



# Lambda Legal Defense and Education Fund

A national organization committed to achieving full recognition of the civil rights of lesbians, gay men, and people with HIV/AIDS through impact litigation, education, and public policy work.

February 10, 1999

An awareness of the fallibility of the legal system and the effects of bias on the courts has led Lambda Legal Defense and Education Fund to oppose the death penalty as an irreversible and harsh misuse of government power.

In Lambda's work fighting sexual orientation bias and advocating for rational HIV policies, the organization confronts the legal system's fallibility on a daily basis. Courts are as imperfect as the people who occupy their jury rooms, counsel tables, and judicial benches, and much of Lambda's litigation seeks to correct errors and overturn unjust outcomes that result from personal and societal biases all too frequently not left outside the courtroom door. Concern over error, and particularly error caused by bias, must be at its height in death penalty cases because of the severity and finality of government executions. A Columbia University study of capital cases from 1973-1995 found that 68% of death penalty sentences were so legally flawed that they had to be reversed on appeal. See Paul Barton, *Efforts to Put Death Penalty on Hold Continue to Grow*, USA TODAY at 5A (July 6, 2000). In addition, 87 innocent people have been released from death row since 1973 as a result of DNA tests, recanted testimony or other new evidence, according to the Death Penalty Information Center. Peter Grier, *Death Penalty Under Siege*, CHRISTIAN SCIENCE MONITOR, at 1 (June 5, 2000). These studies raise grave concerns regarding how many people are put to death as a result of legal error that is not uncovered as well as how many are executed who, in fact, are innocent.

Lambda in particular opposes the death penalty and believes that lesbian and gay community should do so as well because the discrimination that pervades the use of capital punishment conflicts with the goal of equality for all. A 1998 study showed that, even controlling for a variety of factors bearing on severity of the crime, African-American defendants were 3.9 times as likely to be sentenced to death as white defendants and those who kill whites are 4.3 times as likely to receive the death penalty than those who kill African-Americans. Richard Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies* (Death Penalty Information Center, June 1998) at 2, 5 (reporting results of study by professor David Baldus and statistician George Woodworth) (available at [www.essential.org/dpic/racerpt.html](http://www.essential.org/dpic/racerpt.html)).

While there has been less attention paid to the effect of a defendant's sexual orientation on the receipt of the death penalty (in part due to the difficulty of accurately ascertaining the sexual orientation of prisoners sentenced to death), it also appears that there are a disproportionate number of lesbians and gay men on death row in the United States. See Ruthann Robson, *GAY MEN, LESBIANS AND THE LAW* 94-95 (1997); Victoria Brownworth, *Dykes on Death Row*, ADVOCATE, June 15, 1992, at 62-64 (concluding that approximately forty-one percent of the women on death row have been implicated as lesbians); Jenny E. Carol, *Images of Women and Capital Sentencing Among Female Offenders*, 75 TEX. L. REV. 1413, 1423, n. 59 (1997) (theorizing that gay men also are likely to run an elevated risk of execution due to social "willingness to dehumanize" based on "violation of sexual orientation expectations.").

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A number of instances of sexual orientation bias in death penalty cases have come to light in recent years. In one case in which Lambda has been involved, *Burdine v. Johnson*, which is now being reheard by the entire federal appellate court for the Fifth Circuit, Judge Edith Jones (who frequently is mentioned on the short list of Republican favorites for the Supreme Court) and two other judges originally upheld the capital conviction of a gay man from Texas whose lawyer slept through large parts of his trial. 231 F.3d 950 (5th Cir. 2000), *rehearing en banc granted*, 20000 U.S. App. LEXIS 31036 (Dec. 5, 2000). These judges objected that there had been no showing of specifically what part of the trial he slept through and how the result would have been different, even though, at trial, Calvin Burdine was allowed to be questioned about such irrelevant matters as his preferences in sexual positions and even though, at his sentencing hearing, the prosecutor argued for the death penalty by stating that, given the incidence of rape in prison, life in jail “certainly isn’t a very bad punishment for a homosexual.” In another case, handled by the ACLU, the federal Eighth Circuit Court of Appeals held that it was harmless error to allow the sole testimony at a Missouri man’s death penalty sentencing hearing to focus on the fact that he was gay. *Lungar v. Bowersox*, 176 F.3d 453 (8th Cir. 1999), *cert. denied*, 146 L. Ed. 2d 350 (2000).

Because the legal system is fallible, because of the effects of bias on courts, and because the death penalty is irreversible, Lambda opposes the death penalty for any crime, even crimes against lesbians and gay men (as in the Matthew Shephard case) and people living with HIV and AIDS. In doing so, Lambda joins with a number of other organizations, including the National Gay and Lesbian Task Force, the National Center for Lesbian Rights, the ACLU, LLEGO, Gay Men of African Descent, and the International Gay and Lesbian Human Rights Commission. Lambda cannot pretend that legal mistakes do not happen or that equal justice for all is yet a reality in our country. Lambda’s vision of the legal system our community should fight for cannot embrace the deliberate taking of life by the government given these realities.

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