

No. D-2393

IN THE SUPREME COURT OF
TEXAS

THE STATE OF TEXAS,

Petitioner,

v.

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

Respondents.

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

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C.	Sexual Orientation Is Highly Resistant to Change, and It Is Therefore Abhorrent for The State to Penalize Gay People..	25
D.	The Statute Invidiously Discriminates Against A Significant Proportion of the Population.....	30
POINT III	SECTION 21.06 ACTUALLY HARMS THE PUBLIC HEALTH AND INDIVIDUAL MENTAL HEALTH.....	31
A.	The Statute Is Not a Public Health Measure and Is Counterproductive to Public Health Goals.....	31
1.	The statute does not deter behavior through which HIV or other sexually transmitted diseases may be spread.....	31
2.	The statute interferes with health education efforts designed to encourage safer sexual practices..	34
B.	The Statute Does Not Further Any Mental Health Objectives, and Injures the Mental Health of Many Members of Society, with Harmful Repercussions for Individual Physical Health.....	36
1.	The statute is psychologically damaging to gay men and lesbians..	36
2.	The statute is likely to reinforce hostility, discrimination, and violence against gay people.....	39
3.	The statute is likely to interfere with law enforcement efforts to deter violent crimes against gay men and lesbians.....	41
Conclusion.....		42

TABLE OF AUTHORITIES

CASES	Pages
<u>Bowers v. Hardwick</u> , 478 U.S. 186 (1986)	2,6,29
<u>Brown v. Board of Educ.</u> , 347 U.S. 483 (1954)	37
<u>Edgewood v. Kirby</u> , 777 S.W. 2d 391 (Tex. 1989)	17
<u>Hodgson v. Minnesota</u> , 110 S. Ct. 2926 (1990)	2
<u>In Interest of McLean</u> , 725 S.W.2d 696 (Tex. 1987)	17
<u>Kentucky v. Wasson</u> , 1992 Ky. LEXIS 140 (Sept. 24, 1992)	6,17
<u>LeCroy v. Hanlon</u> , 713 S.W.2d 335 (Tex. 1986)	6
<u>Loving v. Virginia</u> , 388 U.S. 1 (1967)	17
<u>Lyng v. Castillo</u> , 477 U.S. 635 (1986)	25
<u>Maryland v. Craig</u> , 110 S. Ct. 3160 (1990)	2
<u>Mathews v. Lucas</u> , 427 U.S. 495 (1976)	26
<u>State v. Saunders</u> , 75 N.J. 200, 381 A.2d 333 (1977)	34
<u>Texas State Employees Union v. The Texas Dep't of Mental Health and Mental Retardation</u> , 746 S.W.2d 203 (Tex. 1987)	6
<u>Texas v. Morales</u> , 826 S.W. 2d 201 (Tex. Ct. App. 1992)	3,7
<u>Watkins v. United States</u> , 875 F.2d 699 (9th Cir. 1989), <u>cert. denied</u> , 111 S. Ct. 384 (1990)	17,30

STATUTES AND CONSTITUTIONAL PROVISIONS

Texas Penal Code Ann. § 26.01(1)	3
Texas Penal Code, § 21.06Passim
Article I, Section 3, Texas Constitution	16
Article I, Section 3A, Texas Constitution	16
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Interest of Amici Curiae

The American Psychological Association ("APA"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 108,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among APA's major functions are promoting psychological research and promulgating the results of this research as it applies to important human concerns. A substantial number of APA's members are concerned with research and provision of therapy pertaining to human sexuality, the nature of prejudice and its impact on individuals and groups, and the dynamics of behavior change and persuasive communications to induce and maintain preventive behaviors.^{1/}

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

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

202 n.2, 208 n.3 (1986) (Blackmun, J., dissenting). APA's amicus briefs have been relied upon by the Supreme Court majority, as well as key concurring and dissenting opinions, in many cases of national significance. E.g., Maryland v. Craig, 110 S. Ct. 3160, 3169 (1990); Hodgson v. Minnesota, 110 S. Ct. 2926, 2938 n.24, 2947 n.38 (1990) (plurality opinion); id. at 2949 (O'Connor, J., concurring in the judgment).

The National Association of Social Workers, Inc. (NASW), a nonprofit professional association with over 140,000 members, is the largest association of social workers in the United States. The Texas Chapter of the NASW has over 5,500 members. 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.

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

Introduction

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

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

^{2/} Section 21.06 provides:

Homosexual Conduct

- (a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.
- (b) An offense under this section is a Class C misdemeanor.

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

adults in the privacy of the home surely violates the rights to privacy and to due course of law guaranteed by the Texas Constitution.

Moreover, this knowledge shows that gay and lesbian people constitute a "discrete and insular minority" deserving of heightened equal protection scrutiny.^{3/} Homosexual orientation has been shown not to impair the ability of individuals to contribute to society; is the subject of prejudicial stereotypes; and in most cases is involuntarily acquired and highly resistant or impervious to attempts to change it. The statute is thus arbitrary and unjust, and violates this State's constitutional guarantees of equal protection of the law. (Point II.)

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

^{3/} 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, The Definition and Scope of Sexual Orientation, in Homosexuality: Research Implications for Public Policy [hereafter Homosexuality] 1-12 (J. Gonsiorek & J. Weinrich eds. 1991).

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

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

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

Argument

POINT I

**THE FREEDOM TO EXPRESS INTIMACY THROUGH
THE PROSCRIBED SEXUAL CONDUCT IS IMPORTANT
TO THE PSYCHOLOGICAL HEALTH OF INDIVIDUALS AND
INTIMATE HUMAN RELATIONSHIPS; SECTION 21.06 THEREFORE
VIOLATES THE FUNDAMENTAL RIGHT TO PRIVACY
UNDER THE TEXAS CONSTITUTION**

As the court of appeals recognized, the Texas Constitution provides protection for the right of privacy independent of and more extensive than that afforded by the federal constitution. Texas State Employees Union v. The Texas Dep't of Mental Health and Mental Retardation, 746 S.W.2d 203 (Tex. 1987). Infringements on that right may be justified only when "reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means." Id. at 205. Similarly, the Texas Constitution's guarantees of due process protect citizens against irrational deprivations of liberty. LeCroy v. Hanlon, 713 S.W.2d 335, 339 (Tex. 1986).^{4/}

^{4/} Article I, Section 19 of the Texas Constitution provides that "[n]o citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or any manner disenfranchised except for the due course of the law of the land." See also Article I, Section 13.

In Bowers v. Hardwick, 478 U.S. at 190, the U.S. Supreme Court specifically noted that state courts remain free to invalidate sodomy statutes on state constitutional grounds. Within recent months, Kentucky found that its Constitution afforded its citizens this protection. Kentucky v. Wasson, 1992 Ky. LEXIS 140 (Sept. 24, 1992). Moreover, Justice Powell has stated that he now believes his crucial fifth vote in Bowers was in error. See "Powell Concedes Error in Key Privacy Ruling," N.Y.L.J., Oct. 26, 1990 at p. 1., col. 3. Thus, a majority of the Bowers Court now believe that the
(continued...)

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

A. The Relationships of Homosexual Couples Are Psychologically Important.

Empirical studies have found that between 40% and 71% of gay men^{4/} and between 45% and 80% of lesbians^{5/} are

^{4/} (...continued)
sodomy statute at issue there violated the Fourteenth Amendment to the United States Constitution.

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

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

involved in steady relationships at a given time. Because convenience samples tend to underrepresent older persons (who are more likely to be coupled) these figures are probably conservative.^{7/} 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.^{8/}

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, have reported relationships lasting decades.^{9/} One study found comparable rates of breakup over an 18-month period for gay, lesbian, and unmarried heterosexual couples.^{10/}

^{6/} (...continued)
Relationships and Friendship Patterns, 3 Alternative Lifestyles 207-230 (1980) [hereafter Raphael & Robinson]; Schafer, Sociosexual Behavior in Male and Female Homosexuals: A Study in Sex Differences, 6 Archives of Sexual Behavior 355-364 (1977) [hereafter Schafer].

^{7/} Peplau, Lesbian and Gay Relationships, in Homosexuality supra n. 3, at 180.

^{8/} Hatfield, Gays Say Life Getting Better, San Francisco Examiner, A-15 (June 30, 1989).

^{9/} See, e.g., D. McWhirter & A. Mattison, The Male Couple: How Relationships Develop (1984) [hereafter McWhirter & Mattison]; Raphael & Robinson, supra n. 6; Schafer, supra n. 6.

^{10/} P. Blumstein & P. Schwartz, American Couples (1983) [hereafter Blumstein & Schwartz].

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

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

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

^{13/} Peplau, Lesbian and Gay Relationships, in Homosexuality supra n. 3, at 195.

an aspiration, is as strong among gay people as it is among heterosexuals."^{14/}

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.^{15/} 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 ways.^{16/} Gay couples, like married couples, frequently make substantial commitments to each other that endure for decades.^{17/}

^{14/} Blumstein & Schwartz, supra n. 10, at 45; see Peplau, Padesky & Hamilton, supra n. 11; Peplau & Cochran, supra n. 5. 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 nongay neighbors and friends." McWhirter & Mattison, supra n. 9, at 286.

^{15/} See Blumstein & Schwartz, supra n. 10; Peplau, Research on Homosexual Couples: An Overview, 8 J. of Homosexuality 3, 5 (1982) [hereafter Peplau]; Peplau, Padesky & Hamilton, supra n. 11, at 27-28, 34-35; Larson, Gay Male Relationships, in Homosexuality: Social, Psychological & Biological Issues [hereafter Issues] 233-47 (W. Paul et al. eds. 1982); Peplau & Amaro, Understanding Lesbian Relationships, in Issues, supra [hereafter Peplau & Amaro]; Peplau & Cochran, supra n. 5.

^{16/} See generally McWhirter & Mattison, supra n. 9; Blumstein & Schwartz, supra n. 10; Peplau & Amaro, supra n. 15, at 237-39; Peplau, supra n. 15, at 4-5; Cardell, Finn & Marecek, supra n. 11. The issue of sexual exclusiveness is more likely to be explicitly dealt with in lesbian and gay relationships than in heterosexual relationships.

^{17/} See, e.g., McWhirter & Mattison, supra n. 9, at 285-86; Peplau, supra n. 15, at 4; Raphael & Robinson, supra n. 6; C. Silverstein, Man to Man: Gay Couples in America (1981).

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

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

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

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

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

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

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

and gay, have engaged in the intimate conduct that Section 21.06 proscribes among gay people.

The proscribed intimate conduct is common among predominantly heterosexual people. In 1983, a major study of couples in the United States found that 90% of the married and unmarried heterosexual couples studied had engaged in oral-genital sex.^{21/} Another study found that approximately 80% of single men and women aged 25-34 have done so.^{22/} Less information is available on the incidence of anal intercourse between women and men. In one representative national sample, 18.3% of the men reported having engaged in anal intercourse with a woman, and 7.3% of the women reported having engaged in anal intercourse with a man.^{23/} One researcher found that 25% of married couples under 35 years

^{21/} Blumstein & Schwartz, supra n. 10, 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. Tavis & 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) [hereafter Hunt].

^{22/} Hunt, supra n. 21. Another major study reported that, after reaching the age of 50, 43% of women and 49% of men had engaged in fellatio, and 49% of women and 56% of men had engaged in cunnilingus. E. Brecher, Love, Sex, and Aging: A Consumer's Union Report 358-59 (1984).

^{23/} International Survey of AIDS Educational Messages and Behavior Change (1988 data collected by Lewis Harris & Associates for Project Hope, Center for Health Affairs, 2 Wisconsin Circle, Chevy Chase, Maryland).

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

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

^{24/} Hunt, supra n. 21, at 204. Six percent of the sample reported engaging in anal intercourse "sometimes" or "often."

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

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

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

In response to the AIDS epidemic, most gay men in cities such as New York and San Francisco where effective community AIDS education programs have been carried out now use condoms during anal intercourse.^{28/}

D. Oral and Anal Sex Do Not Harm But Rather Promote the Psychological Health of Individuals and Their Relationships.

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 functioning. As discussed in greater detail below, see infra, at 16-22, for almost 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 (3rd ed. revised 1987), which provides the

^{27/} (...continued)
that 59% and 95% of gay men have engaged in anal intercourse. 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 n. 5, at 328-330. 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 n. 9, at 277.

^{28/} Ekstrand & Coates, Maintenance of Safer Sexual Behaviors and Predictors of Risky Sex: The San Francisco Men's Health Study, 80 Am. J. of Pub. Health 973-977 (1990); Becker & Joseph, AIDS and Behavioral Change to Reduce Risk: A Review, 78 Am. J. of Pub. Health 394, 394-410 (1988) [hereafter Becker & Joseph]; Martin, Dean, Garcia & Hall, The Impact of AIDS on a Gay Community: Changes in Sexual Behavior, Substance Use, and Mental Health, 17 Am. J. of Community Psychology 269-293 (1989) [hereafter Martin, Dean, et al.].

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

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

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

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

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

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

affirms their self-concept, provides emotional satisfaction, and allows the formation of long-term bonds.^{32/} Indeed, a 1978 study showed that a majority of Americans believe that "oral-genital sex leads to better and happier relationships."^{34/} For these reasons, Section 21.06 deprives gay and lesbian couples of options that may -- and in many cases do -- enhance the quality of their lives and their most intimate relationships.

POINT II

SCIENTIFIC RESEARCH AND OPINION SUPPORT THE CIRCUIT COURT'S DECISION THAT SECTION 21.06 VIOLATES THE APPELLEES' RIGHT TO EQUAL PROTECTION OF THE LAWS UNDER THE TEXAS CONSTITUTION

The Texas Constitution guarantees equality under the law as a general matter, Article I, Section 3, and prohibits discrimination on the basis of sex in particular, Article I, Section 3A.^{35/} These guarantees of equal

^{32/} (...continued)
do not. The same is true for men in unmarried heterosexual couples. Id. at 231 (married and unmarried heterosexual couples). Only for heterosexual women does engaging in oral sex not correlate -- positively or negatively -- with happiness in the relationship. Id. at 233-37.

^{33/} McWhirter & Mattison, supra n. 9, at 262; Bell & Weinberg, supra n. 5, at 217-18; Peplau, What Homosexuals Want in Relationships, 15 Psychology Today 28 (1981).

^{34/} Callen & Planco, Attitudes Towards Oral-Genital Sexuality, 42 Conn. Med. 500, 502 (1978) [hereafter Callen & Planco]. According to a study, a substantial majority of Americans consider oral-genital contact to be "a part of normal sex." Id. (91% of persons under 35, and 78% of all persons, said they consider oral sex normal).

^{35/} Article I, Section 3 states: "All free men, when they form a social contract, have equal rights, and no man, or set
(continued...)

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

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

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

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

individuals lack a substantial degree of control. To punish an individual for an essentially "immutable" characteristic, based upon false stereotypes, when that characteristic is in no meaningful sense detrimental or harmful to society, is arbitrary. Because it does just this, Section 21.06 is unconstitutional.

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

The mental health profession does not consider homosexual orientation to be a disorder.^{36/} Nearly twenty years ago, the American Psychiatric Association removed homosexuality from its list of mental disorders. In so doing, the organization stated that "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities."^{37/} In 1975, amicus American Psychological Association passed a resolution supporting the American Psychiatric Association's action. The APA further urged all mental health professionals to help dispel the stigma of mental illness that long has been associated with homosexual orientation.^{38/}

^{36/} A mental disorder is "a clinically significant behavioral or psychological syndrome or pattern that occurs in a person and that is associated with present distress (a painful symptom) or disability (impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom." DSM-III-R, supra n. 29, at xxii.

^{37/} Resolution of the American Psychiatric Association, December 15, 1973.

^{38/} Resolution of the Council of Representatives of the American Psychological Association (1975) [hereafter APA (continued...)]

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

^{38/} (...continued)

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

^{39/} According to amicus APA's Task Force on Sexual Orientation, the research that had supported the "illness model" of homosexuality was "influenced by poorly founded stereotypes and social prejudice." Weinrich, Task Force Findings: Overview and Prospect, in Issues, supra n. 15, at 377.

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

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

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

Surveys of lesbians and gay men reveal them to be as highly diverse a group as are heterosexuals. They appear to be employed productively in all occupations and professions.^{44/} Research has demonstrated that gay people have an overall potential to contribute to society similar to that of heterosexual people, including in the workplace.^{45/}

^{41/} (...continued)

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

^{42/} Gonsiorek, supra n. 41, at 136.

^{43/} Id. See also Psychological Testing, supra n. 41, at 385, 394; Reiss, supra n. 41, at 296-311; Hart, supra n. 41, at 604 ("findings to date have not demonstrated that the homosexual individual is any less psychologically adjusted than his heterosexual counterpart").

^{44/} Bell & Weinberg, supra n. 5; San Francisco Examiner, June 6, 1989, at A-19.

^{45/} See, e.g., Snyder & Nyberg, Gays and the Military: An Emerging Policy Issue, 8 J. Pol. & Military Soc. 71, 77-79 (1980) (summarizing research and finding that gay people and heterosexuals score about the same in job stability and job satisfaction); Bell & Weinberg, supra n. 5, at 141-148 ("for the majority of our homosexual respondents, male and female, the fact that they happened to be homosexual had little to do with their experiences at work or the satisfaction they derived from them"). Cf. McWhirter & Mattison, supra n. 9, at 286. Recent studies by the United States Armed Forces
(continued...)

Recognizing these facts, amicus APA has passed a series of resolutions urging that gay men and lesbians not be discriminated against in employment, housing, licensing, public accommodation, and child custody.^{46/} Amicus NASW has

^{45/} (...continued)

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

^{46/} American Psychological Association, Minutes of the Council of Representatives, 30 American Psychologist 633 (1975); American Psychological Association, Minutes of the Council of Representatives, 32 American Psychologist 532 (1977); American Psychological Association, Minutes of the Council of Representatives, 36 American Psychologist 581 (1981); American Psychological Association, Policy Statements on Lesbian and Gay Issues (1987). See also American Medical Association, Resolution 12, Annual Meeting of the House of Delegates 322 (1989); American Bar Association Report No. 8, House of Delegates (1989) (The resolution "urges . . . governments to enact legislation prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations.")

taken similar actions.^{47/} Indeed, discrimination against gay people appears to be indefensible.^{48/}

^{47/} NASW Policy Statement, supra n. 38 (" . . . NASW shall support legislation, regulation, policies, judicial review, political action, demonstrations, and other appropriate means that will establish and protect the equal rights of all persons without regard to their sexual orientation. Such activities include, but by no means are limited to working for the adoption of policies and legislation to end all forms of discrimination against lesbians and gay men at the federal, state, and local levels in all institutions. . . . NASW will support the repeal of all laws against any form of consensual adult sexual activity as well.")

^{48/} The history of proscriptions of homosexual conduct is a sad and tortured one. The victory of Christian doctrine may have led to the repression of the freer sexual attitudes of the Greeks and Romans. M. Goodich, *The Unmentionable Vice: Homosexuality in the Later Medieval Period* (1979). In the first thousand years of Christianity there was a considerable range of tolerance for homosexual conduct. J. Boswell, *Christianity, Tolerance & Homosexuality*, chs. 1 & 2 (1980) In the Thirteenth Century, however, St. Thomas Aquinas in effect defined homosexual conduct as more "unnatural" than other "unnatural" sex, such as masturbation, nonprocreative or nonmarital heterosexual conduct, and procreative heterosexual intercourse in other than the approved position. Gilbert, Conceptions of Homosexuality and Sodomy in Western History, 6 *J. Homosexuality* 57, 62 (1981). Aquinas' hierarchy was first embodied in canon law, V. Bullough, *Sexual Variance in Society and History* 380-81 (1976), and these ecclesiastical proscriptions later became part of the criminal codes or common law of England and other European countries. P. Conrad & J. Schneider, *Deviance and Medicalization: From Badness to Sickness* 172, 172-79 (1980). What had been a sin became a crime. With the Eighteenth Century Age of Enlightenment, "science" constructed a concept of health based largely on earlier concepts of morality. Conduct regarded as morally excessive -- such as oral and anal sex, masturbation, and other nonprocreative sexual activities -- was believed to make extraordinary demands on the body and lead to disease. Homosexuality was viewed as pathological. *Id.* at 179-85. This transition from sin to crime to illness has now been reversed. The criminal laws of Texas, however, still enforce the religiously based concept of "unnatural acts."

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

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

Empirical research confirms that those holding negative attitudes about gay people are more likely than those with positive attitudes to believe in false stereotypes. Studies have shown that people holding negative attitudes toward gay people "are less likely to have had personal contact with lesbians or gay men," and, hence, are basing their attitudes on popular beliefs and misconceptions, not on accurate information or personal experience.^{51/}

^{49/} See, e.g., Herek, Stigma, Prejudice, and Violence Against Lesbians and Gay Men, in Homosexuality, *supra* n. 3, at 60-80 [hereafter, Herek, Stigma]; Bierly, Prejudice Towards Contemporary Out Groups as a Generalized Attitude, 15 *J. of Applied Soc. Psychology* 189-199 (1985); K. Gergen & M. Gergen, *Social Psychology* 140-141 (1981) [hereafter Gergen & Gergen]; Herek, Religious Orientation and Prejudice: A Comparison of Racial and Sexual Attitudes, 13 *Personality and Soc. Psychology Bull.* 34 (1987); Herek, Can Functions be Measured?, 50 *Soc. Psychology Q.* 285 (1987) [hereafter Herek, Functions].

^{50/} APA Resolution, *supra* n. 38.

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

(continued...)

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

Most common stereotypes are related to cross-sex characteristics. Additionally, significant numbers of individuals characterize male homosexuals as mentally ill, promiscuous, lonely, insecure, and likely to be child molesters, while lesbians have been described as aggressive and hostile toward men.^{52/}

The same researcher explains that "[l]abeling itself can lead people to perceive stereotypical behaviors, whether or not they occur," and that stereotypes can be so influential that those gay people "who violate stereotypical expectations (e.g., masculine gay men and feminine lesbians) may actually be disliked" for that reason.^{53/} Another study reached stark conclusions about the inaccuracy of the stereotypes popularly held about gay people:

Until now, almost without exception, people in general . . . have been outraged, fearful, or despairing toward homosexuality because of the stereotypes

^{51/} (...continued)
"Homophobia"] (summarizing research). Similarly, several studies indicate that exposure to truthful information about lesbians and gay men often leads to a reduction in homophobia. See *id.*; cf. Amir, The Role of Intergroup Contact in Change of Prejudice and Ethnic Relations in Towards the Elimination of Racism 73 (D. Katz ed. 1976). Public opinion research also demonstrates that people who are acquainted with someone who does not conceal her/his homosexual orientation have, in general, significantly more favorable attitudes toward lesbians and gay men. Schneider & Lewis, The Straight Story on Homosexuality and Gay Rights, 7 Pub. Opinion 16-20, 59-60 (Feb./Mar. 1984) [hereafter Schneider & Lewis].

^{52/} Herek, Beyond "Homophobia", *supra* n. 51, at 9 (citations omitted).

^{53/} Id.

they hold. Not only have they believed that homosexuals are pretty much alike, but that this similarity necessarily involves irresponsible sexual conduct, a contribution to social decay, and, of course, psychological pain and maladjustment. Given such a stereotype, it is little wonder that the heterosexual majority has seen fit to discourage the acceptance of homosexuality by . . . refusing to employ homosexuals, withholding from homosexual men and women the civil rights enjoyed by the majority and by a growing number of other minority groups.

The present investigation, however, amply demonstrates that relatively few homosexual men and women conform to the hideous stereotypes people have of them.

. . . .

Most are indistinguishable from the heterosexual majority with respect to the nonsexual aspects of their lives and whatever differences there are between homosexuals' and heterosexuals' social adjustment certainly do not reflect any malevolent influence on society on the part of the homosexuals concerned.^{34/}

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

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

^{34/} Bell & Weinberg, supra n. 5, at 229-231 (emphasis added).

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

Sexual orientation is acquired at an early age, and thus it makes little sense to argue that the trait is voluntarily acquired. For some, adult homosexual orientation is predictable by early childhood.^{55/} Childhood precursors of homosexual orientation in adulthood have not been reliably identified for the population as a whole. There may be

^{55/} See, R. Green, The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis, 16 J. Psychiatry & Law 537 (1988); R. Green, The "Sissy Boy Syndrome" and the Development of Homosexuality 370 (1987) [hereafter Green].

biological^{56/} as well as socio-environmental factors; these factors may differ substantially within the population.^{57/}

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

^{56/} One recent study reported differences between heterosexual and homosexual men in the volume of a cell group in the anterior hypothalamus, a brain structure that is involved in sexual behavior. LeVay, A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men, 253 *Science* 1034-1037 (1991). Another study compared the concordance between the sexual orientation of three samples of male homosexuals and their monozygotic ("identical") twin, dizygotic ("fraternal") twin, or adoptive brother. Bailey & Pillard, A Genetic Study of Male Sexual Orientation, 48 *Arch. Gen. Psychiatry* 1089 (1991). It concluded that "heritabilities were substantial under a wide range of assumptions." *Id.* at 1089. Where one identical twin was gay, the other was also gay in 52% of the cases; where one fraternal twin was gay, the other was also gay in 22% of the cases; where one brother by adoption was gay, his adoptive brother was gay in just 11% of the cases. *Id.*

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

^{58/} Sexual Preference, supra n. 57, at 186-187.

even though they may not yet have become sexually very active."^{59/} It has been reported consistently that homosexual feelings are much more common among gay adults than heterosexual adults. Further, the feelings appear during childhood and adolescence without prior sexual experience.^{60/}

Once established, homosexual orientation is highly resistant to change. Researchers generally agree that the majority of gay people are unable to change their sexual orientation, even if they wished to do so. Although some therapists have reported that their clients have changed their sexual orientation in treatment (from homosexual to heterosexual), closer scrutiny has shown that such changes were more likely to occur among bisexuals who were highly-motivated to adopt a heterosexual behavior pattern. Many interventions aimed at changing sexual orientation have succeeded only in reducing or eliminating homosexual behavior rather than in creating or increasing heterosexual attractions.^{61/}

^{59/} Id. at 186.

^{60/} Sexual Preference, supra n. 57, at 186-192.

^{61/} Haldeman, Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination, in Homosexuality, supra n. 3, 149-160; A. Martin, Innovations in Psychotherapy with Homosexuals 24-57 (1984) [hereafter Martin].

In January 1990, Dr. Bryant Welch, Executive Director for Professional Practice of amicus APA, stated that "no scientific evidence exists to support the effectiveness of any of the conversion therapies that try to change one's sexual orientation." "[R]esearch findings," he explained, "suggest that efforts to 'repair' homosexuals are nothing
(continued...)

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

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

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

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

^{63/} Bell & Weinberg, supra n. 5, at 195-228; see Gonsiorek & Rudolph, supra n. 31.

^{64/} Davison, supra n. 62, at 148. See, Silverstein, supra n. 62.

875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment).

D. The Statute Invidiously Discriminates Against A Significant Proportion of the Population.

Reliable statistics on the incidence of homosexual orientation in the United States are difficult to obtain, because the criminal penalties and social stigma attached to homosexual behavior make it difficult to obtain representative samples. A recently published analysis of data collected in a 1970 survey with a representative national sample found that between 19.9% and 21.1% (depending on which statistical assumptions were made) of American males had engaged in homosexual behavior; between 3.0% and 6.2% had engaged in such behavior occasionally or fairly often after age 20.^{65/} Although data were not reported concerning adult American females, earlier studies by Alfred Kinsey and his associates suggest that the number of American females who have engaged in homosexual behavior may be slightly lower than for American males.^{66/} One representative national sample including both sexes found that 11.6% of respondents reported same-sex sexual behavior within the prior five years.^{67/} Turning from self-reported homosexual behavior to

^{65/} Fay, Turner, Klassen, & Gagnon, Prevalence and Patterns of Same-Gender Sexual Contact Among Men, 243 *Science* 338-348 (1989).

^{66/} See Male Sexual Behavior, *supra* n. 20; Female Sexual Behavior, *supra* n. 26.

^{67/} Sell, Wells, Valleron, Will, Cohen, and Umbel, Homosexual and Bisexual Behavior in the United States, the
(continued...)

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

POINT III

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

- A. The Statute Is Not a Public Health Measure and Is Counterproductive to Public Health Goals.
1. The statute does not deter behavior through which HIV or other sexually transmitted diseases may be spread.

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

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

^{68/} San Francisco Examiner, June 5, 1989, at A-20.

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

claim therefore can be seen only as a transparent post-hoc attempt to capitalize on the current climate of fear about this tragic disease.

The statute, on its face, lacks a clear relationship with public health goals; it fails to proscribe activities associated with transmission of the AIDS virus (HIV), while prohibiting other activities not associated with such transmission. HIV appears to be transmitted through exchange of semen or blood, as can occur during vaginal or anal intercourse and fellatio.^{70/} Heterosexuals who have been exposed to HIV can transmit the virus through such activities, yet they are not forbidden by the statute.^{71/} Accordingly, the statute is grossly underinclusive, and obviously cannot be justified as an AIDS-related public health measure.

The statute is also overinclusive with respect to possible transmission of HIV. It prohibits all homosexual

^{69/} (...continued)
Published in the Morbidity and Mortality Weekly Report June 1981 through September 1985 [hereafter MMWR Reports] 1 (1985).

^{70/} Recommendations for Preventing Transmission of Infection With Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace, 34 Morbidity & Mortality Weekly Rep. 681, 682 (Nov. 15, 1985); Krim, AIDS: The Challenge to Medicine and Science, in AIDS: The Emerging Ethical Dilemmas: A Hastings Center Report Special Supplement 2, 4 (1985).

^{71/} See, e.g., Heterosexual Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus, 34 Morbidity & Mortality Weekly Rep. 561 (Sept. 20, 1985) [hereafter Heterosexual Transmission], reprinted in MMWR Reports, supra n. 69, at 112.

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

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

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

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

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

and threat of criminal prosecution will effectively deter private sexual conduct between consenting adults, including that proscribed by the Texas statute. If the risk of contracting AIDS, as well as the threat of social ostracism and discrimination, does not serve as an effective deterrent to consensual sexual conduct, the slim possibility of arrest and prosecution is even less likely to do so.^{75/} The experience of the many jurisdictions in which consensual sexual conduct is not criminal seems to be that the prevalence of homosexuality is about the same as in jurisdictions in which it is illegal.^{76/} Thus, consensual sodomy laws deter, at most, a negligible amount of overt homosexual behavior. As a result, even with respect to that subset of sexual conduct prohibited by the statute that does pose a risk of spreading AIDS, the statute has no beneficial public health effect.

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

By interfering with efforts intended to advise the public how to minimize the danger of contracting the disease, the statute again may interfere with public health goals. Public health officials and private groups have been actively

^{75/} See State v. Saunders, 75 N.J. 200, 381 A.2d 333, 341-42 (1977) (criminal penalties add no deterrent force to fear of contracting serious illness).

^{76/} See, Weinberg & Williams, supra n. 5.

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

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

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

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

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

^{80/} Gonsiorek & Shernoff, supra n. 74, at 240.

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 Texas law, educators who encourage "safer sex" practices as proven alternatives to risky behavior are advocating criminal behavior, and individuals who attend educational presentations on risk reduction may fear that they are admitting to engaging in criminal activity. Undoubtedly, the Texas law has inhibited efforts to educate Texans about AIDS risk reduction.

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

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

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

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

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

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

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

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

minorities,^{84/} 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.^{85/} 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, fail to come to terms with the prejudice against their sexuality, and are more troubled and dysfunctional.^{86/} This clinically-observed psychological condition is known as "internalized homophobia."^{87/} By stigmatizing gay people, the statute

^{83/} (...continued)
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. of Homosexuality, 299, 313 (1989). Clearly, environments accepting of homosexuality promote both mental health and public health in gay males, and hence for the body politic.

^{84/} See generally Crocker & Major, Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma, 96 Psychological Rev. 608-630 (1989).

^{85/} Gonsiorek & Rudolph, supra n. 31.

^{86/} Gonsiorek & Rudolph, supra n. 31; Gonsiorek, Mental Health Issues, supra n. 83; Bell & Weinberg, supra n. 5; Hammersmith & Weinberg, supra n. 83; Weinberg & Williams, supra n. 5; Pilard, Psychotherapeutic Treatment for the Invisible Minority in Issues, supra n. 15, at 99; Martin, supra n. 61.

^{87/} See Gonsiorek, Psychotherapeutic Issues with Gay and Lesbian Clients, in 3 Innovations in Clinical Practice: A Sourcebook 73-76 (Keller et al., eds. 1984) [hereafter Gonsiorek, Gay and Lesbian Clients]; Malyon, supra n. 62; Gonsiorek, Mental Health Issues, supra n. 83.

fosters internalized homophobia and its self-destructive effects, and thereby does serious psychological harm.^{88/}

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

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

^{88/} See Gonsiorek, Gay and Lesbian Clients, *supra* n. 87, at 73-76; Malyon, *supra* n. 62, at 56-59.

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

^{90/} Herek, Beyond "Homophobia", *supra* n. 51, at 1, 1-21; Herek, Stigma, *supra* n. 49.

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

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

and Christians' prejudices against Jews. Social scientists have used similar theories and methods to understand all of these forms of prejudice.^{93/}

As with racism and anti-semitism, anti-gay attitudes are affected by societal norms and values in at least two ways. First, societal values are learned by individuals as they mature and in their adult life. The society communicates particular values and attitudes to its 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 and bisexual people.^{94/}

A second way in which sodomy laws affect individual attitudes is by restricting opportunities for interaction between gay and heterosexual people. Empirical research has consistently demonstrated that having a close relationship with an openly gay person is one of the most powerful influences on heterosexuals' acceptance of and tolerance for

^{93/} See sources cited, supra n. 49.

^{94/} Herek & Berrill, Violence, supra n. 91.

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

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

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

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

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

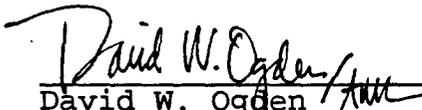
^{97/} See Herek & Berrill, Violence, supra n. 91, at 948-955.

crimes, however, the victim must volunteer information about the bias-related nature of the attack to the police. In many cases, gay male and lesbian victims of 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.^{98/} In States with sodomy laws, such self-identification is likely to be perceived by victims as subjecting themselves to the risk of "secondary victimization," i.e., an additional layer of victimization from law enforcement officials and others who learn about the victim's sexual orientation.^{99/}

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

Conclusion

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


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^{98/} Herek & Berrill, Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy, 5 J. of Interpersonal Violence 401, 401-413 (1990) [hereafter Victimization]; Herek, Hate Crimes, supra n. 91, at 948-955.

^{99/} Victimization, supra n. 98, at 401-413.

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