-10-1 to private consensual sexual behavior between unmarried persons violates the constitutional guarantee of equal protection. As amici have shown in part I. A of this argument, there is no rational basis upon which the Legislature

could conceivably distinguish between the different types of sexual intercourse engaged in by unmarried persons. In making a judgment that extramarital intercourse, in the form of fornication, was not a proper subject for criminal sanction, the Legislature must be assumed to have been acting rationally. See e.g. Lyng v. International Union, 485 U.S. 360, 370 (1988). But no rational purpose can be found to support a distinction between extramarital vaginal intercourse and other forms of extramarital intercourse that are no more of a threat to public health, that pose no risk of illegitimate offspring, and that do not raise moral issues that are different from those raised by fornication. This kind of unrationalized distinction is by its nature invidiously underinclusive and violates equal protection. See Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

In fact, the Legislature's repeal of fornication law creates a statutory scheme strikingly analogous to that invalidated by the Supreme Court in Eisenstadt v. Baird, 405 U.S. 438 (1972). In Eisenstadt the Court was not faced with the question of whether Massachusetts could forbid all use of contraceptives by unmarried persons, because the Massachusetts law permitted use of contraceptives to prevent disease. 405 U.S. at 442. Hence, the Court was confronted with the question whether Massachusetts could forbid pregnancy prevention per se. The Court held that the Equal Protection Clause presented a clear answer to this question: because Massachusetts was powerless under Griswold to regulate

birth control by married persons, its attempt to do so among unmarried persons would violate the Equal Protection Clause unless this classification were rationally related to a legitimate state purpose. The Court could find no such purpose. Whether or not the state's interest in protecting morality could justify a ban on all use of contraceptives by unmarried persons, the Court held that there was no conceivable normal purpose behind a law that permitted contraceptives to prevent disease while banning them to prevent pregnancy. "[W]e cannot agree," the Court wrote, "that the deterrence of premarital sex may reasonably regarded as the purpose of the Massachusetts law." 405 U.S. at 448.

Just as Eisenstadt did not present the question of whether Massachusetts could outlaw all use of contraceptives by unmarried persons, so this case does not present the question of whether Rhode Island can ban all sex by unmarried persons. After repeal of the fornication statute, the Rhode Island statutory scheme bans only anal and oral sex. Because Rhode Island is powerless, as demonstrated in section I. B (1), supra, to regulate these sexual activities between married persons, sec. 11-10-1 has the effect of banning anal and oral sex only between unmarried persons. If the statute is to stand, this distinction must bear some rational relationship to a legitimate purpose of the state. It obviously serves no purpose to reduce illegitimacy. It serves no purpose related to morality so long as the State permits fornication and permits anal and oral sex in marriage. And as argued infra, in section I. B (4), it serves no health- related purpose so long as

the state permits vaginal sex between unmarried persons.

4. The statute cannot be justified as a public health measure.

The State cannot validly contend that sec. 11-10-1 serves to advance the public health or specifically to combat AIDS (acquired immunodeficiency syndrome). State Memorandum, at 22, n. 10. The statute bans only anal and oral sex among unmarried persons. The Legislature has by its repeal of the fornication statute specifically permitted extramarital vaginal sex. The statutory scheme that the State now seeks to defend as a public health measure therefore specifically authorizes the single most common route of sexual transmission of HIV/AIDS to women (vaginal sex),[4] while banning those forms of intercourse associated with the smallest risk of AIDS transmission (oral sex[5] and protected anal sex[6]). This Court need not decide whether the legislative purpose in adopting so grossly underinclusive and over-inclusive a public health measure could possibly survive even the most permissive level of scrutiny under the Equal Protection Clause, because the

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[4] W. Winkelstein et al., Sexual Practices and the Risk of Infection of the Human Immunodeficiency Virus, 257 J. Am. Med. Ass'n 321 (1987).

[5] M.T. Schechter et al., Can HTLV-III Be Transmitted Orally? (letter) The Lancet, i:379 (1986); W. Winkelstein et al., Sexual Practices and Risk of Infection by the Human Immunodeficiency Virus, 257 J. Am. Med. Ass'n 321 (1987).

[6] See e.g. Understanding AIDS, HHS Publication No. (CDC) HHS-88-8404; Institute of Medicine, Confronting AIDS: Update 1988; Detels et al., Seroconversion, Sexual Activity, and Condom Use Among 2915 Seronegative Men For Up to Two Years, 2 J. of Acquired Immune Deficiency Syndrome 77 (1989); P. Van de Perre et al., The Latex Condom: An Efficient Barrier Against Sexual Transmission of AIDS Related Viruses, 1 AIDS 49 (1987).

Legislature has no AIDS-related public health motive when it adopted sec. 11-10-1. The statute was enacted in 1896 and re-codified in its present form in 1956, long before the first recognition of the illness now know as AIDS in 1981.[7] The State's anachronistic reliance on AIDS to suggest a rationale for this plainly irrational statutory scheme is disingenuous and undignified.

II. CONSTRUING SEC. 11-10-1 TO APPLY TO SAME-SEX CONDUCT WHILE PERMITTING OPPOSITE SEX CONDUCT UNDER THE SAME CIRCUMSTANCES DISCRIMINATES AGAINST GAY MEN AND LESBIANS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FEDERAL AND STATE CONSTITUTIONS.

Defendant Lopes or other amici may invite this Court to consider construing the statute in such a way that it would not apply to non-marital, private, adult heterosexual conduct but would apply to the exact same conduct when engaged in by persons of the same sex. Construing the statute to allow heterosexuals to engage in the same behavior which is prohibited between gay persons would raise another equal protection violation which should be avoided by this Court. In Re Advisory Opinion, 485 A.2d 550, 552 (R.I. 1984).

This issue was not addressed by the United States Supreme Court in Bowers v. Hardwick, 478 U.S. 186 (1986). In Hardwick, the Court held only that there was no right protected by the Due

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[7] For statutory history, see G.L. 1896, ch. 281, sec. 12; G.L. 1956, sec. 11-10-1. Medical description in the United States of what has come to be known as AIDS dates from 1981. Pnuemocystic Pneumonia - Los Angeles, 30 Morbidity and Morality Weekly Rep. 250 (June 5, 1981), reprinted in Public Health Service, Department of Health and Human Services, Reports on AIDS Published in the Morbidity and Mortality Weekly Report June 1981 through September 1985.

Process Clause[8] to engage in homosexual conduct. The Court explicitly declined to decide whether prohibiting homosexual conduct, but not heterosexual conduct, would violate the Equal Protection Clause. 478 U.S. at 196, n.8. In fact, the Court's reliance on the history of criminal laws against sodomy suggests that there is no federal due process right to engage in sodomy for either heterosexual or homosexual couples.

As discussed in section II. B (3) supra, the Equal Protection Clause requires that there be a "rational relationship between the disparity of treatment and some legitimate government purpose." Heller v. Doe, ___ U.S. ___, 113 S. Ct. 2637, 2642 (1993). In this instance, there cannot be a legitimate government purpose in penalizing same-gender sexual conduct only.

It is well settled that a mere intent to discriminate against a particular class of persons is not a legitimate governmental objective. "[I]f the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. United States Dept.

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[8] There are fundamental differences between the Due Process and Equal Protection Clauses.

> The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure.

Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1163 (1988).

of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (emphasis in original). It is commonly accepted that "homosexuals have historically been the object of pernicious and sustained hostility." Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985)((Brennan, J., dissenting from denial of certiorari). Nor can the government justify unequal treatment of different groups merely on the basis of negative attitudes and prejudices of others in society. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

There is simply no legitimate governmental interest in taking exactly the same behavior and allowing it when performed by heterosexuals and prohibiting it when performed by gay persons. Such a punitive interpretation of the statute would itself violate equal protection principles prohibiting "capricious" exercises of governmental power. City of Warwick v. Almac's Inc., 442 A.2d 1265, 1270 (R.I. 1982). This Court should reject any invitation to create a classification premised on rank hostility to gay men and lesbians. In Re Advisory Opinion, 485 A.2d at 552.

III. JUSTICE WILEY'S REJECTION OF RHODE ISLAND GENERAL LAWS SECTION 11-10-1 BRINGS RHODE ISLAND INTO THE MAINSTREAM TREND AGAINST ENFORCEMENT OF SUCH LAWS.

In just over 30 years, more than one half of all the states have eradicated their sodomy laws through legislative repeal and judicial decisions. Justice Wiley's decision is part of this growing trend, which amici here attempt to place in its historical context.

In 1961, Illinois became the first of the fifty states to dismantle its sodomy law by legislative action. Note, The Use of the State Constitutional Right of Privacy to Defeat State Sodomy Laws, 14 N.Y.U. Rev. Law & Soc. Change 973 (1986). It did so by adopting the "Model Penal Code," a proposal to update and unify American criminal law, which de-criminalized "deviate sexual intercourse" between consenting adults in private. American Law Institute, Model Penal Code, sec. 213.2, Comment 2 (1962, Comments Revised 1980). Since then, twenty other states have repealed their sodomy laws, including the New England states of Connecticut, Maine and Vermont. Note, The Use of State Constitutional Right of Privacy to Defeat State Sodomy Laws, 14 N.Y.U. Rev. Law & Soc. Change at 979 & nn. 51-53.

The supreme courts of three states -- New York, Pennsylvania, and Iowa -- have ruled their sodomy laws unconstitutional under the principles of Eisenstadt v. Baird, 405 U.S. 438 (1972), employing the same reasoning relied upon by Justice Wiley. See People v. Onofre, 51 N.Y. 2d 476, 434 N.Y.S. 2d 947, 951-53 (1980)(sodomy statute violates both federal and New York constitutions), cert. denied, 451 U.S. 987 (1981); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47, 49-51 (1980); State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976). Courts in Michigan, Kentucky and Texas have invalidated their states' sodomy laws under state constitutions.[9]

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[9] Since Hardwick, Michigan, Kentucky and Texas courts have struck down their state's sodomy laws as a matter of state constitutional jurisprudence. The Michigan decision was a decision of a state trial court judge and was not appealed by the state. Michigan Organization for Human Rights v. Kelley, No. 88-815820 CZ

Moreover, successful challenges against such laws based on state constitutional principles have recently succeeded at the trial level in Tennessee and Louisiana.[10]

(July 9, 1990). The Kentucky Supreme Court decision rested both on state guarantees of privacy and equal protection. Commonwealth v. Wasson, 842 S.W.2d 487, 497, 500 (Ky. 1992)(deeming "arbitrary" state's criminalization of sexual activity solely on grounds of majoritarian sexual preference). There are two Texas decisions. City of Dallas v. England, 846 S.W.2d 957, 959 (Tex. App.-Austin 1993)(Texas sodomy statute violates right of privacy); cf. State v. Morales, 869 S.W.2d 941, 942 (Tex. 1994)(reversing appellate court decision invalidating state sodomy statute on grounds that appellate court did not have jurisdiction to rule on the constitutional challenge).

[10] Campbell et al. v. McWherter, No. 93C-1547 (slip op., Dec. 7, 1994)(5th Cir. Ct., Davidson Cty., Tenn)(Tennessee Constitution's privacy right protects the rights of same-sex couples to engage in sexual activity); Louisiana Electorate of Gays and Lesbians, Inc. v. State of Louisiana, No. 94-9260 (slip op., June 23, 1994)(Civil Dist. Ct. for Parish of Orleans, Div. 1)(granting preliminary injunction against enforcement of state sodomy law "insofar as it prohibits non-commercial, consensual, private sexual behavior by adult human beings" on variety of state constitutional grounds). See also Gryczan et al. v. State of Montana, No. BDV 93 1869 (1st Judicial Dist, Lewis & Clark Cty.)(seeking declaratory relief under equal protection, privacy and other provisions of state and federal constitutions).

IV. CONCLUSION

For all of the foregoing reasons, Amici urge this Court to affirm the decision of Justice Wiley.

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Dated: February 13, 1995

Certification of Service

I certify that on this 13th day of February, 1995, I served a true copy of the within document by two day mail upon Paula Rosin, Esq, Chief Appellate Attorney, Appellate Division, Office of the Public Defender, 100 N. Main Street, Providence, RI 02903; Lauren S. Zurier, Special Assistant Attorney General, Appellate Division, 72 Pine Street, Providence, RI 02903; and Steven Brown, Rhode Island Chapter of the American Civil Liberties Union, 212 Union Street, Room 211, Providence, RI 02903.

2/13/95
Date

Mary L. Bonauto