

MINUTES

November 20, 1983 Meeting

AD HOC TASK FORCE TO CHALLENGE SODOMY LAWS

In attendance were: Roberta Achtenberg (Lesbian Rights Project); Gary Buseck (Gay and Lesbian Advocates and Defenders); Thomas Coleman (Texas Human Rights Foundation); Abby R. Rubenfeld, Nan Feyler (Lambda Legal Defense and Education Fund, Inc.); Arthur Warner (National Committee for Sexual Civil Liberties); Leonard Graff (National Gay Rights Advocates); Ira Glasser, Loren Siegel, Burt Neuborne (American Civil Liberties Union); Thomas Stoddard (New York Civil Liberties Union); John Heilman (ACLU of Southern California); Susan McGrievy (ACLU National Lesbian/Gay Rights Project); Sandra Kurjiaka, Paul Gordon (ACLU of Arkansas); James Kellogg (ACLU of Louisiana); David Waxse (ACLU of Kansas/ Western Missouri); Kathleen Wilde (Counsel, Hardwick v. Bowers).

Neuborne facilitated the morning session of the meeting. After brief introductions the group began with a discussion of updates on pending sodomy challenges.

I. Status Updates on Pending Circuit Court Cases:

A. Baker v. Wade is currently on appeal in the 5th Circuit. Amicus briefs have been filed. The trial judge indicated the case will not be reopened for new evidence pursuant to a request by the Amarillo DA. The parties are waiting for an oral argument date. Issues pending include privacy, equal protection, and standing. All issues have been briefed. Jim Barber is filing a response brief to Dan Hill's reply brief. The group agreed there was no reason to slow down the case because of Uplinger because the district court decision is excellent. Additionally, the Baker decision cannot be



used in Uplinger, because Baker involved completely private activity.

B. Hardwick v. Bowers. Wilde gave an update. She said that upon her motion, the case has been stayed by the Eleventh Circuit pending Uplinger. There was no trial below as the case was dismissed for lack of standing. One of the major issues on appeal will be distinguishing Doe v. Commonwealth's Attorney.

II. Other Pending Sodomy Cases:

In Minnesota a gay judge is in the process of being removed from the bench because of a misdemeanor conviction for soliciting a prostitute. The case is on appeal to the state Supreme Court now following a recommendation from a three-judge review panel that he be dismissed. The judge has come out as gay and stated that, while he will no longer solicit prostitutes, he will continue to violate the state's sodomy law as a homosexual. He has refused to deny his sexuality and will thus challenge the MN sodomy law. The case is In re Crane Winton and the attorney representing him is interested in obtaining amicus support.

In Rhode Island, two women were hired as "party favors" at a stag party. A police plant arrested them and they were convicted of sodomy. In Rhode Island a conviction for violation of the sodomy statute carries a mandatory sentence of 7 to 20 years. The group agreed that more information regarding the stage of proceedings and name of counsel will be obtained from the Playboy Foundation who has contacted several conference participants about the case. Neuborne said he would contact the Rhode Island affiliate of the ACLU to see if they know of the case.



In Arizona, a police officer who came out was dismissed because of the likelihood he would violate the state's criminal sodomy statute. The case is pending before the Arizona Court of Appeals. It is an ACLU case, and Neuborne said he would find out more.

Finally, it appears that the Minnesota ACLU is considering bringing a civil challenge to that state's sodomy law.

Neuborne agreed to contact the ACLU affiliates in R.I., MN, and Arizona to gather more information.

The group discussed the relevance of the Uplinger case to these pending challenges. It was agreed that criminal cases cannot be controlled or delayed pending Uplinger, but the conference participants agreed on the need to help guarantee effective handling of these cases.

It was also agreed to advertise in criminal defense publications such as the NLADA newsletter asking for information on ongoing sodomy challenges. The ACLU will also make an effort to determine whether other ACLU affiliates know of pending criminal cases.

### III. Update on Uplinger

Rubinfeld reported on a conference call, held on November 10, involving Gardner and attorneys involved in amicus briefs in the case. The group was updated on the status of amici. The National Council of Churches has declined to participate. Negotiations are underway to solicit a brief from New York State Attorney General Abrams. The New York City Bar Association is considering a brief which Stoddard is working on.



Neuborne suggested that amici downplay Onofre in the Uplinger briefs. Stoddard agreed, suggesting that briefs must deal with Onofre but should not invite it. He suggests that we appeal to jurisprudential instincts of the Court thereby possibly winning over Stevens, White and Powell. He said the brief of the NYC Bar Association will argue that it would be improper for the Supreme Court to decide on the underlying issues. Kellogg suggested that one amicus brief deal specifically with Onofre. After some discussion it was agreed that the NYC brief would be the most effective to deal with this issue. Stoddard and Rubenfeld will speak with Art Leonard who is coordinating the work on the NYC Bar Association brief.

Everyone at the conference agreed to share drafts of their amicus briefs by the week of December 9, which is one week before the due date of December 17.

IV. New Initiatives While Uplinger is Pending

While the group agreed that criminal cases cannot be delayed, it was agreed that new civil challenges should not be filed until Uplinger is decided, probably in June, 1984. Because of the lengthy start-up time involved in civil challenges, however, it was agreed that preparatory work need not be postponed. Suggestions for initial preparation include: gathering evidence, identifying and meeting with witnesses, and contacting sympathetic medical personnel to prepare strategies to deal with AIDS related issues. Additionally, it was agreed that state analysis to help target priority states in which to bring challenges should be developed.

V. Discussion of Specific States with Existing Sodomy Laws:

A. Louisiana: Jim Kellogg from New Orleans outlined some



of the reasons to target Louisiana:

- 1) There has been a rash of arrests for sodomy and obscenity violations in and around New Orleans involving police entrapment.
- 2) Sodomy is a felony in Louisiana.
- 3) The Louisiana state constitution provides for appellate review of sentences for disproportionality.
- 4) The 5th Circuit, located in New Orleans includes some good judges among the 13 on the bench.
- 5) Louisiana includes some good state constitutional protections including a developing privacy doctrine.
- 6) If AIDS becomes an issue there are several large hospitals in the area.
- 7) A positive decision from Louisiana may have a greater impact on other litigation than a state perceived as more liberal.

Kellogg outlined previous gay cases which have been litigated in Louisiana. Not one of the sodomy cases involve private consensual activity although some of the arrests involve behavior in private clubs. Two other gay-rights cases have been litigated in Louisiana. In one a lesbian who came out at work was fired. The court upheld her termination saying her sexual preference was only one factor. In another case a city denied the use of a public hall to a gay organization. Without a reported decision the judge ruled against the gay group on the facts.

Kellogg recommends bringing a civil challenge with a plaintiff who has been previously arrested but the arrest was dropped. It was agreed at this point the plaintiff should not have been arrested for public sex, as that is a much more difficult case to win. McGrievy suggested considering having a lesbian (or lesbian couple) bring the challenge in light of the low statistical incidence of AIDS for lesbians. However, because lesbians are not prosecuted there may be a standing challenge, although



their challenge could be combined with that of a heterosexual. She also mentioned considering a disabled person as a plaintiff where he or she is precluded from having genital sex and must rely on sodomistic sex for sexual satisfaction. The Louisiana sodomy statute is not gay specific.

There is an obscenity statute that is used to prosecute related sex offenses. Kellogg stated that almost all the sodomy and obscenity prosecutions have been in two neighboring precincts. None have involved straight, married or private sexual activity. If the District Attorney defends he will argue that the statute is valid across the board, however, because he is very anti-crime. McGrievy asked whether it would be most effective to argue this statute in the same circuit as the Baker case. Kellogg responded saying that we should wait until Baker is heard but can begin preparation much sooner. He stated that there is little chance the statute will be repealed in the legislature. Finally, he stated that there are probably no adequate financial resources in Louisiana for the challenge but that there would be available plaintiffs.

In sum, the group identified the following factors to consider in analyzing specific sodomy challenges:

- 1) nature of statute: is it gay specific? Is it "crimes against nature" statute?
- 2) seriousness of the charge
- 3) availability of local resources
- 4) legislative activities related to sodomy law
- 5) local political concerns
- 6) history of prosecution in the state
- 7) if criminal, fact pattern, especially whether the conduct was public
- 8) evaluation of forum, including analysis of state constitutional provisions.



B. Missouri: Factors which make Missouri a possibility in which to bring a challenge include:

- 1) The sodomy statute is gay specific
- 2) Plaintiffs have been obtained. David Morris of Kansas City knows them. They are described as "professional types."
- 3) Judges are geographic, so it would be possible to get a good one (for example, Judge Wright).
- 4) There might be financial support from foundations in St. Louis.

C. Arkansas: The group then discussed the pros and cons of bringing a challenge in Arkansas. Relevant factors include:

- 1) The sodomy statute is gay specific
- 2) It is a misdemeanor offense
- 3) There are currently prosecutions.

Arkansas has a declaratory judgment act. And according to Gordon and Kurjiaka, the state Supreme Court seems to be "loosening up." Previous gay cases include U.S. v. Lemons, recent Eighth Circuit challenge to sodomy law through inimical charges arising in a federal park. The Court upheld the statute because public sex had been involved, but seemed to invite a challenge involving private conduct. Brownlett v. Selman is a gay couple case where the court essentially invoked the concept of constructive trust to help the plaintiff retain property his lover had transferred to him. The decision indicated the Court's willingness to honor a gay relationship.

Additionally, the group discussed the kind of plaintiff which would be preferable in a civil challenge in Arkansas. Gordon and Kurjiaka suggested a Baker plaintiff or a monogamous gay or lesbian couple. They also wondered if Lemons himself could be used as a plaintiff intervener since he had previously been arrested.



They argued that in Arkansas there was the same issue of the public nature of the activity as in Louisiana. The extent to which the focus of the case is on public or private activity will determine the chance of winning. The problem is that enforcement patterns concentrate on public activity.

#### VII. Other general issues in bringing a challenge

McGrievy said she saw three different types of statutes and suggested analyzing feasibility of bringing challenges based on these types. Neuborne said the nature of the challenge may not condition the result. If the courts go on the privacy argument it doesn't matter which statute is challenged. However, the use of an equal protection argument probably can only be applied to a gay specific statute. Thus far the vagueness argument has not worked.

It was pointed out that the equal protection argument may still prevail even if the statute isn't gay specific, as the enforcement almost always is exclusively directed against gays.

In discussing the features of state vs. federal court litigation, the group agreed that it depended on politics and personalities of various judges. Usually states have better standing rules and some states allow advisory opinions. There may be states where a state constitutional argument would be useful. However, some argued that a positive state court decision is not translatable to other states and therefore has less national impact. Stoddard pointed out that originally Onofre was brought in Federal Court because New York state court does not recognize the right to privacy in the state constitution.



#### VIII. Coordination of National Effort

The group concluded the conference with a discussion of its goals and potential resources for future litigation.

Kellogg suggested we highlight a few key cases with the goal of generating excellent caselaw so relitigation of selected issues (e.g. standing) would not be necessary. Glasser recommended looking at the group as an ongoing task force with another meeting after Uplinger is decided. Then, if the group decided on a case all the collective resources would be available to that case. Additionally, if the group can put together a coherent program and generate a series of cases they can (and must) work as a group to raise money.

Glasser stressed if the group puts together a carefully, well thought out program, then it must take national responsibility to do cooperative fundraising to raise the money necessary to implement the programs of the task force. Neuborne suggested, as a practical matter, that people who think litigation should go forward in their state in particular, develop and circulate a memorandum of that state for the next meeting.

McGrievy recommended putting together a memorandum and package of this conference's material to other ACLU and gay groups in an effort to solicit proposals. Rubenfeld said she also wanted the group to take an active role in seeking out priority jurisdictions. Wilde agreed to write a memorandum on the anticipated cost of litigating Hardwick. The group also asked for a memo on the cost of Baker from Coleman.

The group discussed whether they saw its purpose limited to the issue of sodomy or taking on other legal challenges for gay



rights. Gordon said it was important to look at other gay issues as they related to their potential for national impact litigation, for example immigration and military law. Coleman said that sodomy laws were used to justify other kinds of discrimination and once sodomy laws were repealed there was a rippling effect changing other kinds of discriminatory laws and cases which were reasoned, at least in part, based on sodomy law.

The group agreed to concentrate, at least for now, on sodomy reform. Heilman asked whether funding would be available from individuals in reformed states. Achtenberg said she thought the funding wouldn't come from individuals anyway. She also said, although the Lesbian Rights Project views gay and lesbian custody as most important, she thinks sodomy reform is an important key issue. Waxse added that the positive impact of sodomy law reform could be used for fundraising everywhere.

McGrievy proposed that the group collectively put out information regarding this meeting and on the purpose of the ad hoc task force and divide tasks to be accomplished among individuals present.

Rubinfeld said she would be responsible for contacting gay and lesbian attorneys, legal groups, the gay press, the Lawyer's Guild to let them know of today's meeting and ask them for additional names and resources. Warner said he thinks the group needs to rejuvenate the Sexual Law Reporter to educate lawyers and judges. He saw this as an extremely pressing need. Graff suggested the group at least try to get more articles published in legal journals, possibly using the memos circulated to the group as basis for law review articles. McGrievy and Heilman agreed to develop a list of experts on AIDS. Achtenberg said she would develop a list of psychiatric experts.



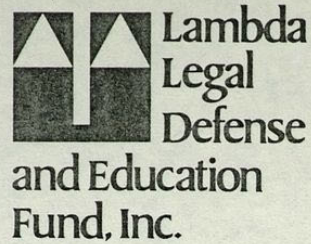
The group agreed on the need for a central directory to share information. Glasser offered the National ACLU to coordinate development of national lists of names and resources. Individuals who are putting together lists will forward them to National ACLU. Warner said he would submit a list of the briefs he has accumulated related to sodomy challenges. Rubenfeld agreed to draft a memorandum outlining the purpose of the meeting in an effort to communicate with other members of the gay and lesbian community and to solicit suggestions for specific challenges.

The group decided to meet as a whole after the oral arguments were held in Uplinger. Prior to that smaller meetings and discussions will take place as necessary to deal with any specific suggestions for future civil challenges or upcoming criminal cases.

The meeting adjourned at 4:30 p.m.



132 West 43 Street  
New York, NY 10036  
(212) 944-9488



**MEMORANDUM**

To: Gay/Lesbian organizations and attorneys in NEFIR Directory

From: Abby R. Rubinfeld, Managing Attorney, Lambda Legal Defense

Subject: National Litigators' Conference and Ad Hoc Task Force to Challenge Sodomy Laws

Date: January 11, 1984

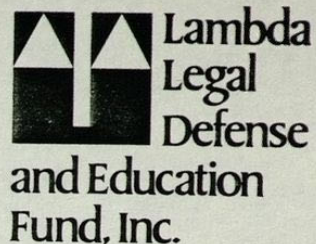
The enclosed memo describes the historic meeting recently hosted by Lambda Legal Defense & Education Fund and the American Civil Liberties Union with representatives of all of the gay/lesbian legal organizations, the American Civil Liberties Union, and attorneys involved in pending sodomy law challenges to begin the task to mapping out a coordinated national strategy for challenging sodomy laws in the twenty-four states that still have them. This meeting represents a first in terms of national ACLU commitment to gay/lesbian rights and to working with the gay/lesbian legal community to have consensual homosexual activity decriminalized.

The materials developed for the meeting, as well as those resulting from it, are available from Lambda or the ACLU (at the same address) for use by your organization or in your practice. In addition, we want to request that you let us know the names of any experts that should be added to the lists we are compiling (see memo), and the names of other folks who should receive the news about the conference.

Finally, as the enclosed memo indicates, the participants in the Ad Hoc Task Force want to stay informed on sodomy law challenges, both civil and criminal, that may arise in your jurisdiction or of which you might be aware, as well as to offer their assistance and expertise to you in such challenges. Please let us know what is happening in your state and, of course, when we can be of help to you.



132 West 43 Street  
New York, NY 10036  
(212) 944-9488



**MEMORANDUM**

To: Ad Hoc Task Force to Challenge  
Sodomy Laws; ACLU affiliates;  
members of the gay/lesbian community  
From: Lambda Legal Defense & the American Civil Liberties Union

Subject: Formation of Ad Hoc Task Force

Date: January 11, 1984

On November 20, 1983, representatives of all of the existing gay/lesbian legal organizations (see list of names at conclusion of memo), the American Civil Liberties Union national staff, various ACLU affiliates, and attorneys involved in pending sodomy law challenge litigation met at the ACLU national headquarters in New York City to begin the process of developing a coordinated national strategy to challenge the sodomy laws in the remaining non-reformed jurisdictions and to express their commitment to fighting anti-gay discrimination in general. The group agreed that it would not adopt any formal organizational structure, but would continue to meet together to develop strategy and to plan for its implementation in a cooperative effort. The group will unofficially call itself the "Ad Hoc Task Force to Challenge Sodomy Laws," and will initially focus on such challenges while anticipating future cooperative efforts that emphasize other aspects of the struggle for gay/lesbian civil rights.

The Ad Hoc Task Force agreed that it was the recommendation of all of the involved organizations and individuals that no further civil challenges to sodomy laws be filed pending the decision of the U.S. Supreme Court in the case of New York v. Uplinger. However, pending that decision, the Ad Hoc Task Force will proceed with preparations to go forward with such challenges that arise in the criminal context. To implement those plans, the Ad Hoc Task Force will work to publicize its efforts so that it can identify or be advised of criminal challenges as they arise anywhere in the country, and will solicit suggestions from



Page Two - Memo to Ad Hoc Task Force et al.

interested ACLU affiliates, gay/lesbian organizations, or other groups in the remaining non-reformed states for affirmative challenges to the laws in their states. The Ad Hoc Task Force will also initiate efforts to target particular states in which successful challenges might be mounted, and will begin the development of a central directory of information and resources to use in such challenges.

In considering suggestions for challenges, the Ad Hoc Task Force will employ, among others, the following factors:

1. Nature of statute: gay-specific or general?
2. Impact of statute: nature of enforcement; severity of penalties.
3. Existence of state constitutional privacy and/or equal protection provisions.
4. Ability to focus litigation on private conduct.
5. Availability of local resources, i.e. money, experts.
6. Political situation in jurisdiction.
7. Nature of local judiciary: state and federal judges.
8. Existence of potentially determinative pending litigation in the jurisdiction (state or federal).
9. History of legislative efforts in the jurisdiction.

The Ad Hoc Task Force will house its central directory of information and resources at the ACLU national headquarters in New York City. The directory will include lists of experts available to testify in such cases (dealing with health issues such as AIDS, with psychiatric issues, with sociological issues on homosexuality in general), existing briefs and/or legal memoranda dealing with sodomy law challenges, and memos prepared for the November 20 conference which analyze the statutes of each remaining non-reformed jurisdiction. Persons or organizations desiring such information or briefs should contact either the ACLU (Loren Siegel) or Lambda Legal Defense (Abby Rubinfeld),



Page Three - Memo to Ad Hoc Task Force et al.

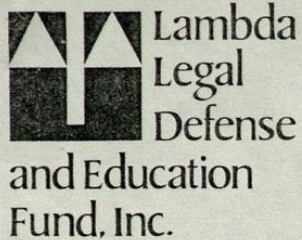
both of whom are located at the same address in New York.

The Ad Hoc Task Force agreed to work on the development of its resource directory and on publicity as to its existence so as to identify criminal challenges as they arise and to encourage the development of proposals for later civil challenges. The group agreed to meet again in New York after the oral arguments in the Uplinger case, and then again after the decision in that case. Any suggestions for post-Uplinger civil challenges to sodomy laws can be sent to either the ACLU or Lambda Legal Defense. Further information about the Ad Hoc Task Force to Challenge Sodomy Laws and about the availability of resource materials for sodomy law challenges can be obtained from Abby Rubenfeld at Lambda Legal Defense or from Loren Siegel at the ACLU.

The following individuals participated in the November 20 conference (including their organizational affiliation):

Lesbian Rights Project	Roberta Achtenberg, Esq.
Gay & Lesbian Advocates & Defenders	Gary Buseck, Esq.
Texas Human Rights Foundation	Thomas Coleman, Esq.
Lambda Legal Defense & Education Fund, Inc.	Abby Rubenfeld, Esq. Nan Feyler, Law Student
National Committee for Sexual Civil Liberties	Arthur Warner, Ph.D.
American Civil Liberties Union	Ira Glasser, Executive Director; Loren Siegel, Esq.; Burt Neuborne, Esq.
New York Civil Liberties Union	Thomas Stoddard, Esq.
ACLU of Southern California	John Heilman, Esq.
ACLU National Lesbian/Gay Rights Project	Susan McGreivy, Esq.
ACLU of Arkansas	Sandra Kurjiaka, Executive Director; Paul Gordon, Esq.
ACLU of Louisiana	James Kellogg, Esq.
Counsel, <u>Hardwick v. Bowers</u>	Kathleen Wilde, Esq.





## News Release

Contact: Pat Maher  
January 12, 1984

### LAMBDA AND ACLU HOLD CONFERENCE ON SODOMY LAWS

On November 20, 1983, Lambda Legal Defense and Education Fund and the national staff of the American Civil Liberties Union organized a meeting of gay/lesbian legal organizations, various ACLU state affiliates, and attorneys involved in current sodomy challenges to develop strategy for eradicating sodomy laws across the country. The meeting, held at ACLU headquarters in New York City, resulted in the formation of the "Ad Hoc Task Force to Challenge Sodomy Laws," which represents the first joint effort of the ALCU and gay/lesbian rights organizations to fight anti-gay discrimination.

The immediate objectives of the Task Force are: to publicize its existence in the event that a gay man or lesbian is arrested under sodomy laws anywhere in the country, to plan an aggressive strategy to challenge sodomy laws in targeted states that still maintain those laws, and to develop a central directory of information and resources to use in sodomy cases.

"Since sodomy laws are the bedrock of legal discrimination against gay men and lesbians, it is imperative that a



coordinated national strategy be developed," said Abby Rubenfeld, managing attorney of Lambda Legal Defense. "We are very excited that an organization like the ACLU, with such a history of struggling for civil rights, is committed to working with the gay and lesbian community to combat discrimination. Our combined resources will be of tremendous help to lawyers across the country who are involved in sodomy cases in particular, and with gay rights cases in general," further commented Ms. Rubenfeld.

The Ad Hoc Task Force will house its directory at the national office of the ACLU in New York City. Persons or organizations involved in sodomy cases or in need of information should contact either Loren Siegel of the ACLU or Lambda's Abby Rubenfeld. Both organizations are located at 132 West 43rd Street, New York, NY 10036.

The Ad Hoc Task Force will meet again after the US Supreme Court hears arguments in New York v. Uplinger, the challenge to the New York loitering statute, in the winter of 1984. This case will have direct impact on planning strategy for challenging sodomy laws.

The following organizations participated in the November 20th conference: Lesbian Rights Project, Gay & Lesbian Advocates & Defenders, Texas Human Rights Foundation, Lambda Legal Defense & Education Fund, Inc., National Committee for Sexual Civil Liberties, National Gay Rights Advocates, American Civil



Liberties Union, New York Civil Liberties Union, ACLU of Southern California, ACLU National Lesbian/Gay Rights Project, ACLU of Arkansas, ACLU of Louisiana, ACLU of Kansas/Western Missouri.

\* \* \*

Lambda Legal Defense and Education Fund is expressly concerned with fighting discrimination against lesbians and gay men through litigation and public education.