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WHEN THE POLICE ARE IN OUR BEDROOMS, SHOULDN'T THE COURTS GO IN AFTER THEM?: AN UPDATE ON THE FIGHT AGAINST "SODOMY" LAWS

*by Evan Wolfson and Robert S. Mower**

So-called "sodomy" laws — criminal sanctions on consensual oral or anal sex even in private — remain in force in nearly half the states. Far from being mere curios of a distant past, they continue to brand a stamp of second-class citizenship on gay men and lesbians, stigmatize our identity and our sexual conduct, and sanction many forms of discrimination against us. Although most "sodomy" laws on their face apply to both non-gay and gay adults engaging in entirely common sexual activity, it is gay people who are their principal direct victims.[1] By their very existence, these statutes hang as an ominous Sword of Damocles over the heads of lesbians and gay men throughout the country.

The brief, filed by Lambda Legal Defense and Education Fund as *amici curiae* in *Louisiana v. Baxley*[2] and reprinted below demonstrates how deleterious "sodomy" or "crime against nature" statutes are in the real everyday lives of millions of Americans. The Brief also argues that because the present purpose of these laws is to stigmatize gay people, because such laws deprive us of personal liberty, and because the laws are understood to outlaw our expressions of love, gay men and lesbians have "standing" to challenge the constitutionality of these laws.

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1. On another, less direct level, "sodomy" laws also wreak harm by perpetuating sexism, as well as heterosexism. *See, e.g.*, Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988) (the "function [of these laws] is to maintain the polarities of gender on which the subordination of women depends").

2. 633 So. 2d 142 (La. 1994).

"Sodomy" laws are used as weapons to deny gay men and lesbians a multitude of rights and benefits.[3] They are often invoked as the basis for hostile legal action, whether it be in the debate over the military's anti-gay policy,[4] employment,[5] parental custody and visitation,[6] or association.[7] Furthermore, "sodomy" laws incite violence against lesbians and gay men,[8] and restrict opportunities for interaction between gay and non-gay people, thereby perpetuating prejudice.[9] Many of the harmful effects of "sodomy" laws fall

3. Brief at 16-28; *see also, e.g.*, Mary C. Dunlap, *Gay Men and Lesbians Down By Law in the 1990's USA: The Continuing Toll of Bowers v. Hardwick,* 24 GOLDEN GATE U. L.REV. 1, 12-16 (1994).

4. *See* Brief at 16-18. *See also* Uniform Code of Military Justice (UCMJ) (ostensibly criminalizing oral or anal sex by anyone); Department of Defense Directive (DoDD) 1304.26 (open gay identity will continue to be a basis for barring entry into the Armed Forces); DoDD 1332.14 and DoDD 1332.30 (even private sex between people of the same sex is a basis for separation); Department of Defense Instruction (DoDI) 5505.8 (in investigations of sexual misconduct by defense criminal investigative organizations, sexual misconduct is defined as a sexual act in violation of the UCMJ that occurs between consenting adults in private). Although most of the rules on sexual activity purport to apply to heterosexual as well as same-sex sex, no regimen of discriminatory exclusion or presumptions against non-gay personnel has been based on these rules. *See, e.g.*, Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381 (1994).

5. Brief at 18-20, 22-23. *See, e.g.*, Shahar v. Bowers, 58 Fair Empl. Prac. Cas. (BNA) 668 (N.D. Ga. 1992), *partial summ. judgment denied, summ. judgment granted, dismissed*, 63 Fair Empl. Prac. Cas. (BNA) 109 (N.D. Ga. 1993) (attorney fired from State Attorney General's office because of her religious marriage to another woman; "sodomy" law cited as basis for dismissal); *see also* City of Dallas v. England, 846 S.W.2d 957 (Tex. App. 1993), *writ dismissed w.o.j.* (May 5, 1993), *reh'g. of writ of error overruled* (June 9, 1993), and Woodard v. Gallagher, No. 89-5776 (Orange Cty. Fla. Cir. Ct. June 9, 1992), involving, respectively, a Texas lesbian and a Florida gay man denied work in law enforcement because of anti-gay hiring policies ostensibly based on "sodomy" laws.

6. Brief at 21. *See* Bottoms v. Bottoms, No. CH93JA0517-00, (Va. Cir. Ct. Henrico County Sept. 7, 1993) (custody of child granted to non-parent because lesbian mother's private sexual activity violates state "sodomy" law), *rev'd*, Bottoms v. Bottoms, 444 S.E.2d 276, 281 (Va. App., 1994) (being lesbian or gay and sexually active does not *per se* render a parent unfit to have custody of his or her child, discussed, *infra*, at 1010).

7. Brief at 21. *See, e.g.*, Gay Lib v. University of Mo., 558 F.2d 848, 850 (8th Cir. 1977) (reversing district court, which ruled that school officials were justified in refusing to recognize organization on the ground that recognition would probably result in the commission of felonious acts of "sodomy"); Gay Students Organization v. Bonner, 509 F.2d 652, 662-63 (1st Cir. 1974) (university unsuccessfully asserts interest in "preventing illegal activity," which may include "deviate" sex acts or "lascivious carriage" as basis for ban on student group); Gay Activists Alliance v. Board of Regents, 638 P.2d 1116, 1121-22 (Ok. 1981) (refusal by regents to recognize gay student organization because of mere existence of Oklahoma law against oral or anal sex).

8. Brief 25-26; *see also* Dunlap, *supra* note 5 at 12-16.

9. Brief at 26-27.

harshest on lesbian and gay youth.[10] Finally, these laws intrude upon the sexual activity, private choices, and intimate association rights of gay and non-gay adults, where the State has no legitimate business, and thus injure and diminish all Americans.[11] The United States Supreme Court turned a "willful[y] blind[ ]" eye to the harms such statutes impose on all Americans in general, and on gay and lesbian people in particular.[12] *Bowers v. Hardwick* upheld Georgia's "sodomy" statute against a federal constitutional challenge brought by a man arrested and kept overnight in jail for the "crime" of oral sex with another adult in his own bedroom.[13]

Invoking the purported "ancient roots" of anti-gay sentiment,[14] the Court declared that there is no "fundamental right to engage in *homosexual sodomy*" implicit in the Constitution; its framing of the question tellingly ignored the fact that at issue in the case was Georgia's prohibition on oral and anal intercourse *between anyone*, whether gay or non-gay, married or unmarried, male or female.[15]

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10. *See, e.g.*, Gibson, *Gay Male and Lesbian Youth Suicide,* in REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE, U. S. DEP'T OF HEALTH & HUMAN SERVICES 3-110, 3-117 (1989) (discussing connections between anti-gay discrimination in society and distress and violence experienced by many young gay people); Remafedi, Farrow & Deisher, *Risk Factors for Attempted Suicide in Gay and Bisexual Youth,* 87 PEDIATRICS 869, 873 (1991) (suicide by lesbian and gay youth); *see also* Cook, *Who is Killing Whom?* at 1 (Respect All Youth Project of Fed'n of Parents & Friends of Lesbians & Gays, Issue Paper 1, 1991)(gay youth internalize negative social messages about gay people); Hetrick & Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents,* 14 J. OF HOMOSEXUALITY 25, 29 (1987)(gay youth "often demonstrate an appalling ignorance of what it means to be homosexual, reflecting the basest stereotypes about homosexual people and therefore about themselves"); Gonsiorek, *Mental Health Issues of Gay and Lesbian Adolescents,* 9 J. ADOLESCENT HEALTH CARE 114, 117-19 (1988)(gay youth's consequent sense of social isolation and moral worthlessness); Martin, *Learning to Hide: The Socialization of the Gay Adolescent,* 10 ADOLESCENT PSYCHIATRY: DEVELOPMENTAL AND CLINICAL STUDIES 52, 58-59 (S. Feinstein ed. 1982).

11. Brief at 30.

12. Bowers v. Hardwick, 478 U.S. 186, 205 (1986)(Blackmun, J., dissenting).

13. *Id.* at 191; *see also* Michael Hardwick, *What Are You Doing in My Bedroom,* in PETER IRONS, THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT 392-403 (1988).

14. The Court's assertion that a history of hatred and past discrimination justifies continued discrimination and official hatred in the future turns constitutional jurisprudence on its head. Even on its own terms, however, the Court was wrong in its discussion of the history of "sodomy" laws and same-sex affection and sexual activity. *See* Nan D. Hunter, *Life After Hardwick,* 27 HARV. C.R.-C.L. L. REV. 531 (1992); *see also* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY (1980) (documenting non-linear shifts in attitudes toward same-sex relationships throughout Western history); BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994) (same).

15. *Id.* at 191-92 (emphasis added). The majority's recasting of a law against oral or anal sex by anyone into a law against "homosexual sodomy" was a revealing exam-

By so disingenuously construing the constitutional issue before it, the Court failed to address the broader question of the right to be free of government intrusion into choices regarding sexual intimacy between consenting adults.[16] Although former Justice Lewis F. Powell has since repudiated his "mistake[n]" "swing vote" that made up the five-to-four majority, *Hardwick* casts a looming shadow, an excuse for judges who do not wish to protect gay people against official discrimination.[17]

The anti-gay impetus of *Hardwick* was further highlighted just a few weeks later when the Supreme Court refused to grant certiorari in an Oklahoma case holding that that state's gender-neutral "sodomy" law could not constitutionally be enforced against different-sex partners.[18] The Oklahoma decision and the Supreme Court's silence suggested that *Hardwick* somehow drew a constitutionally tolerable line between the rights of gay people and those of non-gay people, even under a law that on its face ostensibly applied to both conduct by different-sex and same-sex partners.

By contrast, the Supreme Court of Maryland just two years later rejected that proposition, holding rather that under Supreme Court right-to-privacy precedents, the operative line between protected and unprotected conduct is not between gay and non-gay people, or same-sex and different-sex partners, but rather between married and unmarried adults.[19] Thus, the Maryland high court concluded, under Hardwick, unmarried gay and non-gay adults alike can be prosecuted for private consensual sex.

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ple of the true evil these laws do today. *Id.* at 200 (Blackmun, J., dissenting) ("the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used"). *See* Evan Wolfson, *Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different,* 14 HARV. J.L. & PUB. POL'Y 21, 34 n.59 (1991). It is also an example of what Wolfson calls "the Tom Lehrer principle," in honor of the comedian who declared "Life is like a sewer; what you get out of it depends on what you put into it." Tom Lehrer, *An Evening Wasted With Tom Lehrer,* (record) (1959).

16. *Id.* at 200-203 (Blackmun dissenting).

17. *Hardwick,* a privacy decision, was taken up as an all-purpose anti-gay weapon by some judges, notably Reagan-Bush appointees to the federal appellate bench, who reversed well-reasoned lower court decisions even when based on equal protection and other constitutional claims. *See, e.g.*, High Tech Gays v. Defense Industrial Security Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd*, 895 F.2d 563 (9th Cir. 1990); Ben Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied,* 110 S.Ct. 1296 (1990).

18. Post v. Oklahoma, 715 P.2d 1105 (Okla. Crim App. 1986), *cert. denied*, 479 U.S. 890 (1980).

19. State v. Schochet, 75 Md. App. 314, 541 A.2d 183 (1988) (under Supreme Court precedents, including *Hardwick*, right to privacy does not protect sexual activity of consenting adults outside of marriage).

Although it reached the wrong result in protecting no one rather than protecting all, the Maryland Supreme Court at least was more faithful to the Constitution than either the U.S. or Oklahoma courts in its refusal to create different classes of citizenship along sexual orientation lines. Such an approach, as Justice Stevens wrote in his *Hardwick* dissent, is "plainly unacceptable."[20] Justice Stevens declared:

> Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.[21]

Despite its glaring defects and offensiveness, *Hardwick* continues to distort the law of privacy and individual freedom, as well as the equality and personal rights of gay men and lesbians.

In the wake of *Hardwick* and its progeny, those of us seeking to challenge the constitutionality of "sodomy" statutes have, of necessity, turned to state courts and state constitutions to secure the protection of private sexual intimacy denied by federal courts. In some states, such as Pennsylvania[22] and New York,[23] the judiciary has been remarkably receptive to such challenges. Courts there have recognized that their own state constitutions can and do offer greater protection for individual liberties than the federal constitution. Indeed, until recently, we were on a roll, with powerful decisions from the Supreme Court of Kentucky,[24] lower courts in Texas,[25] Louisiana,[26] and Michigan,[27] and legislatures in Nevada[28]

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20. 478 U.S. at 218 (Stevens, J., dissenting).

21. *Id.* at 218-19.

22. Pennsylvania v. Bonadio, 415 A.2d 47 (Pa. 1980).

23. New York v. Onofre, 434 N.Y.S.2d 947, 51 N.Y.2d 476 (1980), *cert. denied* 451 U.S. 987 (1981).

24. Kentucky v. Wasson, 842 S.W.2d 487 (Ky. 1992).

25. City of Dallas v. England, 846 S.W.2d 957 (Tex. Ct. App. 1993); Texas v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992);

26. State v. Baxley, No. 356-945, Section E (Crim. Dist. Ct. 1993).

27. Michigan Organization for Human Rights ("MOHR") v. Kelley, No. 88-815820 CZ (Mich. Cir. Ct. July 9, 1990). *MOHR* was adjudicated in Wayne County, sitting at Detroit, with the State Attorney General, in his official capacity, as the defendant. The court struck down the "sodomy" and "gross indecency" statutes as unconstitutional when applied to private, consensual oral and anal sex between adults. The attorney general chose not to appeal and is therefore bound by this decision not

and the District of Columbia[29] all striking down their respective "sodomy" statutes.

Unfortunately, aberrant decisions from the Louisiana and Texas supreme courts this year brought about a departure from the recent willingness of courts to tackle the harms caused by even the mere existence of "sodomy" laws.[30] In *Louisiana v. Baxley* and *Texas v. Morales*, two state high courts chose to avoid reaching the important constitutional and social issues presented in challenges to "sodomy" statutes by focusing instead on "standing" and jurisdictional arguments.[31]

Louisiana v. Baxley involved a state constitutional challenge by a gay man, charged with a criminal violation of Louisiana's "crime against nature" statute.[32] Johnny Baxley was arrested for propositioning an undercover officer in the New Orleans French Quarter and allegedly offering to pay him twenty dollars for oral sex.[33] Baxley admitted discussing consensual fellatio but denied ever having offered money.[34]

The Louisiana "sodomy" statute provides, in part:

A. Crime against nature is:

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to prosecute private, consensual "sodomy" between adults. Furthermore, because the Attorney General has supervisory powers over all prosecuting attorneys in the State, MICH. COMP. LAWS ANN. § 14.30 (West 1994) (MICH. STAT. ANN. § 3.183 (Callaghan 1985)); *In re* Watson, 293 Mich. 263, 270 (1940), the attorney general should be obliged to direct all prosecutors not to prosecute the "sodomy" and "gross indecency" statutes where the sexual conduct is private, consensual, and between adults.

In theory, then, MOHR ended such prosecutions of gay men and lesbians in Michigan. There is, however, some question regarding the precedential value of MOHR v. Kelley. The opinion, being one issued by a trial court, is not published in any reporter or available electronically. Annotated statutory compilations also make no mention of it. Because of this, and in the absence of further action by the courts, many will more likely conclude that Michigan's "sodomy" law may still be enforced against private, consensual "sodomy" between adults. *MOHR* illustrates once again the difficulty at getting at these statutes, which serve the State's purpose whether or not actually "enforced."

28. In 1993, the "sodomy" law was amended, substituting "anal intercourse, cunnilingus, or fellatio *in public*" for "the infamous 'crime against nature.' " NEV. REV. STAT. § 201.190 (1993) (emphasis added). A second amendment deleted former subsection 2, which read "the infamous 'crime against nature' means anal intercourse, cunnilingus, or fellatio between consenting adults of the same sex." NEV. REV. STAT. § 201.193 (1993) (repealed "Crime Against Nature: Sexual Penetration" statute). *See* 1993 STATUTES OF NEVADA 236 at 518.

29. D.C. Act 10-23 (D.C. CODE SUPP. 1994).

30. Louisiana v. Baxley, 633 So. 2d at 144; Texas v. Morales, 869 S.W.2d 941, 944 (Tex. 1994).

31. *Baxley*, 633 So. 2d at 144; *Morales*, 869 S.W.2d at 942.

32. 633 So. 2d at 143.

33. *Id.*

34. *Id.*

> (1) The unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal. . . . Emission is not necessary; and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.
>
> (2) The solicitation by a human being of another with the intent to engage in any unnatural carnal copulation for compensation.
>
> B. Whoever violates the provisions of this Section shall be fined not more than two thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.[35]

Louisiana thus criminalizes two kinds of so-called "crime against nature" provisions: commercial and non-commercial consensual oral or anal sex by anyone. Upon arrest, Baxley was charged generally with both.[36]

Baxley and his defense attorney, John Rawls, of New Orleans, seized the opportunity presented by his arrest to challenge the constitutionality of the entire "sodomy" law.[37] In order to do so, Baxley had to hurdle the question of "standing". In Louisiana, "a party does not have standing to challenge the constitutionality of a statute unless the application of that statute adversely affects him."[38] Baxley argued that he had "standing" because he was charged with violating La. Rev. Stat. § 14:89(A) in its entirety, a five-year felony that placed his personal liberty in jeopardy.[39]

The State's attorneys claimed that Baxley lacked "standing" because the "commercial" nature of his alleged crime put him solely under the purview of § 14:89(A)(2).[40] To assert that he could address subpart (A)(2) alone, the State argued that the statute's two clauses were independent and could be severed, despite having charged him with both.

The trial court granted Baxley "standing" to challenge the entire law, deciding that because the constitutionality of one part implicated the other, the statute was not severable.[41] It held that subpart (A)(2), which prohibits solicitation of compensated "unnatural carnal copulation," must be considered with subpart

35. LA. REV. STAT. § 14:89 (1994).
36. Brief at 6.
37. *Baxley*, 633 So. 2d at 143-44.
38. Louisiana v. Brown, 389 So. 2d 48, 50 (La. 1980).
39. *Baxley*, 633 So.2d at 144.
40. *Id.* at 143.
41. *Id.*

(A)(1), which simply prohibits "unnatural carnal copulation."[42] If one subpart were unconstitutional, so must the other.[43] The trial court then held that the statute unconstitutionally infringed upon the choice of an adult to engage in consensual, private anal or oral sex with another adult and, thus, violated the protected right to privacy explicitly recognized by Article I, Section 5 of the Louisiana Constitution.[44]

The State Supreme Court reversed, agreeing with the State that Baxley had standing to challenge § 14:89(A)(2) alone.[45] The State did not seek to defend the validity of prosecuting Baxley for non-commercial sex; it argued that he was not subject to the law and thus should not be able to challenge that prosecutorial option (even though a jury could have found that he did not offer to pay, but did offer to engage in oral sex, and thus was liable for attempting the "lesser included offense" of non-commercial "crime against nature").

Ignoring the actual charges brought in the case, the Court allowed the State to prosecute Baxley on the "commercial" charges alone.[46] Through this maneuver, the Court evaded the issue of whether § 14:89(A)(1) violated the state constitutional right to privacy.[47]

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42. *Id.*

43. *Id.*

44. *Baxley*, 633 So. 2d at 143

45. *Id.* at 146. Baxley never contested the State's ability to regulate commercial sex, asserting instead that the police officer had fabricated the claim about compensation, a routine occurrence. He also challenged as constitutionally defective the incorporation of "unnatural carnal copulation" into the commercial provision, § 14:89(A)(2), a claim the Court elided.

46. *Id.* at 146.

47. *Id.* Both concurrences agreed with the majority that the legislature's proscription of commercial "sodomy" is not unconstitutional. *Baxley*, 633 So. 2d at 147 (Ortique, J., concurring), 146 (Calogero, C. J., concurring in part, dissenting in part). One justice also agreed with the majority that, facing a charge under subpart (A)(2), Baxley lacked standing to challenge subpart (A)(1). *Id.* at 147 (Ortique, J., concurring). However, Justice Ortique went on to say that:

> Revamping of this antiquated statute is long overdue. Morality statutes should reflect the moral standards of the era and not those of the turn of the *previous* century. While the state has a legitimate interest in proscribing bestiality and even the public solicitation of oral sex for compensation, in my view it does not have a legitimate public policy interest in regulating the non-commercial, consensual private acts of oral sex between consenting adult human beings.

Id. The other dissenter argued that Baxley should have "standing" to challenge part (A)(1) of the "sodomy" law because he was also at risk of being found guilty of conduct prohibited by that part of the statute. *Id.* at 146 (Calogero, C. J., concurring in part, dissenting in part). Because "few areas of personal autonomy are more private

Baxley also contended that he *was* subject to conviction for crime against nature under § 14:89(A)(1) as a responsive verdict to a charge under § 14:89(A)(2), if the jury were to find that he merely discussed uncompensated oral sex with the undercover officer.[48] The trial court had earlier seen that Baxley could indeed be convicted of attempted "crime against nature" on the facts presented.[49] The high court, however, chose to ignore this, saying that "mere discussion or solicitation without a financial aspect cannot constitute an attempt to engage in conduct prohibited by § 14:89(A)(1)."[50] The Court declared that solicitation of another to commit a crime is only "preparatory to the crime and not an overt act" supporting conviction.[51] Since Baxley was accused of no "overt act" (beyond the alleged offer of money, for these purposes discounted by the Court), the Court said he lacked standing to challenge subpart (A) (1). Although the Court's manuevering left the "sodomy" law intact, it was forced at least to clarify that merely propositioning someone for oral sex is not a violation of the "sodomy" law.[52]

Baxley's counsel anticipated that the State and the Court might try to avoid addressing the law on its merits by focusing on "standing." After all, as the Lambda Brief demonstrated, the State's "purpose" in such "sodomy" laws is not really to consummate any particular conviction, nor to herd people wholesale out of their bedrooms in handcuffs (especially since the law technically punishes acts commonly enjoyed by both gay and non-gay people alike).[53] Rather the primary purpose and effect of the laws today is

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than sexual intimacy between consenting adults," Chief Justice Calogero, too, concluded that the "sodomy" statute "invades the area of protected privacy recognized by [the state constitution];" since "no compelling interests [to justify such an invasion] have been urged, much less shown by the state in this case," the statute should be struck down as unconstitutional. *Id.* at 147.

48. *Id.* at 144; Brief at 6-7.

49. 633 So. 2d at 147.

50. *Id.*

51. *Id.*

52. *Id.* One distinguished commentator has observed:

> This decision stands the normal course of homosexual law reform on its head. Usually, the first step is to get the sodomy law repealed, and then to get the public solicitation law repealed or invalidated. (The Model Penal Code, for example, recommended decriminalizing consensual sodomy but retaining a ban on public solicitation for "deviate sexual intercourse.")

Arthur S. Leonard, "*Louisiana Supreme Court: Plaintiff Lacks Standing in Sodomy Challenge, But Solicitation For Private Gay Sex is Lawful*," LESBIAN/GAY LAW NOTES, p. 1 (April 1994).

53. For example, in Bowers v. Hardwick, the State had declined to prosecute Michael Hardwick after holding him overnight in jail, even though he was arrested in

to stigmatize and punish gay people as a class, whether or not they actually have engaged in sex.

Thus, the Brief presented several alternative bases for granting Baxley "standing" to assert both privacy-based and equal protection claims. Among these was evidence that, Baxley and gay people suffer actual and serious legal, social, and psychological harms from the mere existence of the Louisiana "sodomy" statute, whether or not they are arrested and prosecuted.

The Louisiana Supreme Court ignored these harms and failed to even address them in its opinion.[54] By confining itself to "standing" and a dexterous severing of the statute far beyond the State's own approach, the Court skirted any discussion of the constitutional issues involved and successfully preserved the"sodomy" law on the books. Even its declaration that a mere proposition does not constitute a sufficient "overt act" ignored the reality that police officers often misrepresent the facts of their enticement rackets, in which they frequently invite propositions, then fabricate critical details, including offers of compensation.[55]

The Louisiana Supreme Court was not alone in evading the atavistic social injustice of "sodomy" law enforcement. The Supreme Court of Texas did likewise just a couple of months earlier, in *Texas v. Morales*.[56] *Morales* was a civil proceeding brought by five gay plaintiffs challenging the state "sodomy" law, Tex. Penal Code § 21.06, which explicitly criminalized so-called "homosexual conduct" only.[57] The trial court, affirmed by the court of appeals, had recognized the many different ways in which "sodomy" statutes are used as weapons against gay people.[58] Accordingly, those courts granted the plaintiffs "standing" to assert their constitutional

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his bedroom with a police officer as an eyewitness to the "crime," and was willing to acknowledge that he had engaged in oral sex and would do so again. Likewise, in *Morales*, the State actually defended *maintaining* the prohibition on gay people's private consensual oral or anal sex by asserting that the statute "has not been, and in all probability, will not be, enforced." 869 S.W.2d at 941. Nevertheless, the courts refused to strike down the laws, leaving intact their threat and their stigma.

54. 633 So. 2d at 144-45.

55. *See* ROTELLO & WOLFSON, FIGHTING BACK: REST STOP ARRESTS, POLICE ABUSE, AND THE GAY AND LESBIAN COMMUNITY (Lambda publication) (1992); Nisonoff & Wolfson, *The Defense of Consensual Sodomy, Public Lewdness, and Related Criminal Cases,* in THE PROSECUTION AND DEFENSE OF SEX OFFENSES, p. 7-1 (Matthew Bender 1991).

56. 869 S.W.2d at 943.

57. Texas was one of a number of states that eliminated its general proscription on oral or anal sex, and replaced it with a statute explicitly targeting gay people and same-sex sexual activity. *See* Hunter, 27 HARV. C.R.-C.L. L. REV. at 538-39.

58. 869 S.W.2d at 942. Texas v. Morales, 826 S.W.2d 201, 202 (Tex. Ct. App. 1992).

claims based on the fact that they had "shown that the statute causes actual harm which goes far beyond the mere threat of prosecution," even though none of the plaintiffs had been arrested under the statute.[59] The lower courts declared the statute an unconstitutional infringement on the right to privacy.[60]

On appeal, the Texas Supreme Court proved disappointingly reluctant to discuss the merits of the constitutional challenge to the "sodomy" law or, in an election year, to take heat for protecting the equality and rights of gay people.[61] It reversed the lower court decision, implausibly maintaining that it lacked jurisdiction under the state's "bifurcated system of civil and criminal jurisdiction" to declare the criminal statute unconstitutional, absent some "irreparable injury to property rights" occasioned by the *enforcement* of the statute.[62] The dissent lambasted the majority's "shirking [of] its equitable duty to provide a remedy for a wrong [by allowing] the State to insulate its laws from judicial scrutiny."[63]

Underlying the court's contortion, perhaps, was its knowledge that it could have its cake and eat it, too. It refused to strike down the law in *Morales*, but explicitly left standing Lambda's successful challenge to the same "sodomy" law in *City of Dallas v. England*,[64] in which the statute had been expressly used as a basis for denying a lesbian applicant employment as a police officer.

In *England*, the plaintiff challenged the anti-gay hiring policy of the Dallas police department, an administrative rule implementing a criminal statute, the "sodomy" law.[65] In order to determine the validity of the hiring policy, the Texas Court of Appeals had to consider the constitutionality of the "sodomy" statute on which the policy was based.[66] It held that both statute and policy were unconstitutional.[67]

This judgment in *England* is now final notwithstanding *Morales*, which after all was simply the dismissal of a particular challenge to the "sodomy" law for lack of jurisdiction, not a ruling on the mer-

59. *Morales*, 826 S.W.2d at 202.
60. *Id.* at 204-205.
61. "Three of the five justices in the majority are up for reelection this year." Arthur S. Leonard, *Cowardly Texas High Court Blows Off Sodomy Challenge,* LESBIAN/GAY LAW NOTES, p. 13 (February 1994).
62. 869 S.W.2d at 942, 944.
63. *Id.* at 954.
64. 846 S.W.2d 957 (Tex. App. 1993), *writ dismissed w.o.j.* (May 5, 1993), *reh'g. of writ of error overruled* (June 9, 1993).
65. *Id.* at 957.
66. *Id.* at 959.
67. *Id.*

its. In Texas, in order for a judgment to be subject to collateral attack as void, it must carry evidence of its invalidity on its face.[68] As the *Morales* Court itself explicitly noted in its "duck-and-cover" ruling, unlike *Morales*, *England* did not present a naked challenge to the "sodomy" statute.[69] Rather, *England*'s challenge to § 21.06 and the Dallas hiring policy implementing it fell squarely within the exception noted by the Texas Supreme Court in *Morales* for challenges to statutes "unconstitutionally applied by a rule, policy or other noncriminal means subject to a civil court's equity powers."[70] Thus, far from undermining the validity of the *England* judgment, the *Morales* opinion made clear that the Court of Appeals properly exercised its jurisdiction in that case.[71]

Furthermore, since *Morales* explicitly did not overturn it, the *England* decision striking down the "sodomy" statute as unconstitutional remains binding on all courts throughout Texas unless and until the Texas Supreme Court decides otherwise.[72] Indeed, because the State's petition for a writ of error was refused outright by the Supreme Court in *England*, the court of civil appeals opinion must be accorded "substantially equal dignity" to a decision of the Supreme Court.[73] Small thanks to the State Supreme Court, then, the Texas "sodomy" law is off the books. Only the harms that had been identified by the lower court in *Morales* remain unrecognized by the high court.

Despite these unhappy aberrations, the battle against "sodomy" laws continues, and there is hope again in Louisiana. In the wake of *Baxley*, a trial court in New Orleans recently granted "standing" to gay persons, including Johnny Baxley and his attorney, John

68. South Surety Co. v. Texas Oil Clearing House, 281 S.W. 1045, 1046 (Tex. Comm. App. 1926, judgment adopted); City of Lufkin v. McVicker, 510 S.W.2d 141, 144 (Tex. Civ. App. 1973).

69. *Id.* at 942 n.5 (distinguishing *England* with its "concrete injury" from mere declaratory actions).

70. *Id.* at 942.

71. *See also* Passel v. Fort Worth Indep. Sch. Dist., 440 S.W.2d 61 (Tex. 1969), where plaintiff, like England, challenged an administrative rule implementing a criminal statute. As the dissent in *Morales* noted, *Passel* made clear that in order for the court to determine the validity of a hiring policy, it must examine the constitutionality of the criminal statute it implements. 869 S.W.2d at 951-53 (Gammage, J., dissenting). Although *Morales* shows the lengths courts will go to avoid handing down a pro-gay decision, the Texas Supreme Court left standing the victory in *England*, and left open the possibility of a stronger ruling in the future.

72. *See* Swilley v. McCain, 374 S.W.2d 871, 875 (Tex. 1964).

73. Muldoon v. Musgrave, 545 S.W.2d 539, 541 (Tex. Civ. App. Fort Worth 1976); *see also* 21 Int'l Holdings, Inc. v. Westinghouse Electric Corp., 856 S.W.2d 479, 483 (Tex. Civ. App. 1993).

Rawls, to challenge the state "sodomy" statute in a *civil* proceeding. In *Louisiana Electorate of Gays and Lesbians, Inc. v. Louisiana*,[74] the court preliminarily enjoined the State's "sodomy" law as "manifestly unconstitutional," observing that gay men and lesbians suffer real and irreparable injury from the threatened enforcement of such statutes.

In fact, the *Louisiana Electorate* Court explicitly recognized the harms that "sodomy" laws and the threat of arbitrary enforcement have on gay men and lesbians.[75] As set forth in the Lambda Brief, such laws have a "direct deleterious and psychological effect on lesbians and gay men," seeking to deprive them of "physical sexual intimacy that is essential for physically and mentally healthy people and for healthy relationships."[76] Furthermore, the enforcement of "sodomy" laws destroys "property rights" of gay people.[77] If found to have committed "sodomy," gay men and lesbians would be subject to charges of professional misconduct and even revocation or suspension of professional licenses, effectively ending their chosen career.[78]

The *Louisiana Electorate* Court concluded by declaring its inability to imagine "an individual activity more personally private and more deserving of constitutional privacy protection" than consensual, private, and non-commercial sex between adults.[79] Because it is "unconscionable that a law prohibiting such behavior be viewed by any reasonable mind as anything other than a violation of the constitutional right of privacy,"[80] the court held that the prohibition on non-commercial, consensual, private sex between adults is an "anachronism in today's body of law."[81] The June 1994 trial court ruling restored Louisiana to the "moving stream"[82] in the trend of decisions striking down "sodomy" laws.

Meanwhile, courts in two other states have since jumped into the anti-"sodomy"-law mainstream. In a preliminary ruling in *Gryczan v. Montana*,[83] a facial state constitutional challenge to the state

74. No. 94-9260, slip op. at 5-6 (La. Civ. Dist. Ct. June 23, 1994), *cert denied*, 640 So. 2d 1319 (La. 1994).
75. *Id.*, slip op. at 6.
76. *Id.*, slip op. at 6-7.
77. *Id.*, slip op. at 7.
78. No. 94-9260.
79. *Id.*
80. *Id.* slip op. at 6.
81. *Id.*
82. *Wasson*, 842 S.W.2d at 499 ("our decision, rather than being the leading edge of change, is but a part of the moving stream").
83. No. BDV-93-1869 (1st Dist. Lewis & Clark Cty), slip op. (June 28, 1994).

"sodomy" law, the court upheld plaintiffs' standing and denied the State's motion to dismiss. The court pointedly noted plaintiffs' claims that

> the statute fosters discrimination, harassment, and violence from society. The statute has often caused Plaintiffs to alter the manner in which they would normally conduct their lives. Plaintiffs also allege that because the statute labels them as felons, it can and has been used in third party contexts to deny or restrict rights of Plaintiffs and other homosexuals.[84]

Citing the strong, explicit right to privacy language of Montana's constitution, as well as its guarantee of equal protection, the court refused "to deny Plaintiffs access to this forum when such basic and fundamental constitutional rights are at issue[.]"[85]

Meanwhile, in late June 1994, the Virginia Court of Appeals declared that the "sodomy" law could not be used to deny a lesbian the custody of her son.[86] It reversed a Henrico County trial court ruling that relied on the "sodomy" statute as the most determinative factor in taking a child from his lesbian mother.[87] The trial court had earlier decided that, because as a sexually active woman in a committed relationship with her partner (also a woman), she presumptively violated Virginia's "sodomy" statute, Sharon Bottoms was an unfit parent as a matter of law.[88]

In its closely-watched ruling, the Court of Appeals disagreed, holding that the fact that Sharon Bottoms is a lesbian, and admittedly engaging in "illegal" sexual activities, did not alone justify taking custody of her son away from her and awarding custody to a non-parent, in this case, Bottoms' mother.[89] To justify taking away the child, any such "criminal" conduct (oral sex) must have harmful impact on the child; the court found no such impact.[90]

Coming so swiftly after the anomalous rulings in *Baxley* and *Morales*, decisions such as *Louisiana Electorate* (with its condem-

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84. *Id.* at 11.

85. *Id.* at 12.

86. *Bottoms*, 444 S.E.2d at 281-83.

87. *Id.*

88. Again, this is an example of how "sodomy" laws are used against gay people. Virginia's "sodomy" law applies to all adults, gay or non-gay, and yet only gay men and lesbian parents stand to lose their children because they engage in, or are presumed to engage in, oral sex with their adult partners.

89. *Bottoms*, 44 S.E.2d at 282.

90. *Id.* Indeed, the court of appeals cited the undisputed evidence that lesbians and gay men are fit parents, that children of gay parents grow up as health, happy, and well-adjusted as the children of non-gay parents, and that a parent's sexual orientation, gay or otherwise, is no indicator of parental fitness. 444 S.E.2d at 282-83.

nation of the invasiveness of "sodomy" statutes), *Bottoms* (with its condemnation of the use of such statutes to perpetrate a host of evils on gay people), and *Gryczan* (with its condemnation of the State's attempt to deprive gay plaintiffs of a judicial forum) signal renewed hope to those across the country who seek to eliminate such oppressive laws. Perhaps, this time around, should *Louisiana Electorate* go up on appeal, the Louisiana Supreme Court will recognize the "sodomy" statute for what it is and does. Meanwhile, the fight will continue, or begin afresh, in the remaining unfree states.

Because wiping away "sodomy" laws, whether in court or through political means, remains a very high priority for Lambda, for the gay rights movement, and for Americans concerned with privacy and freedom generally, cases like *Baxley, Bottoms, Shahar*, and *Louisiana Electorate* will receive much attention in the months and years to come. Although lesbians and gay men seeking equality and basic human rights have come a long way from a time just thirty-three years ago when every state had a "sodomy" law, sixteen states and the federal government still penalize oral and anal sex for all people, and five states single out same-sex oral and anal intercourse for criminal penalties. Court challenges are now pending in Louisiana,[91] Tennessee,[92] and Montana,[93] and there is legislative action in many states each year, from Missouri to Maryland.

The abolition of "sodomy" laws is both a gay issue and an issue for all Americans to fight and win in both real and symbolic terms. As we told the United States Supreme Court in *Hardwick*, the question is not what people like Michael Hardwick are doing in the bedroom, but rather what the State is doing there.[94]

91. Louisiana Electorate of Gays and Lesbians Inc. v. State, 640 So. 2d 1319 (La. 1994); *Baxley*, 633 So. 2d 142.

92. Campbell v. McWherter, No. 93C-1547 (Cir. Ct. Davidson Cty) (facial state constitutional challenge).

93. *Gryczan*, No. BDV-93-1869 (1st Dist. Lewis & Clark Cty), slip op. (June 28, 1994).

94. Petition for Rehearing for Respondent at 10, Bowers v. Hardwick (No. 85-130) (1986).

The following is the amicus curiae *brief in support of the gay defendant filed by Lambda Legal Defense and Education Fund before the Louisiana Supreme Court in* Louisiana v. Baxley, *633 So.2d 142 (La. 1994). In it, Lambda, the nation's oldest and largest lesbian and gay legal rights organization, shows why Baxley, as a gay man, has "standing" to challenge the constitutionality of the state "crime against nature" statute. As seen in* Baxley, *the manipulation of standing has been a device used by courts to evade deciding constitutional challenges to "sodomy" laws on the merits. It is therefore important to catalogue the real harms that "sodomy" laws inflict. The brief argues that "sodomy" statutes violate constitutional guarantees of personal privacy, expression, and intimate association by allowing state proscription of consensual, private, non-commercial sex between all adults, gay and non-gay alike. Furthermore, the selective enforcement and invocation of these statutes, despite their facial applicability to all, shows the government's purpose in stigmatizing and punishing gay people through official discrimination. Such animus and invidious effect violate the equal protection guarantees that state constitutions such as that of Louisiana expressly provide.**

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA
versus
JOHNNY L. BAXLEY

NO. 93-KA-2159

DIRECT APPEAL FROM THE CRIMINAL DISTRICT COURT
FOR THE PARISH OF ORLEANS, CASE NO. 356-945, SECTION "E,"
THE HON. CALVIN JOHNSON, JUDGE PRESIDING

BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF APPELLEE JOHNNY L. BAXLEY

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* EDITOR'S NOTE: The following *amicus curiae* brief was filed with the Louisiana Supreme Court by Lambda Legal Defense and Education Fund on December 30, 1993. Footnotes, however, have been altered to conform to the style of the *Fordham Urban Law Journal.*

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STATEMENT OF INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is submitted by Lambda Legal Defense and Education Fund, Inc. ("Lambda") in support of the appellee, Johnny L. Baxley. A not-for-profit corporation based in New York, Lambda engages in precedent-setting litigation in all substantive areas affecting the rights of lesbians and gay men. Founded in 1973, Lambda is the oldest and largest national legal organization devoted to these concerns, and has appeared as counsel or *amicus curiae* in numerous cases in state and federal courts on behalf of lesbians and gay men who have suffered discrimination or been deprived of their equal rights because of their sexual orientation. In particular, Lambda has appeared as counsel or has participated as *amicus curiae* in several similar cases—*i.e.*, Bowers v. Hardwick, Michigan Organization for Human Rights v. Kelley, City of Dallas v. England, Kentucky v. Wasson, New York v. Onofre[1] —involving challenges to statutes prohibiting consensual sexual conduct.

At stake in this case is the scope of the right to privacy guaranteed by the Louisiana Constitution, as well as the constitutional right of gay men and lesbians and to equal protection of the laws. The lower court's ruling striking down La.R.S. 14:89 as an unconstitutional invasion of the privacy rights of Louisiana citizens decriminalized primary modes of sexual and affectional expression for most Americans, including gay men and women. It also invalidated a law, the main purpose and effect of which has been to stigmatize lesbians and gay men both in Louisiana and generally. Lambda therefore has a compelling interest in assisting this Court in reaching a just result in this important case.

1. Full cites are provided as each case is discussed *infra*.

SUMMARY OF ARGUMENT

> "[S]odomy is against the law. . . .
> Heterosexuals don't practice sodomy. [*sic*]"
> Senator Strom Thurmond[2]

> "[A]ll previously reported cases dealing with
> this crime involved *homosexual* encounters"
> State v. Pruitt[3]

On its face, Louisiana's "crime against nature" statute criminalizes normal, healthy sexual intimacy between consenting adults, gay and non-gay alike. Through the statutory prohibition on oral and anal intercourse, the State purports to dictate to Louisiana citizens its own notions of the acceptable moral parameters of personal sexual expression. This intrusion upon such profoundly personal conduct and choices violates the right to freedom from "invasions of privacy" guaranteed by Article I, Section 5 of the Louisiana Constitution.

A further offense to the constitution arises from the statute's true purpose and effect, stigmatizing lesbians and gay men, as betrayed by the State's record of selective enforcement (and non-enforcement).[4] Because it is understood and used as an anti-gay measure, the statute effectively codifies gay second-class citizenship, fosters hostility, misunderstanding, and violence, and underlies other discrimination against lesbians and gay men in law. Moreover, by outlawing our expressions of love and sexuality, the statute causes us tangible psychological harm and emotional pain, assaulting our human dignity.

Mr. Baxley, who has been arrested and charged with a five-year felony, clearly has standing to challenge the constitutionality of the very statute that has placed his personal liberty at jeopardy. Contrary to the State's disingenuous assertion, the "solicitation" aspects of this case do not obviate Mr. Baxley's standing to challenge the precise statute under which the State charged him. Mr. Baxley is subject to conviction under both the "solicitation" and "non-solicitation" prongs of the "crime against nature" statute because,

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2. *Senators Loudly Debate Gay Ban*, N.Y. TIMES, May 8, 1993, at 9. *See* discussion *infra* at 16-17.

3. 449 So. 2d 154, 156 (La.App. 4th Cir. 1984), *cert. denied*, 450 So. 2d 1309 (La. 1984), *on reh'g* 482 So. 2d 820 (La.App. 4th Cir. 1986), *cert. denied*, 488 So. 2d 1018 (La. 1986). *See* discussion *infra* at 40.

4. *See generally*, Timothy W. Reinig, *Sin, Stigma, and Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 BUFF. L. REV. 859 (1990); *see also* discussion *infra* at 37.

even were a jury to find no "compensation" involved in this case, Mr. Baxley could be found guilty of *attempting* to commit a "crime against nature" under the "non-solicitation" branch of the statute. Furthermore, this Court has historically declined to sever the interdependent clauses of this statute, and has instead interpreted its subsections much as the State has used it here, in an inclusive manner.

This Court has declared, in both its privacy and equal protection jurisprudence, that the Louisiana Constitution is itself a font of individual liberties with protections which extend beyond those required by the federal judiciary's interpretation of our federal Constitution. If the right to privacy and autonomy means anything, it is the right of the individual, married or unmarried, gay or non-gay, to be free from unwarranted governmental intrusion into matters so profoundly personal as decisions regarding how to express love, affection, intimacy, and sexuality between consenting adults. If the right to equal protection means anything, it is that the State may not maintain a statute to stigmatize and harm a class of people, or incite prejudice against them.

This Court now has the opportunity to take down the "Sword of Damocles" that hangs so ominously over the heads of Louisiana's gay and lesbian citizens. The Court may do so safe in the knowledge that other provisions of Louisiana law provide the State with ample and more narrowly tailored means to achieve any legitimate goals. By striking down the "crime against nature" statute, the Court will both significantly disarm those who would discriminate against lesbians and gay men, and meaningfully reinforce the most important values of our democratic society — individual freedom, respect for diversity, and equal justice for all.

ARGUMENT

I. MR. BAXLEY HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE "CRIME AGAINST NATURE" STATUTE

Johnny Baxley, a Louisiana citizen, was arrested in public by police officers, charged with a felony, arraigned and released on bond, and prosecuted for a crime that could result in his incarceration for five years. Nevertheless, the State would have this Court hold that Mr. Baxley does not have standing to challenge the constitutionality of the statute under which he has been arrested.

The State urges the Court to obtain this astonishing result by severing the interdependent clauses of R.S. 14:89 (inextricably conjoined under the present statutory structure), focusing solely on its allegations of a commercial aspect to the facts of this case, ignoring Mr. Baxley's exposure to a potential conviction for the lesser included offense of attempted violation of subsection R.S. 14:89(A)(1), and disregarding previous instances in which this Court has granted a defendant standing to challenge the constitutionality of this very statute.[5] The State also asks this Court to turn a blind eye to the harmful impact that even the mere existence of R.S. 14:89 has on Mr. Baxley and all gay people, the State's record of selective enforcement, and what that record reveals about the true, illegitimate purpose behind the "Crime Against Nature" statute.

5. LA. REV. STAT. ANN. § 14:89 (West 1986)[hereinafter R.S. 14:89] states:

A. Crime against nature is:

(1) The unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal, except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in R.S. 14:41, 14:42, 14:42.1 or 14:43. Emission is not necessary; and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.

(2) The solicitation by a human being of another with the intent to engage in any unnatural carnal copulation for compensation.

B. Whoever violates the provisions of this Section shall be fined not more than two thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.

A. Mr. Baxley Has Standing to Challenge the "Crime Against Nature" Statute Because He Has Been Charged With Violating It

Mr. Baxley has been charged with a five-year felony which, if he is convicted, would brand him a Sex Offender under La. R. S. 15:540 through 549 and would require him to register with the Sheriff of his Parish of domicile for ten full years after his conviction or release from imprisonment, whichever came first. La. R.S. 15:542 & 15:544. Mr. Baxley's liberty interests could not be more directly at stake, nor could a case or controversy be more fully before this Court. Clearly, Mr. Baxley has standing to challenge the very statute that has placed his liberty in jeopardy. In light of the direct threat that the "crime against nature" statute poses to Mr. Baxley, as well as the discrimination and inequality such statutes invite against all lesbians and gay men in Louisiana and elsewhere, the State's contention that the trial court indulged in an "advisory opinion" by declaring the statute unconstitutional on privacy grounds is simply untenable.

Furthermore, as the lower court correctly noted, this Court has willingly entertained a number of other constitutional challenges to the "crime against nature" statute and "has never denied the defendant standing to raise the claim."[6] Indeed, just six years ago, the Court allowed a defendant who, like Mr. Baxley, had been charged with soliciting a "crime against nature" pursuant to R.S. 14:89, to challenge the federal constitutionality of R.S. 14:89.[7] It would be manifestly unfair to now deny Mr. Baxley, who has been arrested under the very same statute, the opportunity to challenge the constitutionality of that statute under his own state's constitution.

In entertaining other constitutional challenges to R.S. 14:89, this Court has not, as the State suggests, separated the interdependent clauses of the statute. Rather, the Court has consistently dealt with the two provisions in an inclusive manner. In fact, in *Neal,* this Court considered defendant's constitutional challenge to the statute as a whole, despite the fact that the bill of information specifically charged her with violating only subsection (A)(2) of R.S. 14:89. Here, the bill of information hauling Mr. Baxley into court did not specify a subsection, but simply charged that appellee ". . . did wilfully and unlawfully violate R.S. 14:89, relative to Crime

6. *Judgment* at 3. *See, e.g.*, State v. Bluain, 315 So. 2d 749 (La. 1975); State v. Lindsey, 310 So. 2d 89 (La. 1975); State v. McCoy, 337 So. 2d 192 (La. 1976).

7. State v. Neal, 500 So. 2d 374 (La. 1987).

Against Nature. . ." (R-1). Surely, if the bill of information involved in *Neal* warranted this Court's consideration of the statute as structured, the same full consideration is warranted here.

B. Mr. Baxley Has Standing to Challenge the Constitutionality of R.S. 14:89(A)(1) Because He is Subject to Conviction Under That Subsection of the Statute in a Responsive Verdict

Even if, as the State insists, R.S. 14:89(A)(2) could somehow be severed from R.S. 14:89(A)(1), Mr. Baxley would remain exposed to a conviction for attempt to engage in consensual oral sex, proscribed by R.S. 14:89(A)(1). This possibility is especially likely if, at trial, the jury rejects the police officer's assertion and concludes that Mr. Baxley did not, in fact, offer or demand compensation, a critical element of the offense proscribed by 14:89(A)(2). A jury might nonetheless determine that, although no money was mentioned, Mr. Baxley did propose engaging in oral sex. Since, under Article 803 of the Louisiana Code of Criminal Procedure,[8] the trial court *must* charge the jury with the law applicable to all other included offenses of which the appellee could be found guilty, the jury might feel constrained to return a verdict of guilty of attempted violation of R.S. 14:89(A)(1).

Thus, even were this Court to accept the State's strained reading of the statute as severable, and to overlook the bill of information actually filed in this case, Mr. Baxley would still remain exposed to possible conviction under R.S. 14:89(A)(1). Because he is subject to prosecution under both subsections of the statute, he has standing to challenge the constitutionality of either section of the statute or both.

C. As a Gay Man, Mr. Baxley Has Standing to Challenge The Constitutionality of the "Crime Against Nature" Statute Because the Statute Causes Him, All Sexually Active Adults, and All Gay Men and Lesbians, Actual Harm Beyond the Present Prosecution

Mr. Baxley also has standing to challenge the constitutionality of the "crime against nature" statute, not only because he has been

8. LA. CODE CRIM. PROC. ANN. art. 803 (West 1981), provides:
When a count in an indictment sets out an offense which includes other offenses of which the accused could be found guilty under the provisions of Article 814 and 815, the court shall charge the jury as to the law applicable to each offense.

arrested under the statute and is subject to conviction under all of its parts, but also because the statute's very existence causes real and serious harm to him and to all lesbians, gay men, and other sexually active persons living in Louisiana. The statute improperly intrudes where the State has no business interfering; the State then compounds the intrusion with selective and stigmatizing use of the statute to render gay men and lesbians in Louisiana second-class citizens.

Scientific, demographic, and clinical knowledge demonstrates that the intimate sexual conduct prohibited by the "crime against nature" statute is healthy and often important to the mental health and happiness of individuals and their deepest relationships, and is engaged in often by many, if not most, Americans. *See* Point I (C)(1) at 10 below. Moreover, the choice as to whether to engage in such sexual conduct is a highly personal and important one for most, if not all. By criminalizing such healthy and important activity and choices, even in the privacy of the home, the "crime against nature" statute violently invades the personal autonomy of all sexually active persons in Louisiana. *See* Point II, at 28 below.

In addition, the State's record of selectively enforcing and invoking the statute against Louisiana's gay and lesbian citizens betrays its stigmatizing impact and purpose, violating the guarantee of equal protection. *See* Point III, at 37 below. As a sexually active adult, and as a gay man, Mr. Baxley properly has standing to challenge this unlawful government conduct.

The State would deprive Mr. Baxley and the others harmed daily by the statute of an opportunity to be heard before this Court. It first asserts that, notwithstanding the open-ended bill of information in this case, the "crime against nature" statute "is simply not applied in a non-solicitation context,"[9] and then maintains that Mr. Baxley lacks standing to raise a privacy-based constitutional challenge to the statute because he was arrested in an alleged solicitation context.[10] Clearly, if this statute is not enforced in a non-solicitation context and yet standing to raise a privacy-based constitutional challenge is predicated on being arrested in such a context, the courts will simply never hear challenges, such as Mr. Baxley's, to an oppressive statutory scheme. If the State were to prevail in its argument against standing, Louisiana citizens — particularly its

9. *State's Brief* at 12. It is puzzling, to say the least, that the State would devote so much of its scarce resources, not to mention the resources of this Court, to its effort to defend the constitutionality of an assertedly unenforced provision of R.S. 14:89.

10. *Id.* at 7-8.

lesbian and gay citizens — whose interests are harmed by the very existence of this statute, would be denied any opportunity to assert and protect their rights.[11]

1. The "Crime Against Nature" Statute, Which Criminalizes Intimate and Important Sexual Conduct, Causes Psychological Harm to Appellee and All Sexually Active Adults.

Appellee is a gay man who, like other gay and non-gay adults, regularly engages in private sexual acts, choosing personal conduct and entering consensual relationships that the State has no proper business invading. All *non-gay* sexually active adults in Louisiana live under an ostensible threat of prosecution under R.S. 14:89 for precisely this kind of sexual and intimate conduct or for proposing the same to other consenting adults; because of R.S. 14:89, all *gay* people, including Mr. Baxley, live under an ever-present legally-enforced stigma, and a *real* and often realized threat of prosecution. Because R.S. 14:89's prohibition of important intimate action thus causes psychological harm beyond the present prosecution, Mr. Baxley has standing to challenge the statute's facial overbreadth.

Sexuality is fundamental to the lives and relationships of all people, gay and non-gay, married and unmarried. In both gay and non-gay couples, sex functions as a complex bond between the partners, an opportunity to express and satisfy many human needs, desires, and even aspects of one's identity in this world. Many have extolled "the majesty of true sexuality. . .its earthiness; its mystical and exalted power of momentary union between two humans; its capability of ameliorating the natural aloneness of the

11. The United States Supreme Court addressed a similar standing issue in Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court ruled that, in raising a privacy-based constitutional challenge to a restrictive contraception statute, a contraceptives manufacturer had standing to assert the rights of unmarried persons who "[were] not themselves subject to prosecution and, to that extent, [were] denied a forum in which to assert their own rights." *Id.* at 446. The Court stated, "more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third party interests." *Id.* at 445. Here the interests of all gay men, lesbians and sexually active persons in Louisiana are appropriately raised by Mr. Baxley. And unlike in *Eisenstadt*, Mr. Baxley does not seek merely to assert the interests of third-party classes not themselves before the court. Rather, he is himself a member of those classes, as well as being personally subject to prosecution and conviction under all parts of the statute.

human condition; and its ability to replenish the human soul."[12] "Having 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."[13] For all couples, "a good sex life is central to a good overall relationship."[14] Gay and non-gay men and women share the fundamental value in sexuality, and make choices that should be equally protected by the constitutional guarantee of personal privacy.

Although many inappropriately and incorrectly assume that only gay men and lesbians engage in "sodomy" or "crimes against nature," (see discussion at 16 below), in fact the oral and anal sex proscribed by Louisiana's "crime against nature" statute 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.[15] Another study found that approximately 80% of unmarried men and women aged 25-34 have done so.[16]

Although less information is available on the incidence of anal intercourse between women and men, one representative national sample showed that 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.[17] One researcher

12. James G. Sweeney, *Letter to the Editor*, THE NEW REPUBLIC, Jan. 3, 1994, at 5; *see also* David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979).

13. PHILLIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 193 (1983). [hereinafter BLUMSTEIN & SCHWARTZ].

14. Id. at 201, 205-206; *see* DAVID P. MCWHIRTER & A. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP (1984) [hereinafter MCWHIRTER & MATTISON] 262 (1984).

15. BLUMSTEIN & SCHWARTZ, *supra* note 11, 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* CAROL TAVRIS & SUSAN SADD, THE REDBOOK REPORT ON FEMALE SEXUALITY (1977) (85% of married couples engaged in cunnilingus, and over 83% engaged in fellatio, often or occasionally); MORTON HUNT, SEXUAL BEHAVIOR IN THE SEVENTIES 199 (1974) (90% of married couples under 25 years old engaged in oral sex)[hereinafter Hunt].

16. HUNT, *supra* note 15. Another major study reported that after reaching the age of 50, 43% of women and 56% of men had engaged in cunnilingus. EDWARD BRECHER, LOVE, SEX, AND AGING: A CONSUMER'S UNION REPORT, 358-59 (1984).

17. INTERNATIONAL SURVEY OF AIDS EDUCATIONAL MESSAGES AND BEHAVIOR CHANGE (1988 data collected by Lewis Harris & Associates for Project Hope, Center

found that 25% of married couples under 35 years old had engaged in anal intercourse in the year preceding the study.[18] A 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.[19] Without doubt, therefore, much of the sexual activity in Louisiana — among heterosexual and gay people, men and women, young and old, married and unmarried — involves the oral or anal sex proscribed by the "crime against nature" statute.[20]

Whatever the lip service some in society pay to the contrary, mental health professionals consider this diverse sexual expression between consenting adults as indicating, indeed promoting, mental health.[21] Engaging in a variety of sexual expression, including the oral and anal sex proscribed by the "crime against nature" statute, does not result in mental or physical dysfunction;[22] rather, enforced repression of desire for such expression is associated with dysfunction and pathology, particularly where accompanied by stigma and discrimination.[23] Research also reveals that oral and anal sex can

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for Health Affairs, 2 Wisconsin Circle, Chevy Chase, Maryland). Of course, in many cultures, anal intercourse is encouraged, in part based on lingering cultural attitudes about the significance of "virginity" and as an alternative to potentially procreative sex. *See, e.g.* CLELLAN S. FORD & FRANK A. BEACH, PATTERNS OF SEXUAL BEHAVIOR 130 (1951).

18. HUNT, *supra* note 15, at 204. Six percent of the sample reported engaging in anal intercourse "sometimes" or "often."

19. June Machover Reinisch, et al., *The Study of Sexual Behavior in Relation to the Transmission of Human Immunodeficiency Virus: Caveats & Recommendations*, 43 AMERICAN PSYCHOLOGIST 922 (1988).

20. *See also*, SHERE HITE, *The Hite Report: Nationwide Study of Female Sexuality* (1976); SHERE HITE, *The Hite Report on Male Sexuality* (1981); and ALFRED KINSEY et al., SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

21. A substantial majority of Americans consider oral-genital contact to be "a part of normal sex," a recent study found. Callen & Planco, *Attitudes Toward Oral-Genital Sexuality*, 42 CONN. MED. 500, 502 (1978) (91% of persons under 35, and 78% of all persons, said they consider oral sex normal). Moreover, the American Psychiatric Association removed homosexuality from its list of disorders in 1973. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261-83 (3d ed. rev. 1987).

22. 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*, John C. Gonsiorek et al., *Social Psychological Concepts in the Understanding of Homosexuality*, in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL & BIOLOGICAL ISSUES 115-19 (William Paul *et al.* eds. 1982).

23. WILLIAM H. MASTERS & VIRGINIA JOHNSON, HUMAN SEXUAL INADEQUACY (1st ed. 1970); *see* JOHN C. GONSIOREK & RUDOLPH, HOMOSEXUAL IDENTITY: COMING OUT AND OTHER DEVELOPMENTAL EVENTS, IN HOMOSEXUALITY: RESEARCH

significantly benefit both heterosexual and gay relationships. Indeed, a 1978 study showed that a majority of Americans believe that "oral-genital sex leads to better and happier relationships."[24]

Just as the choice to engage in oral and anal sex is important to many non-gay people, oral and anal sex are among the primary forms of sexual expression available to gay people.[25] As with heterosexual couples, lesbian and gay male couples who engage in oral sex are (on the whole) happier than those who do not.[26] Gay people also benefit by engaging in behavior that affirms their self-concept, provides emotional satisfaction, and allows the formation of long-term bonds.[27]

In response to the AIDS epidemic, of course, most gay men, in those populations that have been studied, have now had to educate and reinforce themselves to use condoms during anal intercourse — as should everyone in any form of intercourse involving the potential exchange of semen, blood, or other body fluids.[28] Frank ac-

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IMPLICATIONS FOR PUBLIC POLICY 161-76 (1991); P. Gibson, *Gay and Lesbian Youth Suicide* in U.S. DEP'T OF HEALTH AND HUMAN SERVICES YOUTH SUICIDE REPORT 110 (1989) ("[.] The root of the problem of gay youth suicide is a society that discriminates against and stigmatizes homosexuals.").

24. Callen and Planco, *supra* note 21, at 502.

25. 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* note 13, at 236. Seventeen percent of male couples and 12% of lesbian couples reported engaging in oral sex every time they had sexual relations. *Id.* Seventy percent of male couples reported regularly engaging in anal intercourse. *Id.* at 243 Kinsey Institute studies have reported estimates 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); A. BELL & M. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN at 328-30 (1978)[hereinafter BELL & WEINBERG]. Another major study, limited to male couples, found that about 95% of the sample reported engaging in fellatio and 71% reported engaging in anal intercourse at some time during the preceding year. MCWHIRTER & MATTISON, *supra* note 14, at 277.

26. BLUMSTEIN & SCHWARTZ, *supra* note 13, at 239-40 (lesbian 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 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.

27. MCWHIRTER & MATTISON, *supra* note 14, at 262; BELL & WEINBERG, *supra* note 25, at 217-18; Letitia Anne Peplau, *What Homosexuals Want in Relationships*, 15 PSYCHOLOGY TODAY 28 (1981).

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 973-77 (1990); Becker & Joseph, *AIDS and Behavioral Change to Reduce Risk: A Review*, 78 AM. J. OF PUB. HEALTH 394, 394-410 (1988).

knowledgment of reality is a necessary prerequisite to promoting health in one's sense of self, behavior, and choices in all respects; it is clear that the "crime against nature" statute — the true purpose and effect of which is [to] stigmatize lesbians and gay men — does not reflect the reality and non-gay people's sexual conduct and choices.[29]

2. The Statute's Illegitimate Implicit Condemnation of Gay People Underlies Much Discrimination in Law Against Appellee and Lesbians and Gay Men Generally.

Notwithstanding the facial application of R.S. 14:89 to gay and non-gay people alike, and despite the reality (demonstrated above) of the fact that both non-gay and gay people in Louisiana routinely engage in the conduct the statute proscribes, R.S. 14:89 is pervasively misused, both as a prohibition on the sexual activity of gay people alone, and, even worse, as a stamp of second-class citizenship on gay people, regardless of individual conduct. Over time, and due in large part to the State's selective endforcement [sic] (and non-enforcement), R.S. 14:89 has become the instrument, not of a meaningful curb on conduct, but rather of a stigma on homosexuality and gay identity, sanctioning many forms of discrimination against lesbians and gay men.

For example, at one point during his strenuous efforts against permitting gay people openly to serve our country in the military, Senator Strom Thurmond, shouted, "[S]odomy is illegal" and "[h]eterosexuals don't practice sodomy."[30] Although Senator Thurmond's statement elicited laughter in the Senate hearing room,[31] his inaccuracy and his deliberate equation of ostensibly neutral, illegal "sodomy" with gay people are no laughing matters.

In the Senator's dangerous formulation, "sodomy" is such a defining characteristic of gay people, and so exclusive to us, that it may constitute a rhetorical proxy for us, and a legal basis for deny-

29. Such statutes are in no way a public health measure, and, indeed, undoubtedly undermine the fight against HIV and other public health concerns. *See, e.g.*, Kentucky v. Wasson, 842 S.W.2d 487, 489-90 (Ky. 1992). New Jersey v. Saunders, 381 A.2d 333, 341-42 (N.J. 1977) (criminal penalties add little or no deterrent force to fear of contracting serious illness).

30. *Senators Loudly Debate Gay Ban*, *supra* note 2. "Sodomy," of course, often refers to the same conduct characterized as "crime against nature."

31. *Id.* ("The comment by Mr. Thurmond, the ranking Republican on the committee, brought laughter from the audience.")

ing us other basic rights.[32] As the following discussion amply illustrates, the Senator is not alone in making this equation. And, indeed, R.S. 14:89, like all "sodomy" statutes, hangs over the heads of all lesbians and gay men, an omnipresent and potent weapon routinely used to deny gay people a wide range of rights and benefits.

The "sodomy" provision of the Uniform Code of Military Justice ("UCMJ") featured significantly, if hypocritically, in the government's justification for upholding the ban against lesbians and gay men in the military.[33] The "sodomy" provision of the UCMJ, like R.S. 14:89, applies as much to heterosexual men and women as it does to gay men and women. Still, it is brandished exclusively against lesbians and gay men, not only to punish oral or anal sex when gay people engage in them, but as a basis for massively restricting our ability, *regardless of conduct*, to serve our country openly and to share in the myriad benefits and career opportunities that stem from military service. The purported need to root out "homosexual acts" and those with a "propensity" to engage in them (notwithstanding the UCMJ's ostensible neutrality as to the gender of those engaging in oral or anal sex), is not just invoked to justify anti-gay discrimination, but also to justify such discrimination without real regard to whether individuals actually engage in the acts prohibited by the UCMJ.[34]

Another classic example of anti-gay prejudice masking as the enforcement of a "sodomy" statute is found in a Texas case, City of Dallas v. England.[35] There, the Dallas Police Department denied

32. For an in-depth discussion of the popular equation of "sodomy" with homosexuality, *see* Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993).

33. *Senators Loudly Debate Gay Ban*, *supra* note 2. *See also* Statement of Charles R. Jackson, Executive Vice President, Non-Commissioned Officers Association Before the Republican Study Committee on Homosexuals in the Armed Forces, FEDERAL NEWS SERVICE, December 9, 1992 ("NCOA suggests to the committee that prior to any change in current policy [regarding the presence of gays in the military], efforts must be redirected to making homosexual conduct legal in all states. . .").

34. Nothing in the latest incarnation of the military regulations, announced on December 22, 1993, changes either the core anti-gay discrimination or the disingenuous attempt to base it in part on the UCMJ. After all, if neutral enforcement of the neutral UCMJ were in fact the objective, there would be no need to single out gay and lesbian service personnel for restrictions, special "rebuttable presumptions," or the like. The regulations reflect yet another impermissible effort to reclassify speech and identity as conduct, conduct selectively prohibited when associated, accurately or otherwise, with gay people.

35. 846 S.W.2d 957 (Tex. Ct. App. Austin 1993), *writ denied w.o.j.* (May 5, 1993), *reh'ng of writ of error overruled* (June 9, 1993).

the plaintiff employment because she stated truthfully that she was a lesbian. Deeming her thus to be in violation of a departmental policy that singled out for rejection, among others, those who had engaged in same-sex sex since the age of 16, or who had engaged in sex with an animal since the age of 17 (!), the Department argued that as a lesbian, Ms. England could be presumed in continuing violation of the Texas "sodomy" statute, Tex. Penal Code § 21.06.[36] There was of course no such evidence, nor were any charges brought directly under the statute itself.

The trial court ruled the state "sodomy" statute, and the discriminatory anti-gay policy that purported to derive from it, unconstitutional, a decision affirmed by the appellate courts. The court clearly saw that the anti-gay impact of the criminal statute was squarely before it, even though the case arose in the employment context.

In another recent case, an attorney was fired from the Office of the State Attorney General of Georgia because she engaged in a religious marriage with another woman.[37] The woman had worked as a summer clerk at the Attorney General's Office, had graduated at the top of her law school class, and had passed the Georgia bar exam. Still, Georgia Attorney General Michael Bowers cited Georgia's "sodomy" law — which, like Louisiana's, on its face neutrally proscribes oral or anal sex as to men and women, gay and non-gay, married and unmarried — as a fit basis for his refusal to hire a qualified open lesbian:

> [r]egardless of whether [p]laintiff has actually committed sodomy. . . the Attorney General is justified in withdrawing the offer of employment in order to ensure public perception (and the reality) that his [d]epartment is enforcing and will continue to enforce the laws of the State.[38]

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36. TEX. PENAL CODE ANN. § 21.06 (West 1994) provides:

§ 21.06. *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.

TEX. PENAL CODE ANN. § 21.01 defines "Deviate sexual intercourse" 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.

37. Shahar v. Bowers, 58 Fair Empl. Prac. Cas. (BNA) 668 (N.D. Ga. 1992) *partial summary judgment denied, summary judgment granted, dismissed* 63 Fair Empl. Prac. Cas. (BNA) 109 (N.D. Ga. 1993).

38. *Id.* at 671, citing Defendant's Reply, at 11 note 5.

Once again a statute that on its face reaches everyone, a statute in fact rarely if ever enforced directly, was used to punish a gay person never even accused of violating it.

Similarly, in Florida, the Orange County Sheriff fired a deputy, despite his concededly "exemplary" record, when it was discovered that he was gay.[39] The sheriff's office cited the existence of "sodomy" laws as a justification for the dismissal, noting that Florida prohibits oral or anal sex (again, however, ostensibly applying to all, gay and non-gay alike), and that deputies might have to work with agencies in other states that also have such laws. The court implicitly rejected such arguments (as well as the implication that private consensual sexual conduct could be criminalized), and found that the anti-gay discrimination violated the state constitutional right to privacy. Ultimately, after a four-year struggle, the deputy won his job back.

"Sodomy" statutes are also frequently invoked to deny lesbians and gay men custody of, or even visitation with, their children.[40] Indeed, in New York City, a local school board has even invoked "sodomy" as a justification for preventing school teachers from teaching their students about the mere existence of lesbian or gay parents.[41] Laws such as R.S. 14:89 have also been invoked to justify bans on gay people assembling or communicating the availability of services.[42]

At the national level, the Federal Bureau of Investigation, the Central Intelligence Agency, and other federal government agen-

39. Woodward v. Gallagher, No. S9-5776 (Orange Co., Fla. Cir. Ct. filed June 9, 1992).

40. *See, e.g.*, Chicoine v. Chicoine, 479 N.W.2d 891, 896 (S.D. 1992); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985); Bottoms v. Bottoms No. CH93JA0517-00 (Va. Cir. Ct., Henrico County, filed Sept. 7, 1993).

41. Joseph Berger, *Teaching about Gay Life is Pressed by Chancellor*, N.Y. TIMES, Nov. 17, 1992, at B12 (quoting the President of a Queens school board as characterizing the proposed material as "aimed at promoting acceptance of sodomy.")

42. *See, e.g.*, Gay Lib. v. Univ. of Mo., 558 F.2d 848, 850 (8th Cir. 1977), *cert. denied sub nom*, Ratchford v. Gay Lib, 434 U.S. 981 (1978) (reversing district court which "ruled that the school officials justified their action of the ground that recognition. . .would probably result in the commission of felonious actis of sodomy. . ."); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1075-76 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977) ("sodomy" statute invoked to justify newspaper's refusal to print advertisement for gay counseling and legal aid because of professed concern regarding abetting "criminal" activity); Gay Students Org. v. Bonner, 509 F.2d 652, 662-63 (1st Cir. 1974)(ban on gay social function invalid despite university's asserted interest in "preventing illegal activity which may include 'deviate' sex acts [and] 'lascivious carriage' "); Gay Activists Alliance v. Bd. of Regents, 638 P.2d 1116, 1121-22 (Ok. 1981) (lower court upheld refusal by regents to grant organization recognition because of mere existence of Oklahoma law against homosexual activity).

cies have consistently dismissed employees identifying or identified as gay or lesbian.[43] Officials in those agencies routinely cited the existence of state "sodomy" statutes such as R.S. 14:89 as a justification for the denial of employment or special security clearances for gay men and lesbians.[44] For example, in one instance, a private investigator in San Francisco was told by the FBI that it would be hard for the agency to hire her because, since she is a lesbian, the FBI would not be able to transfer her to any of the states, like Louisiana, with "sodomy" laws.[45]

Every instance of anti-gay discrimination by national entities such as the FBI, CIA, or even large corporations directly implicates R.S. 14:89. When using "sodomy" or "crime against nature" statutes to justify overt discrimination, agency and company officials do not necessarily point to specific statutes, let alone specific details or provisions; rather, they invoke the existence of all "sodomy" statutes generally (and, as we have seen, often invoke them in a selective, discriminatory fashion). Louisiana's "crime against nature" statute is therefore used by others throughout the country to deny lesbians and gay men equality in opportunities to which they would otherwise be entitled.

Finally, two courts have granted standing to gay persons to challenge state "sodomy" statutes in *civil* proceedings.[46] In Michigan, a plaintiff group — comprised of gay men, lesbians, a bisexual man and woman, heterosexual men and women, and a woman with a physical disability — was granted standing to challenge the constitutionality of Michigan's "sodomy" and "gross indecency" statutes. The Wayne County Circuit Court concluded that, although none of the plaintiffs had actually been arrested under the statute, they had standing to seek declaratory relief in a civil proceeding because

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43. *See, e.g.*, Buttino v. F.B.I., No. c-90-1639-SBA, 1992 U.S. Dist. LEXIS 4659, at *17 (U.S. Dist. Ct. February 11, 1992) ("Plaintiff has submitted evidence — and indeed it is undisputed — that the FBI has had a history of anti-gay discrimination.") The FBI has now announced a non-discrimination policy, pursuant to a departmental directive issued by Attorney General Reno on December 2, 1993, and a settlement stipulation in Buttino.

44. *FBI Policy on Homosexuals at Issue in Ex-Agent's Suit*, L.A. TIMES, November 26, 1993 at A1 ("the bureau has said homosexual conduct poses concerns about the potential for 'unlawful' activities — several states have anti-sodomy laws — and security lapses.").

45. *Gays Accuse U.S. Agencies of Bias*, CHICAGO TRIBUNE, May 2, 1993, at 1.

46. *See* Michigan Organization for Human Rights ("MOHR") v. Kelley, No. 88-815820 CZ, slip op. (Mich. Cir. Ct. July 9, 1990); Texas v. Morales, 826 S.W.2d 201 (Tex. Ct. App. Austin 1992) *writ granted* 35 Tex. Sup. Ct. J. 1117 (Tex. 1992) *set for submission* Jan. 5, 1993.

the statutes caused them real and serious harm by their very existence:

> The individually named Plaintiffs in the instant case have all violated at least one of the statutes in question and have testified by way of affidavits, as to the fears and harm they face in their lives currently as a result of their continuous violations. *Plaintiffs' fears are legitimate and real and constitute a basis for an actual controversy.*[47]

In the Texas case, the Texas Court of Appeals similarly granted standing to five gay persons (three women and two men) to challenged the constitutionality of the Texas "sodomy" statute in a civil proceeding. The Court found that, although none of the plaintiffs had been arrested or charged under the statute, they suffered and suffer serious harm from the statute's very existence:

> [Appellees] argue that the existence of § 21.06 implicitly condones hate crimes against lesbians and gay men, encourages discrimination in our legal system, and raises the potential threat of arrest, fine, and pecuniary loss. Further, they assert that *the statute brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law.* For example, according to appellees, *the stigma of criminality arising from the statute encourages discrimination in the context of employment, family issues, and housing. . . ..*
>
> We conclude that appellees have standing to attack the constitutionality of § 21.06 because they have shown that *the statute causes actual harm which goes far beyond the mere threat of prosecution.* Because of these consequences to appellees, we cannot agree with the State that this case is hypothetical, abstract or generalized.[48]

3. The "Crime Against Nature" Statute Promotes Hostility, Violence, and Discrimination Against *Gay People.*

Even aside from its frequent, if illogical, invocation in the legal arena, the "crime against nature" statute works significant harm on gay people in this State and in society. Lesbians and gay men are a stigmatized group in American society, stamped through prejudice

47. *MOHR v. Kelley*, slip opinion at 5.

48. *Morales*, 826 S.W.2d at 202-203 (emphasis added). Although the Texas equivalent of R.S. 14:89 on its face singles out conduct between people of the same sex, Louisiana's "crime against nature" results in the same stigmatizing effects, particularly in light of the way it is selectively enforced and invoked, and the general equation, however doubly inaccurate, of "sodomy" with gay people.

and ignorance with the classic stereotypes of dehumanization.[49] Nationally, we are the victims of extensive discrimination,[50] interpersonal prejudice,[51] and violence[52] because of our sexual orientation. Regrettably, the State of Louisiana is no exception to this general truth. Indeed, the lower court heard testimony regarding the discrimination and police abuse aimed at the lesbian and gay community of New Orleans.[53]

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 — or at least the preached values — of the society. Thus, laws that penalize specific forms of sexual expression, or that come to be used or understood as branding a particular group as outlaws, convey a message of social disapproval to all citizens. They reinforce individual hostility against the people who practice (or who are deemed to practice) such behaviors, or who are inaccurately held to be "the class defined by the conduct" ostensibly proscribed by the law.[54]

Ironically, there are values the law should be conveying instead. In a democratic society, the laws should reinforce the importance of, and respect for, individual choice and freedom. Laws should encourage tolerance and celebrate diversity rather than foster ignorance and instill prejudice. They should not become the vehicle for hypocrisy regarding the personal or sexual conduct of some, while serving as the engine for attacks on others.

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49. *See* Evan Wolfson, *Civil Rights, Human Rights, Gay Rights: Humanity and the Humanity of the Different*, 14 HARV. J.L. & PUB. POL'Y 21 (1991).

50. *See, e.g.*, Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ., 536 A.2d.1, 35 (D.C. App. 1987). *See also* Evan Wolfson, "*Sexual Orientation Discrimination*," in M. Rossein, EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION, ch. 28 (Clark Boardman, rev. ed., 1993); Levine, *Employment Discrimination Against Gay Men*, 9 INT'L REV. OF MODERN SOCIOLOGY 151 (1977) [hereinafter Levine]; Levine & Leonard, *Discrimination Against Lesbians in the Work Force*, 9 SIGNS 700 (1984)[hereinafter Levine & Leonard].

51. Herek, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, 10 J. HOMOSEXUALITY 1 (1984) [hereinafter Herek, *Beyond "Homophobia"*]; Herek, *Stigma, Prejudice and Violence Against Lesbians and Gay Men*, in HOMOSEXUALITY, [hereinafter Herek, *Stigma*].

52. Herek, *Stigma*, *supra*, note 51; Herek & Berrill, *Violence Against Lesbians and Gay Men: Issues for Research, Practice, and Policy*, J. OF INTERPERSONAL VIOLENCE (special issue 1990); Herek, *Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy*, 44 AM. PSYCHOLOGIST 948, 948-55 (1989).

53. Supplemental Record at 124-34.

54. Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism*, 5 J. OF INTERPERSONAL VIOLENCE 316-33 (1990).

Yet another way in which laws such as R.S. 14:89 affect individual attitudes is by restricting opportunities for interaction between gay and non-gay people. Empirical research has consistently demonstrated that having a relationship with an openly gay person is one of the most powerful influences on heterosexuals' acceptance of and tolerance for gay people.[55] In order for this interaction to occur, the gay man or lesbian must disclose his or her sexual orientation to the heterosexual person. Such disclosure is inhibited most often by fears concerning the stigmatization that might follow such exposure.[56] By promoting stigma, R.S.14:89 inhibits disclosure by gay people of their sexual orientation. This, in turn, prevents heterosexuals from interacting with openly gay people which, in turn, reinforces unconstitutional and socially destructive anti-gay prejudice.

This Court can break the vicious cycle of stigma and disenfranchisement in which the State through R.S. 14:89 has played so grievous a role. It should recognize, as the courts in Texas, Michigan, and Kentucky have recently, that the mere existence of statutes such as R.S. 14:89 causes actual harm to lesbians and gay men beyond the threat of prosecution. Mr. Baxley, a gay man who *has* actually been prosecuted under R.S. 14:89, surely has standing to challenge the statute and its overreach. By repudiating R.S. 14:89's brand of inferiority on lesbians and gay men, the Court will eliminate it as a weapon serving no legitimate social or governmental purpose.

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55. Herek, *Beyond "Homophobia"*, *supra*, note 51, at 1, 1-21; Schneider & Lewis, *The Straight Story on Homosexuality and Gay Rights*, 7 PUB. OPINION 16 (Feb./Mar. 1984) at 16, 16-20, 59-60. In announcing the Administration's version of the anti-gay military policy on July 19, 1993, President Clinton acknowledged that "those who have studied this issue extensively have discovered an interesting fact: people in this country who are aware of having known homosexuals are far more likely to support lifting the ban." Speech by President Clinton, July 19, 1993, p.2. Laws that compel people to hide their identities, or that reinforce stigma, clearly prevent the very social and political interaction essential to removing prejudice, inequality, and the fear and ignorance that underlie them. In this sense, coming out, being able to identify oneself as lesbian or gay, is political expression essential to a democratic society and the gay people within it. Gay Law Students Ass'n v. Pacific Tel & Tel. Co., 595 P.2d 592, 610 (1979) ("one important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet'. . . .").

56. BELL & WEINBERG, *supra* note 25; Levine, *supra* note 50, at 151; Levine & Leonard, *supra*, note 50, at 700; Schneider, *Coming Out at Work: Bridging the Private/ Public Gap*, 13 WORK AND OCCUPATIONS 463, 463-87 (1986); Wells & Kline, *Self-Disclosure of Homosexual Orientation*, 127 J. OF SOC. PSYCHOLOGY 191, 191-97 (1987).

II. THE TRIAL COURT CORRECTLY HELD THAT THE "CRIME AGAINST NATURE" STATUTE VIOLATES THE STATE CONSTITUTIONAL GUARANTEE OF PERSONAL PRIVACY.

A. In Applying State Constitutional Principles, This Court Is Not Constrained by the Federal Judiciary's Interpretation of Federal Constitutional Provisions.

The case at bar was argued and decided solely on *state* constitutional grounds. Therefore, contrary to the State's assertion, this Court's recognition in Neal, 500 So.2d 374, that Bowers v. Hardwick, 478 U.S. 186 (1986) *reh'g denied* 478 U.S. 1039 (1986), at present forecloses a *federal* constitutional challenge to R.S. 14:89 is not dispositive of this case. Indeed, the United States Supreme Court, when deciding Hardwick, expressly acknowledged "the right or propriety. . . of state-court decisions invalidating [sodomy] laws on state constitutional grounds."[57]

As the trial court correctly noted, "[i]t is axiomatic that a State Constitution can give its citizens more freedom than its Federal counterpart."[58] In fact, this Court has on several occasions held that the Louisiana constitution is more protective of individual rights than the federal constitution.[59] In 1982, the Court stated: "[w]e, of course, give careful consideration to the United States Supreme Court interpretations of relevant provisions of the federal constitution, but *we cannot and should not allow those decisions to*

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57. *Hardwick*, 478 U.S. at 190. Indeed, Justice Brennan has argued that "the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the [United States Supreme] Court has put in them. . . .With federal scrutiny diminished, state courts must respond by increasing their own." W. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

58. Judgment at 3. In 1977, Justice Brennan emphasized the increasingly critical role of state courts in the protection of individual liberties:

> "[s]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed."

Brennan, *supra* note 50 at 491.

59. *See* State v. Church, 538 So. 2d 993, 996 (La. 1989); Sibley v. Bd. of Sup'rs of La. State Univ., 477 So. 2d 1094, 1108 (La. 1985); State v. Breaux, 329 So. 2d 696, 700 (La. 1976); *See generally*, Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade be Alive and Well in the Bayou State?* 51 LA. L. REV. 685, 688 (1991).

replace our independent judgment in construing the constitution as adopted by the people of Louisiana."[60] When defining the scope of individual liberties guaranteed by the Louisiana constitution, therefore, this Court is not bound by federal caselaw and should decline to follow it when valid reasons lead to a different conclusion.[61]

Clearly, this case is one in which valid reasons exist to decline to follow the federal example. Critical response to the Supreme Court's majority opinion in Hardwick has been uniformly harsh. In fact, "[c]ommentators have been virtually unanimous in their criticism of Hardwick's reading of the Court's privacy jurisprudence."[62] Moreover, former Justice Lewis Powell, the "swing vote" on the bitterly divided Hardwick Court, has declared that he "probably made a mistake" in voting to uphold the "sodomy" law, stating that, in retrospect, "the dissent had the better of the arguments."[63]

Thus, a majority of the Hardwick Court is now on record as believing that the Georgia "sodomy" statute should have been declared an unconstitutional infringement on the federal right to privacy. Rather than impose upon the citizens of Louisiana the "mistake" made by the Hardwick then-majority, this Court should recognize, as did the Hardwick dissenters, that "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."[64]

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60. State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982)(emphasis added).

61. "[S]tate court judges... do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees." Brennan, *supra* note 57 at 502.

62. *Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1523 note 30 (May 1989) (majority opinion's analysis departs from established privacy doctrine). *See also* J. JOSEPH, BLACK MONDAYS: WORST DECISIONS OF THE SUPREME COURT 65-74 (1987) (including Hardwick among "worst" Supreme Court opinions); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-21, at 1421-35 (critique of decision by attorney who argued Hardwick in Supreme Court); Note, *Chipping Away at* Bowers v. Hardwick*: Making the Best of an Unfortunate Decision*, 63 N.Y.U.L.REV. 154 (1988)(criticizing *Hardwick* and suggesting ways to minimize its effect on future cases).

63. *See Powell Concedes Error in Key Privacy Ruling*, N.Y.L.J., Oct. 26, 1990, p.1, col. 3.; Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990 at A3.

64. *Hardwick*, 478 U.S. at 214 (Blackmun, J., dissenting).

Since Hardwick, courts in other states have struck down "sodomy" statutes as violative of state constitutional guarantees.[65] Most recently, the Kentucky Supreme Court, in a careful and learned opinion, described Hardwick as "a misdirected application of the theory of original intent," [and] noted that "in the space of three decades half the states decriminalized this conduct," and ruled that the Kentucky "sodomy" statute violated the right to privacy guaranteed by the Kentucky constitution.[66] In Texas, the Third District Court of Appeals similarly rejected the Hardwick opinion and struck down the Texas sodomy statute as violative of the right to privacy guaranteed by the Texas constitution, explicitly stating that "the Texas Constitution accords individuals greater safeguards to their personal freedom than its federal counterpart does."[67]

Additionally, twenty-six states have repealed their "sodomy" and "crime against nature" statutes since the 1961 adoption of the Model Penal Code, which repudiated intrusive laws. This year two jurisdictions, the District of Columbia[68] and the State of Nevada[69] joined in removing their statutes from the books. This history of judicial vigilance and legislative repeal means that as of now, there are but four state statutes that continue to single out "homosexual sodomy," and sixteen states which purport to criminalize both heterosexual and homosexual "sodomy" — of which Louisiana's "crime against nature" statute is one.[70] As the Kentucky Supreme Court noted when striking down the Kentucky "sodomy" statute, "our decision, rather then being the leading edge of change, is but a part of the moving stream."

The State's contention that "none of these cases [from other states] involved solicitation for sexual favors"[71] is not only inapt, it is simply untrue. The Kentucky Supreme Court struck down the Kentucky "sodomy" statute in a case which, like the present case,

65. *See* City of Dallas v. England, 846 S.W.2d 957 (Tex. 1993); Kentucky v. Wasson, 842 S.W.2d 487 (Ky. 1992); Texas v. Morales, 826 S.W.2d 201 (Tex. 1992); MOHR v. Kelley, No. 88-815820 CZ, slip op. (Mich. Cir. Ct. July 9, 1990). Prior to Hardwick, *see* New York v. Onofre, 434 N.Y.S.2d 947 (1980) *cert. denied* 451 U.S. 987 (1981); Pennsylvania v. Bonadio, 415 A.2d 47 (Pa. 1980).

66. *Id.*

67. *Morales*, 826 S.W.2d at 204.

68. *See* D.C. ACT 10-23 (D.C. Code Supp. 1994)

69. *See Nevada Repeals Sodomy Law*, WASH. TIMES, June 16, 1993, at B5; *Addenda*, WASH. POST, June 18, 1993, at A2 (reporting that Nevada Governor Robert J. Miller had signed the repeal into law).

70. *See generally* Halley, *supra* note 32 at 1774-76.

71. State's Brief at 12.

involved a defendant who was charged with "having solicited an undercover . . . policeman to engage in deviate sexual intercourse."[72] The State's contention that the other state cases involved only "non-commercial sexual relations"[73] ignores the existence of the Pennsylvania case. The Pennsylvania Supreme Court struck down that state's "sodomy" statute on facts involving sexual acts performed in a commercial theater with members of the audience.[74] Additionally, the alleged "public" nature of the facts of this case do not differ significantly from the facts of the Kentucky and Pennsylvania cases. The New York Court of Appeals, the highest court of New York State, also struck down the New York consensual "sodomy" statute in a case involving sexual acts in a car parked on a public street.[75]

Clearly, other courts have realized that they are not barred from addressing the privacy ramifications of a statute which seeks to regulate intensely intimate conduct simply because that statute may have been enforced in a solicitation context. This Court is similarly free to address R.S. 14:89's violation of the constitutional guarantee of personal privacy.

B. There is No Compelling State Interest Justifying the Governmental Invasion of Privacy and Usurpation of Individual Choice Embodied in the "Crime Against Nature" Statute.

By invading the private sexual intimacies of consenting adults, the "crime against nature" statute places an intolerable burden on the right of personal privacy guaranteed by the Louisiana Constitution. "[W]here a decision as fundamental as those included within the right of personal privacy is involved, state action imposing a burden on it may be justified only by a compelling state interest, and the state action must be narrowly confined so as to further only that compelling interest."[76] The State thus must demonstrate that it has a compelling interest in interfering with the intensely personal conduct, and policing the anatomical choices, of consenting adults living in Louisiana.

72. *Wasson*, 842 S.W. 2d at 488.

73. State's Brief at 12.

74. *Bonadio*, 415 A.2d 47.

75. *Onofre*, 415 N.E.2d 936.

76. State v. Perry, 610 So.2d 746, 760 (La. 1992); *See also* Hondroulis v. Schuhmacher, 553 So.2d 398 (La. 1988)(on reh'ng), *appeal after remand*, 612 So.2d 859 (La. Ct. App. 1992), *cert. denied*, 615 So.2d 335 (La. 1993).

Not surprisingly, the State has adduced *no* interest, compelling or otherwise, for regulating such inherently private and important personal matters. Nor has it borne its burden of demonstrating that a more "narrowly confined," well-tailored law, *i.e.*, the regulation of prostitution, would not meet any purported legitimate objectives.

Article I, Section 5 of the Louisiana Constitution clearly provides that "every person shall be secure. . . against unreasonable. . . . invasions of privacy."[77] This Court has stated that Article I, Section 5 was intended to embody an affirmative right to privacy beyond criminal search and seizure law, "establishing the principles of the Supreme Court decisions in explicit statement instead of depending on analogical development."[78]

As this Court has itself acknowledged, the Louisiana right to privacy "is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution."[79] Just last year, in State v. Perry, this Court observed: "[a]n individual's constitutionally protected interest in his mind, thoughts and mental processes was. . . recognized by the

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77. ARTICLE 1, SECTION 5 reads as follows:

Right to privacy

Section 5. Every person shall be secure in his person, property, communications, houses, paper, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to search, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affect[ed] by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

78. *Hondroulis*, 553 So.2d at 415.

79. *Hernandez*, 410 So.2d at 1385. *See also Church,* 538 So.2d at 996 (quoting same passage from Hernandez); Devlin, *supra* n. 52 at 689 ("Because the federal and Louisiana constitutions do differ with respect to the right of "privacy"— that right is explicitly protected in the text of the state constitution but has only been inferred into the federal Constitution— it is a particularly likely candidate for independent interpretation under the two documents."). The Louisiana constitution was drafted, debated and ultimately ratified during the period from January 1973 to April 1974. By that time, the right to privacy in the sense of autonomy had already been extended to the right to make certain choices about one's personal or family life. Indeed, Roe v. Wade, 410 U.S. 113 (1973) *reh'g denied* 410 U.S. 959 (1973), was handed down just months before the provisions of the Louisiana constitution were debated by the members of the Louisiana legislature. As Professor Devlin has pointed out, "it seems scarcely possible that the committee members could have failed to appreciate the potential import of a state constitutional right to 'privacy.' " Devlin, *supra* at 700.

Supreme Court prior to the adoption of our state Constitution."[80] Nor is that interest confined merely to desire, affection, or thought; personal conduct, expression and autonomy partake of protection.

In Hondroulis v. Schuhmacher, the Court held that, under the Louisiana constitution, "*[the] right of personal privacy includes the interest in independence in making certain kinds of important decisions.*"[81] The Court embraced the autonomy conception of privacy articulated so eloquently long ago by Justice Brandeis: "no right is held more sacred, or is more carefully guarded at common law, than the right of every individual to the possession and control of his own person. . . 'to be left alone.' "[82] Indeed, in extending the protection of Article I, § 5 to the decision to obtain or reject medical treatment, the Court based its decision on the fact that "the choice of whether to undergo. . . medical treatment is to an extraordinary degree *an intrinsically personal decision.*"[83]

It is difficult to imagine a more "intrinsically personal decision" than the type of decisions that the State seeks to regulate through R.S. 14:89. *See* Point I (C) (1), *supra.* The Michigan Court of Appeals, in striking down the Michigan "sodomy" statute, recognized the profoundly personal nature of this type of decision:

> A mature individual's choice of an adult sexual partner, and sexual relations, in the privacy of his or her own home, appears to this Court to be an intensely personal matter. State regulations affecting "adult sexual relations" or personal decisions in matters of sex, done in one's home are subject to the strictest standard of judicial review.

MOHR v. Kelly, slip opinion at 11. As Justice Blackmun eloquently stated in his Hardwick dissent:

> Only the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.' (citation omitted) The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship may come from the freedom an individual has to *choose* the form and nature of his intensely personal bonds. . . . [A] neces-

80. *Perry*, 610 So. 2d at 758.

81. *Hondroulis*, 553 So.2d at 414 (emphasis added).

82. *Perry*, 610 So.2d at 757, *citing* Olmstead v. U.S., 277 U.S. 438 (1928) (Brandeis, J., dissenting).

83. *Id.* at 756.

> sary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices. . . . Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. (citation omitted) It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.[84]

This Court should reestablish the boundary protecting the freedom of all adults in choices regarding consensual sexual conduct. The State simply has no legitimate business invading the decision of non-gay people or gay people as to whether to engage in oral or anal sex.

III. THE STATE'S ADMITTED SELECTIVE ENFORCEMENT OF THE "CRIME AGAINST NATURE" STATUTE, REVEALING ITS TRUE PURPOSE AND EFFECT OF STIGMATIZING GAY PEOPLE DESPITE THE STATUTE'S FACIAL APPLICABILITY TO ALL, VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE LOUISIANA CONSTITUTION.

Article I, Section 3 of the Louisiana Constitution provides that "no persons shall be denied the equal protection of the laws."[85] "The equal protection guarantee of Article I, § 3 requires state laws to affect alike all persons and interests similarly situated."[86] In the landmark Yick Wo v. Hopkins case, the Supreme Court emphasized that a law need not be facially discriminatory to run afoul of this fundamental principle:

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84. 478 U.S. at 205, 211.

85. LA. CONST. ART. I, SEC. 3 provides as follows:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

86. *Succession of Thompson*, 367 So. 2d 796, 798 (La. 1979); *see also* Latona v. Dep't of State Civil Service, 492 So. 2d 27, 30 (La. Ct. App. 1st Cir. 1986) *cert. denied*, 496 So. 2d 1043 (La. 1986); Valentine v. Thomas, 433 So. 2d 289, 292 (La. Ct. App. 1st Cir.), *cert. denied*, 440 So. 2d 728 (La. 1983).

> Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with . . . an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.[87]

This Court, too, has long embraced the Yick Wo principle in interpreting both the federal and state constitutions. "Although the decision of the United States Supreme Court in Yick Wo. . . was handed down in the year 1886, the principle of constitutional law therein asserted has not changed through the corridors of time."[88]

In elaborating on the Yick Wo principle, the Supreme Court has emphasized that targeting a specific group for differential treatment compounds the severity of the unequal application:

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense. . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.[89]

Because the State's discriminatory enforcement and invocation of the "crime against nature" statute have remade it into a sword wielded with "an unequal hand" to stigmatize and oppress gay people, this Court should strike it down.[90]

A. The "Crime Against Nature" Statute is Selectively Enforced Against Lesbians and Gay Men.

The history of prosecutions under the "crime against nature" statute represents the epitome of selective, discriminatory enforcement and intentional misconstruction of a facially neutral law, as Senator Thurmond reminds us.[91] Although R.S. 14:89 clearly pros-

87. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

88. Simmons v. City of Shreveport, 60 So. 2d 867, 872 (La. 1952).

89. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

90. Indeed, just months ago, the Louisianna Supreme court favorably cited a Mississippi case which held that "statutes imposing fee caps, though not unconstitutional on their face, may be unconstitutional as applied." State v. Wigley, 624 So. 2d 425, 430 n.5 (La. 1993)(*citing* Wilson v. State, 574 So. 2d 1338 (Miss. 1990)).

91. The unequal application of a facially neutral law must include an element of purposeful discrimination in order to rise to the level of a denial of equal protection. State v. Anderson, 20 So. 2d 288, 290 (La. 1944), *cert. denied*, 324 U.S. 868 (1945). This discriminatory intent "may. . . be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself." *Id.* Here, the State's bold admission that it does not uniformly apply the "crime against nature" statute, combined with the judiciary's frank acknowledgment that the statute has historically been prosecuted *exclusively* against gay men and lesbians amply satisfies the requisite showing of intentional or purposeful discrimina-

cribes certain sexual activity "by a human being with another of the same sex or opposite sex," the statute is in fact enforced almost exclusively against lesbians and gay men. It is rarely, if ever, used to prosecute heterosexuals.

In 1984, the Louisiana Fourth Circuit Court of Appeals frankly acknowledged that "*all* previously reported cases dealing with this crime involved *homosexual* encounters."[92] The court added that "any statement in prior cases which purported to include heterosexual oral sex in the definition of unnatural carnal copulation would be dicta. . . ."[93] Furthermore, the State has itself conceded that the statute is prosecuted on a selective basis: "R.S. 14:89 is simply not applied in a non-solicitation context. . . [T]he use of the statute against non-commercial sexual conduct between consenting adults is 'unlikely.' " State's Brief at 12 (citation omitted).

Unfortunately, the State's asserted non-enforcement has eliminated neither the intrusion into personal decisions, nor the statute's impact on Louisiana's lesbian and gay citizens. As Mr. Baxley's case shows, the threat remains; as demonstrated above, so does the stigma. Moreover, even if the claim of selective non-enforcement were true, it would not cure the real harms or the assault on the dignity of lesbians and gay men perpetrated by the existence of even the unenforced statute. This is because, quite simply, "[u]nenforced sodomy laws are invective by government."[94]

Not only has the State engaged in discriminatory prosecution of the statute, but Justices of this Court (perhaps recognizing that the statute as written constitutes a massive invasion of personal liberty) have felt constrained to propose selective rewriting of the statute as well. In 1975, for example, a defendant argued that the "crime against nature" statute violated the right to privacy guaranteed to married couples by Griswold v. Connecticut[95]. In denying a rehearing on that issue, Justice Tate noted the record of selective prosecution and stated that "conduct between married couples is not included within the scope of the statutory offense."[96] Justice

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tion. *See* United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974) (statute or prosecution unconstitutional where "government's discriminatory selection . . . has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent [one's] exercise of constitutional rights.").

92. *Pruitt*, 449 So. 2d at 156 (case involving a male defendant who solicited a female police officer for oral sex for compensation).

93. *Id.*

94. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW 123-24 (1988).

95. 381 U.S. 479 (1965).

96. *Lindsey*, 310 So. 2d at 92 (Tate, J. concurring).

Tate either was suggesting that, despite the plain meaning of the statute, the oral or anal sexual acts that constitute "unnatural carnal copulation" when undertaken by unmarried people do *not* constitute "unnatural carnal copulation" when undertaken by *married* couples, or that the State's actual enforcement practices cured any harm.[97] Either way, Justice Tate's concurrence constituted an acknowledgment that the "crime against nature" statute has become something other than what it says it is.

Whether through selective enforcement or through selective, discriminatory construction and invocation, the "crime against nature" statute hangs as a veritable "Sword of Damocles" over the heads of lesbians and gay men in Louisiana and elsewhere, and is used as a powerful weapon to deny us our liberty, our equality, our jobs, our children and our personal safety.[98] As discussed above in Points I (C) (2) and (3), R.S. 14:89 and its ilk brand us criminals for expressing normal human intimacy and codifies into law a negative attitude toward gay men and lesbians, communicating that attitude to society and feeding prejudice, hatred, discrimination, and violence. Thus, with or without actual prosecution, the "crime against nature" statute serves only to deny lesbians and gay men equal protection of the laws, having become the means by which the State and society treat us differently than our non-gay brothers and sisters who are, by the express, if disregarded, terms of the statute, similarly situated.

B. Such Selective Enforcement Reflects Illegitimate Government Animus and Does Not Further Any Appropriate State Interest.

A law which classifies individuals on a basis other than those specifically listed in Article I, Section 3,[99] "shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest."[100] Because R.S. 14:89

97. Since the State of Louisiana to date denies lesbians and gay men our equal right to marry the partner of our choice, this particular strand of selective enforcement itself discriminates against lesbians and gay men.

98. As Justice Marshall once put it, the problem with "a sword of Damocles is that it hangs—not that it drops." Arnett v. Kennedy, 416 U.S. 134, 231 (1974), *reh'g denied*, 417 U.S. 977 (1974) (Marshall, J. dissenting).

99. The listed categories are: race, religion, birth, age, sex, culture, physical condition, or political ideas or affiliations. *See supra* note 85 for full text.

100. *Sibley*, 477 So. 2d at 1107-08. Under Sibley, if the state action classifies on the basis of "culture" or "political ideas or affiliations," the burden of proof shifts to the State to show a "reasonable basis" for the classification. *Id.* Because the classification at issue here does not even "suitably further any appropriate state interest" under the

does not "suitably further" any "appropriate" or rational state interest, and, indeed, through its discriminatory effect, offends fundamental constitutional principles, it must fall.

The Kentucky Supreme Court, in striking down the Kentucky "sodomy" statute on both privacy and equal protection grounds, determined that there was no legitimate governmental interest justifying that statute's discrimination against lesbians and gay men:

> The Commonwealth has tried hard to demonstrate a legitimate governmental interest justifying a distinction, but has failed. Many of the claimed justifications are simply outrageous: that "homosexuals are more promiscuous than heterosexuals, . . . that homosexuals enjoy the company of children, and that homosexuals are more prone to engage in sex acts in public." The only proffered justification with superficial validity is that "infectious diseases are more readily transmitted by anal sodomy than by other forms of sexual copulation." But this statute is not limited to anal copulation, and this reasoning would apply to male-female anal intercourse the same as it applies to male-male intercourse. The growing number of females to whom AIDS (Acquired Immune Deficiency Syndrome) has been transmitted is stark evidence that AIDS is not only a male homosexual disease. . . . In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging in the same activity heterosexuals are now at liberty to perform. . . . We need not

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third prong of the Sibley analysis, this Court need not reach the issue of whether or not the classification at issue triggers any heightened standard. However, should the Court find that the statute, as selectively enforced and discriminatorily invoked, does appropriately serve some legitimate state interest, it would have to consider whether heightened scrutiny is warranted.

In that regard, the gay and lesbian community, particularly as it is responded to by society, does exhibit many of the defining attributes of a "culture." *See, e.g.*, D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (1983); E. KENNEDY AND M. DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY (1993); G. CHAUNCEY, THE POLICED: GAY MEN'S STRATEGIES OF EVERYDAY RESISTANCE IN *Inventing Times Square: Commerce and Culture at the Crossroads of the Worlds, 1880-1939* 315-328 (W. Taylor ed. 1991); D. ALTMAN, THE HOMOSEXUALIZATION OF AMERICA AND THE AMERICANIZATION OF THE HOMOSEXUAL (1982). Moreover, since increased "visibility" or open acknowledgement of sexual orientation is a corner-stone of the struggle for equal rights for gay men and lesbians, there are also inherently political dimensions to being openly gay or lesbian. *See Gay Law Students*, 595 P.2d at 610 ("the struggle of the homosexual community for equal rights . . . must be recognized as a political activity"); *see also, e.g., Gay Rights Coalition*, 536 A.2d at 33-37; Watkins v. U.S. Army, 875 F.2d 699, 711-31 (9th Cir. Wash. 1989)(en banc)(Norris, J. and Canby, J., concurring in the judgment), *cert. denied*, 498 U.S. 957 (1990).

> sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.[101]

This Court should similarly recognize that there is no legitimate state interest in the effective reworking of the "crime against nature" statute into a weapon against the lesbian and gay community of Louisiana. The only possible purpose for this discriminatory selective enforcement is to stigmatize gay men and lesbians, and to effectuate, indeed promote, anti-gay prejudice. Such a goal is never a permissible basis for governmental action.[102]

Furthermore, the State has asserted no interest whatsoever for regulating the intensely personal sexual behavior that R.S. 14:89 proscribes. In fact, in its zeal to deny Mr. Baxley standing to assert his constitutional rights, the State has utterly failed to address the central issue of this case: whether there is any appropriate reason for the State of Louisiana to regulate the intrinsically personal sexual choices of the citizens of Louisiana, let alone to do so in a discriminatory fashion.

The State makes much of the alleged "commercial" aspects of the facts of this case, arguing that Mr. Baxley "left his Article I, § 5, freedom from "invasions of privacy" behind when he chose to openly solicit a stranger on a public street for compensation."[103] However, if the State's real interest in this case were the protection of the public against the open solicitation of sexual acts for compensation, then the logical crime to be charged was *prostitution*, not "crime against nature."

Louisiana Revised Statutes includes a prostitution statute, R.S. 14:82, which clearly proscribes "the solicitation by one person of another with the intent to engage in indiscriminate sexual intercourse with the latter for compensation,"[104] without sharing R.S. 14:89's discriminatory or invasive features. The prostitution statute

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101. *Wasson*, 842 S.W.2d at 501.

102. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Palmore v. Sidoti, 466 U.S. 429, 433 (1984)("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); Steffan v. Aspin, 8 F.3d 57, 68-69 (DC Cir. 1993) ("[A] cardinal principle of equal protection law holds that the government cannot discriminate against a certain class in order to give effect to the prejudice of others.... The Constitution does not allow government to subordinate a class of persons simply because others do not like them.").

103. State's Brief at 15.

104. R.S. 14:82 provides:

> A. Prostitution is:
>
> (1) The practice by a person of indiscriminate sexual intercourse with others for compensation.

more precisely addresses the State's articulated concern, and will continue to provide the State with sufficient means to pursue its asserted goal of controlling the solicitation of *any* sex for compensation, even once the "crime against nature" statute is declared unconstitutional.

This Court should recognize, as the Pennsylvania Supreme Court has, that regulating the private, non-commercial sexual conduct of consenting adults "exceeds the valid bounds of the police power while infringing the right to equal protection of the laws."[105] It was, in part, the stigmatizing effect of selective enforcement of Pennsylvania's "sodomy" statute[106] that led that court, in 1980, to strike down the statute as violative of the equal protection guarantee of the Pennsylvania Constitution (Pa. Const. Art. I, § 9).[107] The court stated:

> With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others. No harm to the secular interests of the community is involved in atypical [*sic*] sex practice in private between consenting adult partners. Many issues that are considered to be matters of morals are subject to debate, and *no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority.* Indeed, what is considered to be "moral" changes with the times and is dependent upon societal background. Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals.[108]

To the extent the State has a legitimate interest in addressing alleged commercial aspects of the conduct in Mr. Baxley's case, it does not arise from the nature of the sex act proposed (the State cannot seriously contend that commercial oral or anal sex is any worse or gives rise to any greater state interest than any other form of commercial sex). Nor does a legitimate state interest arise from

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(2) The solicitation by one person of another with the intent to engage in indiscriminate sexual intercourse with the latter for compensation.

105. *Bonadio*, 415 A.2d 47, 50.

106. Pennsylvania's sodomy statute proscribed "voluntary deviate sexual intercourse," defined as "sexual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal." Act of December 6, 1972, P.L.1482, No. 334, § 1, 18 PA.C.S.A. § 3101 (1973).

107. *Bonadio*, 415 A.2d 47.

108. *Id.* at 50 (citing Model Penal Code § 207.5 — Sodomy & Related Offenses. Comment (Tent. Draft No. 4, 1955))(emphasis added).

the fact that Mr. Baxley is gay or approached a partner of the same sex, nor from any proper role of the State in regulating autonomous sexual conduct or choice. Because the "crime against nature" statute, unlike the prostitution law, rests on each of these illegitimate State concerns, and because the statute's purpose and effect is to stigmatize and harm gay people, it must fall. The State will remain free to pursue any legitimate interests by other means, and gay and non-gay people in Louisiana will no longer bear the respective burdens of State intrusion into their personal relationships and choices.

CONCLUSION

This Court should strike down R.S. 14:89, "the crime against nature" statute, as a violation of state constitutional guarantees of privacy and equal protection.

Respectfully submitted,

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109. Application pending for admission to the New York State Bar.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Rule VII, Section 8(a), Supreme Court Rules, that a copy of this Brief of *Amicus Curiae* Lambda Legal Defense and Education Fund, Inc. in Support of Appellee Johnny L. Baxley has been mailed, prior to the filing of the original with this Court on this — day of December, 1993, to the following attorneys of record: John D. Rawls, Esq., 431 Gravier Street, Suite 200, New Orleans, Louisiana 70130-2418, attorney for Appellee Johnny L. Baxley; The Hon. Richard P. Ieyoub, Attorney General of Louisiana and The Hon. Carol Jewell, Assistant Attorney General, P.O. Box 94095, Baton Rouge, Louisiana 70804; The Hon. Harry F. Connick, Sr., District Attorney for Orleans Parish, and The Hon. Mark D. Pethke, Assistant District Attorney, 619 South White Street, New Orleans, Louisiana 70119; Grover J. Rees, III, Esq., P.O. Box 92882, Lafayette, Louisiana 70509, attorney for *Amicus Curiae* Louisiana Council of the Knights of Columbus, Christian Coalition of Louisiana, and Louisiana Public Policy Advocates; and Jeffrey Thomas Reeder, Esq., 938 Lafayette St., Suite 513, New Orleans, Louisiana, attorney for *Amicus Curiae* Friends For Life/Capital Area HIV-AIDS Services, Inc., The Philadelphia Center NO/AIDS Task Force, Inc., and United Services for AIDS Foundation, Inc.

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