

President's Task Force on 21st Century Policing
Office of Community Oriented Policing Services
U.S. Department of Justice
Electronically submitted to PolicingTaskForce@usdoj.gov

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Written Testimony of Lambda Legal to the President's Task Force on 21st Century Policing

Lambda Legal welcomes the opportunity to submit written testimony to supplement the in-person testimony of Deputy Legal Director Hayley Gorenberg to the Community Oriented Policing Services Listening Session on Policy and Oversight to be convened January 30, 2015. Founded in 1973, Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and people living with HIV through impact litigation, education and public policy work. At any time Lambda Legal has more than 70 high-impact legal matters active around the country, and throughout our four-plus decades, policing issues have loomed large. Lambda Legal's criminal justice work includes *Lawrence v. Texas*,ⁱ the landmark Supreme Court decision that struck down all remaining sodomy laws in the United States; challenges to police "sting" operations targeting gay and bisexual menⁱⁱ; advocacy to end criminalization of HIV statusⁱⁱⁱ; advocacy to end the use of condoms as evidence of prostitution-related crimes^{iv}; litigation to address transgender prisoners' access to medical treatment^v and their safety while in custody^{vi}; working to interrupt the "school-to-prison pipeline"^{vii}; and a recent national survey of thousands of lesbian, gay, bisexual, transgender, and gender-nonconforming people and people living with HIV, which focused on the communities' experience with the criminal justice system and policing.^{viii}

Lambda Legal collaborates widely on criminal justice issues affecting lesbians, gay men, bisexuals, transgender people, gender-nonconforming people, and people living with HIV. LGBT people (lesbians, gay men, bisexuals, transgender people), gender-nonconforming people and people living with HIV, especially those who are also people of color, are particularly vulnerable to police power abuses. People who are LGBT, HIV-positive, of color, or any combination of those personal characteristics, are more likely to bear the brunt of unfair and dangerous policing. The following comments reflect our experience as an organization, as well as our work with sister organizations nationwide.

As highlighted in a report recently published by the NAACP, in addition to experiencing many of the same forms of racial profiling and race and poverty-based discriminatory policing as other members of communities of color, LGBTQ people of color experience gender and sexuality-specific forms of racial profiling and police brutality,^{ix} and LGBT people, particularly LGBT youth and people of color, also experience pervasive profiling and discriminatory treatment by local, state and federal law enforcement agents based on actual or perceived sexual orientation, gender, gender identity or expression, and HIV status.^x

Over the past decade, the National Coalition of Anti-Violence Programs has found law enforcement agents consistently among the top three categories of perpetrators of LGBT-targeted violence reported to anti-violence organizations.^{xi} The National Transgender Discrimination Survey conducted by the LGBTQ Task Force and National Center for Transgender Equality found transgender respondents who interacted with police likely to report harassment, as well as physical (including sexual) assault by police officers.^{xii} Across the country, LGBT and gender-nonconforming youth are more likely to be stopped by the police and experience greater criminal justice sanctions that do not correlate with any greater involvement in violating the law.^{xiii} Investigations of local police departments in New Orleans and Puerto Rico by the U.S. Department of Justice have documented patterns and

practices of discriminatory policing of LGBT people,^{xiv} and these findings are consistent with documentation from local organizations, as well as Lambda Legal’s case load and our recent national study exploring the issue of misconduct by the police, courts, prisons and school security against LGBT people and people living with HIV.^{xv} Many respondents reported that police officers’ attitudes toward them had been hostile, and the younger they were, the more likely they were to experience police hostility. More than one in eight respondents reported verbal and physical harassment from police, with the incidence rising for people of color and low-income people. Of respondents who said they had lodged complaints about police misconduct in the last five years, almost three-quarters said their complaints were not fully addressed. Many Lambda Legal respondents also reported that police neglected their reports of assault, and nearly half of African-American, transgender and gender-nonconforming respondents, and more than half of HIV-positive respondents reported police failed to address their reports of intimate partner violence.

These documented patterns and practices, gender- and sexuality-specific profiling and discriminatory policing require specific policy reforms to address the following:

- Anti-LGBT verbal harassment and abuse by law enforcement officers;
- Profiling and discriminatory enforcement of prostitution-related and lewd conduct offenses, including citation of possession or presence of condoms as evidence of intent to engage in prostitution-related or lewd conduct offenses;
- Failure to respect people’s gender identity and expression when addressing members of the public, arrest processing, searches, and placement in police custody;
- Sexual harassment and assault by law enforcement officers;
- Police neglect of LGBT crime victim complaints;
- Searches to assign gender, and disproportionately invasive and intrusive searches of transgender and gender-nonconforming (TGNC) people than non-TGNC people;
- Dangerous placement and cruel and degrading treatment in police custody;
- Discriminatory and damaging policing impacts on young people in schools.

RECOMMENDATIONS

I. Passing, effectively implementing, and enforcing LGBT-inclusive anti-profiling measures

1. We urge the Administration to expand the protections of the Guidance for Federal Law Enforcement Agencies on the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation and Gender Identity issued by the U.S. Department of Justice in December 2014 to reach all federal and federally funded law enforcement activities.
2. The Administration should work with Congress toward the passage of an End Racial Profiling Act in an expanded form that also includes protections against profiling on the basis of gender, sexual orientation, and gender identity.
3. Local law enforcement agencies should be required, as a condition of receipt of federal funding, to adopt, effectively implement, and enforce prohibitions against profiling consistent with the new federal Guidance. State and local profiling bans should incorporate an independent enforcement mechanism accessible to members of the public.
4. The Administration should, consistent with the recommendation of the Presidential Advisory Commission on HIV/AIDS,^{xvi} issue and publicize guidance to federal, state and local law

enforcement agencies condemning the reliance on mere possession or presence of condoms as evidence of intent to engage in criminal activity, and encouraging agencies to adopt policies prohibiting this practice. Policing agencies do not have a public health agenda at their core, and are often unmoved by clear evidence of the damage to public health of considering unused condoms as evidence of prostitution-related crimes. Additionally, political attention to the scourge of human trafficking has one unfortunate effect, in that it causes law enforcement leaders to shy away from law and policy reforms that would bar use of condoms as evidence in sex trafficking prosecutions despite the fact that victims of trafficking have raised their concerns that using condoms in this fashion limits the ability of people who are among the most severely abused to take a simple measure that could, even in their circumstances, protect them.^{xvii}

II. Building Culturally Competent Police Forces

1. The Administration should seek to ensure that police departments include sexual orientation, gender identity and expression, and HIV status in nondiscrimination policies, guidelines and resolutions. Police departments should also ensure that patrol guides and similar resources explicitly include a commitment to equal and respectful treatment of people who are LGBT, gender-nonconforming, and people living with HIV. These guidelines should specifically explain that police officers will be held accountable for failing to comply. Patrol guides and policy manuals of New York City,^{xviii} New Orleans,^{xix} and Los Angeles^{xx} provide helpful examples.
2. The Administration should seek to ensure that police departments institute systems to identify officers who have engaged in insensitive or abusive behavior and follow up with training and discipline sufficient to end the behavior.
3. The Administration should seek to ensure that police implement mandatory training about HIV for employees at all levels of the department, with content specific to the duties of the personnel being trained. The training should address confidentiality and accurate information about how HIV is transmitted.
4. The Administration should seek to ensure that police departments adopt or amend policies, patrol guides, union contracts, and accountability mechanisms to mandate nondiscrimination and respectful treatment, and to prohibit profiling based on race, gender, national origin, ethnicity, actual or perceived sexual orientation, gender identity and expression, HIV status, disability, religion, immigration status, age and housing status.
5. The Administration should seek to ensure that police departments implement mandatory cultural competency training concerning LGBT and HIV issues, with ongoing community involvement, for all employees. Training should address implicit bias with regard to race; gender; national origin; ethnicity; actual or perceived sexual orientation, gender identity and expression; HIV status; disability; religion; immigration status; age; and housing status.^{xxi} Such training should specifically utilize existing police structures, e.g., incorporating training into sessions whose importance is underscored by including them among sessions that require rotating officers from street duty, rather than in brief pre-roll call sessions, and/or incentivizing units through systems that award points toward upcoming exams for successful completion.

III. Establishing nationwide standards for treatment of LGBT and gender-nonconforming people in custody

In the absence of policies prohibiting discrimination based on sexual orientation and gender identity and clear policies governing the determination of gender for the purposes of arrest processing and protection of LGBT people in police custody, LGBT people in police custody all too often experience unlawful, unnecessary and humiliating searches to assign gender, as well as LGBT-targeted discrimination and abuse, and unsafe placement.^{xxiii} In particular, searches conducted by police officers on the street or in police detention facilities for the purposes of assigning a gender to detainees based on anatomical features—or simply to ogle or humiliate TGNC people are widespread, though unlawful.^{xxiii}

1. The Department of Justice should promulgate national standards for local law enforcement agencies relating to placement, searches, and other interactions with LGBT and gender-nonconforming people, consistent with consent decrees entered into with the New Orleans Police Department and the Puerto Rico Police Department, and condition federal funding on adopting these policies.
2. The Department of Justice should amend PREA regulations to include an explicit prohibition on searches in police lock-ups for the purpose of determining genital characteristics.^{xxiv}
3. The Administration should seek to ensure that police provide efficient procedures for access to medication, including but not limited to HIV medications and hormone treatments for transgender people, so that medical care is not interrupted in detention.

IV. Ending Sexual Harassment and Assault by Law Enforcement Officers

As documented by Amnesty International, the International Association of Chiefs of Police, the Cato Institute, and independent researchers, and as reflected in Lambda Legal’s national survey, sexual harassment and assault by law enforcement officers is pervasive but often undetected, and requires effective policies, training, oversight and disciplinary practices.^{xxv} LGBT people, and particularly lesbian and transgender women, are particularly targeted for this gender-specific form of police abuse.^{xxvi}

1. Federal law enforcement agencies should adopt policies to prevent, address, and document sexual harassment, abuse, and assault by local law enforcement agents, consistent with recommendations of the International Association of Chiefs of Police.
2. The Department of Justice should clarify that the definition of “lock-ups” contained in the Prison Rape Elimination Act (PREA) regulations includes police cars and other temporary locations of police detention, and should pursue application and enforcement of existing PREA standards for every form of police lock-up.
3. The Department of Justice should initiate new rulemaking pursuant to PREA that would align PREA provisions pertaining to police lockups with those pertaining to adult jails and prisons, including expanding provisions related to access to victim advocates, training and education, and screening for risk of sexual victimization and abusiveness.

V. Collecting Information to Promote Safety and Eliminate Risk

To protect the privacy and dignity of people with whom they come in contact, law enforcement agents should never be charged with mandatory data collection relating to sexual orientation or gender identity during police interactions or while LGBTQ people are in custody. This policy is distinct from

and does not affect voluntary provision of information relating to sexual orientation or gender identity to ensure safer placements in police custody. Questions concerning mistreatment of LGBT and gender-nonconforming people by law enforcement officers should be added to the Bureau of Justice Statistics Police Contact Survey and the Office of Victims of Crime National Intimate Partner and Sexual Violence Survey.

VI. Policing Young People in Schools: Interrupting the “School-to-Prison Pipeline”

The skyrocketing placement of school safety agents tasked from local police departments to schools has diverted school discipline issues from the principal’s office and guidance counselors, to police handcuffs and arrests. Research shows LGBT and gender-nonconforming teens and young adults are disproportionately punished by school and criminal authorities.^{xxvii} Data from a nationally representative sample of more than 15,000 people show that lesbian, gay and bisexual adolescents are about 40 percent more likely than other teens to be punished by school authorities, police, and courts. (While this study did not explore the experiences of transgender youth, anecdotal reports suggest that they are similarly at risk for excessive punishment.) These disparities in punishments do not correlate to rates of misbehavior. In fact, the study showed that adolescents who identified themselves as LGB actually engaged in less violence than their peers.^{xxviii} The resulting dynamic shunting young people from school to criminal justice systems is known as the “school-to-prison pipeline.”

1. The Administration should seek to ensure that police and schools to limit interventions that push students out of educational environments (including referrals to law enforcement, and school-based arrests) to conduct that poses a serious safety threat to students or staff.
2. The Administration should seek to minimize the involvement of police in schools and ensure that police and schools engage alternative programs when appropriate, including peer mediation, conflict resolution, guidance counseling, peer juries and courts, mentoring, restorative justice practices and parental and community involvement initiatives.
3. The Administration should seek to ensure that police and schools at the district level, to comply with or create a public reporting system for school discipline data, including school-based arrests and referrals to law enforcement, and regularly audit the data and analyze it, with meaningful involvement from community partners, to reduce arrests and police referrals to the greatest degree possible.
4. The Administration should seek to ensure that, if police are to be routinely present in schools, they are integrated into the educational community and used to connect students to community resources, e.g., law enforcement programs to clear warrants for low-level, nonviolent offenses that, when left unaddressed, impair young people’s access to further schooling and employment. As the Vera Institute has noted, police can play a key role in linking youth and families to rehabilitative options instead of resorting to court interventions.^{xxix}

Lambda Legal thanks the *Task Force on 21st Century Policing* for creating this opportunity to offer potential policy solutions, and urges continued outreach to LGBT communities as the Task Force continues to listen and collect recommendations.

ⁱ 539 U.S. 558 (2003)

ⁱⁱ E.g., *Calhoun v. Pennington*, No. 1:09-CV-3286 (N.D. Ga., order approving settlement filed Dec. 8, 2010) and *Giles v. City of Johnson* (COA 09-5627, 6th Cir., filed Sept. 30, 2008).

ⁱⁱⁱ “World AIDS Day 2014, 15 Ways HIV Criminalization Hurts Us All,” available at http://www.lambdalegal.org/blog/20141114_world-aids-day-2014; “Lambda Legal Calls for Halt to HIV-Based Criminal Prosecutions in Wake of Department of Justice Guidance,” available at http://www.lambdalegal.org/blog/20140717_lambda-legal-calls-for-halt-to-hiv-based-criminal-prosecutions; *Rhoades v. State*, 848 N.W.2d 22 (Iowa 2014).

^{iv} Memorandum of Support from Lambda Legal Defense and Education Fund for Bill S.323/A.1008., available at http://www.lambdalegal.org/sites/default/files/ltr_ny_20120405_condoms-as-evidence_0.pdf.

^v *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).

^{vi} *Zollicoffer a/k/a Star v. Livingston*, No. 4:14-cv-03037 (S.D. Tex., Compl. filed Oct. 23, 2014)

^{vii} *Testimony to the U.S. Senate Judiciary Committee on the Constitution, Civil Rights and Human Rights of Ending the School-to-Prison Pipeline* (Dec. 10, 2012), available at http://www.lambdalegal.org/in-court/legal-docs/leg_us_20121210_testimony-school-to-prison-pipeline

^{viii} Lambda Legal, *Protected and Served? Survey of LGBT/HIV Contact with Police, Courts, Prisons, and Security* (2014), available at www.lambdalegal.org/protectedandserved.

^{ix} National Association for the Advancement of Colored People, *Born Suspect: Stop-and-Frisk Abuses & the Continued Fight to End Racial Profiling in America* (2014), available at http://action.naacp.org/page/-/Criminal%20Justice/Born_Suspect_Report_final_web.pdf

^x Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011); Kathryn E. W. Himmelstein and Hannah Brückner, “Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study,” *Pediatrics* 127 (1) (2011): 49-57 (LGB youth more likely to be stopped by the police and experience greater criminal justice sanctions not explained by greater involvement in violating the law or engaging in transgressive behavior); Brett G. Stoudt, Michelle Fine, and Madeline Fox, *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. Sch. L. Rev. 1331 (2011) (LGB youth are more likely to experience negative verbal, physical, and legal contact with the police, and more than twice as likely to experience negative sexual contact in preceding six months); Amnesty International, *Stonewalled: Police Abuse and Misconduct Against LGBT People in the United States* (Washington: Amnesty International, 2005), available at <http://www.amnesty.org/en/library/asset/AMR51/122/2005/en/2200113d-d4bd-11dd-8a23-d58a49c0d652/amr511222005en.pdf>.

^{xi} National Coalition of Anti-Violence Programs, *Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities in the United States in 2010*, (New York: National Coalition of Anti-Violence Programs, 2011), available at http://www.avp.org/storage/documents/Reports/2011_NCAVP_HV_Reports.pdf.

^{xii} Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011), available at http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

^{xiii} Himmelstein, *supra* note x.

^{xiv} U.S. Department of Justice, Civil Rights Division, *Investigation of the New Orleans Police Department*, March 16, 2011; U.S. Department of Justice, Civil Rights Division, *Investigation of the Puerto Rico Police Department*, September 5, 2011. See also, *A Roadmap for Change: Federal Policy*

Recommendations to Address Criminalization of LGBT People and People Living With HIV, available at <http://web.law.columbia.edu/gender-sexuality/roadmap-change>.

^{xv} Lambda Legal, *Protected and Served? Survey of LGBT/HIV Contact with Police, Courts, Prisons, and Security* (2014), available at www.lambdalegal.org/protectedandserved.

^{xvi} Presidential Advisory Council on HIV/AIDS. *Resolution on ending federal and state HIV-specific criminal laws, prosecutions, and civil commitments*, available at <http://aids.gov/federal-resources/pacha/meetings/2013/feb-2013-criminalization-resolution.pdf>.

^{xvii} Human Rights Watch, *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four U.S. Cities* (2012) available at http://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf; Acacia Shields, *Criminalizing Condoms: How Policing Practices Put Sex Workers at IV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe* (New York: Open Society Foundations, 2012), available at <http://www.opensocietyfoundations.org/reports/criminalizing-condoms>; PROS Network and Leigh Tomppert, *Public Health Crisis: The Impact of Using Condoms as Evidence of Prostitution in New York City*, (New York: PROS Network and Sex Workers Project, 2012), available at <http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf>; Florrie Burke (founder of national Freedom Network and recipient of the inaugural Presidential Award for Extraordinary Efforts to Combat Trafficking in Persons from President Barack Obama), *Forced Into Prostitution and Denied a Lifeline*, Huffington Post May 15, 2013, available at http://www.huffingtonpost.com/florrie-burke/forced-into-prostitution-b_3279937.html; Lambda Legal et al., *Human Rights Abuses Related to the Criminalization and Incarceration of LGBT People and People Living with HIV in the United States*, submission to the United Nations Universal Periodic Review of the United States of America (May 2015), http://www.lambdalegal.org/sites/default/files/us_20150915_upr-contribution.pdf; Memorandum of Support from Lambda Legal Defense and Education Fund for Bill S.323/A.1008., available at http://www.lambdalegal.org/sites/default/files/ltr_ny_20120405_condoms-as-evidence_0.pdf (citing Centers for Disease Control and Prevention, *Condoms and STDs: Fact Sheet for Public Health Personnel* (2011); Coalition Memos of Support for Bill S.323/A.1008, available at <http://www.nocondomsasevidence.org/memos-of-support/>; Urban Justice Center, Memorandum in Support, available at <http://www.nocondomsasevidence.org/wp-content/uploads/2012/04/20110303-swp-a1008-memo-in-support.pdf>).

^{xviii} Communities United for Police Reform, *Community Safety Act*, available at <http://changethenypd.org/community-safety-act>.

^{xix} *New Orleans Police Department Issues LGBTQ Policy on Anniversary of Historic Stonewall Riots Against Police Brutality* (June 29, 2013), available at <http://www.youthbreakout.org/content/new-orleans-police-department-issues-lgbtq-policy-anniversary-historic-stonewall-riots>

^{xx} 2014 1st Quarter Manual, Los Angeles Police Department, available at http://www.lapdonline.org/lapd_manual/.

^{xxi} Researcher shows human brains are, to a large extent, “designed to be biased,” largely towards those with whom they are most familiar. See, e.g., Shankar Vedantam, *The Hidden Brain*, Ch. 4 (“The Infant’s Stare: The Life Cycle of Bias”) (Spiegel & Grau) (2010). Though there may be an evolutionary utility to that bias, when a police officer has a gun in hand, training to inform and counter bias becomes a matter of life and death – particularly for people on the outskirts of an officer’s familiarity. So color, sexual orientation, gender identity and other distinguishing characteristics require interventions if police who don’t share those characteristics are to protect and serve our communities. Untrained police power exercised without accountability leaves us less safe, and particularly endangers segments of our

communities already on the periphery of power. For these reasons, diversity of police forces and training – in addition to legal mandates – potentially become issues of life and death.

^{xxii} National Prison Rape Elimination Commission, “National Prison Rape Elimination Commission Report” (2011), available at http://static.nicic.gov/UserShared/2013-03-29_nprec_finalreport.pdf; Mogul et al., *supra* note x; Amnesty International, *supra* note x.

^{xxiii} Amnesty International, *supra* note x; Alex Coolman, Lamar Glover, and Kara Gotsch, *Still in Danger: The Ongoing Threat of Sexual Violence against Transgender Prisoners* (Los Angeles and Washington: Stop Prisoner Rape and ACLU National Prison Project, 2005), available at <http://www.justdetention.org/pdf/stillindanger.pdf>.

^{xxiv} Invasive and degrading genital searches conducted by law enforcement as “gender checks” are unfortunately commonplace. Amnesty International, *supra* at note x. The current language in PREA, which prohibits such searches “unless part of a broader medical examination” leaves too much discretion as to what constitutes a “broader medical examination,” given the ongoing problem of harassing and assaultive genital searching of LGBT detainees.

^{xxv} Stinson, Philip M.; Liederbach, John; Brewer, Steven L.; and Mathna, Brooke E., *Police sexual misconduct: A national scale study of arrested officers* (2014), Criminal Justice Faculty Publications. Paper 30, http://scholarworks.bgsu.edu/crim_just_pub/30; International Association of Chiefs of Police, *Addressing Sexual Offenses and Misconduct by Law Enforcement Officers: An Executive Guide* (Virginia: International Association of Chiefs of Police, 2011), available at <http://www.theiacp.org/Portals/0/pdfs/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf>; Cato Institute, *National Police Misconduct Reporting Project Annual Report (2010)*, available at: <http://www.policemisconduct.net/statistics/2010-annual-report>; Samuel Walker and Dawn Irlbeck, *Driving While Female*, Police Professionalism Initiative, University of Omaha (2012), available at <http://samuelwalker.net/wp-content/uploads/2010/06/dwf2002.pdf>.

^{xxvi} Amnesty International, *supra* note x; see also National LGBTQ Task Force, *supra* note x.

^{xxvii} Kathryn E. W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 *Pediatrics* 49, 49-57 (2010).

^{xxviii} Karen N. Peart, *Lesbian, Gay and Bisexual Teens Singled Out for Punishment*, Yale News (Dec. 6, 2010) <http://news.yale.edu/2010/12/06/lesbian-gay-and-bisexual-teens-singled-out-punishment>.

^{xxix} <http://www.vera.org/sites/default/files/resources/downloads/nick-turner-testimony-presidents-task-force-21st-century-policing.pdf>.