



**Written Statement of Lambda Legal Defense & Education Fund, Inc.
Before the United States Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Human Rights**

Hearing on

Reassessing Solitary Confinement II:
The Human Rights, Fiscal, and Public Safety Consequences
Tuesday, February 25, 2014
at 2:30 pm

Mr. Chairman Durbin, Ranking Member Cruz, and Members of the Judiciary Committee:

Thank you for devoting your time and attention to the human rights, fiscal, and public safety consequences of solitary confinement in U.S. jails, prisons, and detention centers. Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) appreciates the opportunity to weigh in on this pressing issue and highlight the deleterious consequences of solitary confinement for lesbian, gay, bisexual, and transgender (“LGBT”) people, and people living with HIV. LGBT people are often placed in solitary confinement ostensibly for their protection. But, because of the physical, mental, and emotional toll solitary confinement takes on those subjected to it, it is not an appropriate solution to individual or systemic safety concerns. The safety of LGBT prisoners can and must be addressed through better alternative means.

Lambda Legal is the oldest and largest national organization committed to achieving full recognition of the civil rights of LGBT people and people living with HIV through impact litigation, education, and public policy work. Founded in 1973 and headquartered in New York City, Lambda Legal has offices in Los Angeles, Chicago, Atlanta, and Dallas. Lambda Legal has been directly involved in many cases advocating for prisoners’ rights, including access to appropriate medical care for transgender individuals, desegregation of HIV-positive inmates in state facilities, and prisoners’ rights to sue prison officials for sexual assault. Our Legal Help Desk receives more than 7,000 inquiries per year, roughly 2,000 of those inquires since 2009 have come from individuals detained in prisons, jails and/or immigration detention facilities, often in solitary confinement.

The Harms of Solitary Confinement Disproportionately Affect LGBT and HIV-Positive Prisoners

LGBT detainees are disproportionately placed in protective custody, often based on the false notion that protective custody is necessary for their safety. While it is well documented that LGBT prisoners are a vulnerable population, systemically confining LGBT detainees in solitary confinement does not increase their safety. In fact, it harms them.

It is well established that solitary confinement can cause a wide variety of negative physiological and psychological responses. In addition to a general increase in psychiatric symptoms, suicide rates and incidents of self-harm are much higher for prisoners in solitary confinement. In California, for example, 73% of all suicides in the prison population in 2004 were committed by prisoners being held in isolation units, even though less than 10% of the state's prison population was held in isolation units.¹

Solitary confinement can exacerbate the psychological trauma already experienced by many LGBT prisoners. Gay men², lesbians³, bisexuals⁴, and HIV-positive people⁵ already have higher incidences of depression, suicidality, and stigma. Suicidality rates are especially high among transgender people. Of the transgender respondents in *Injustice at Every Turn: A Report from the National Transgender Discrimination Survey*, the largest data collection of transgender individuals to date, 41% had attempted suicide, compared to 1.6% of non-transgender people.⁶ These mental health risk factors make solitary confinement especially dangerous for LGBT and HIV-positive prisoners.

¹ Expert Report of Professor Craig Haney at 45-46 n. 119, *Coleman v. Schwarzenegger*, 2008 WL 8697735 (E.D. Cal. 2010) (No: Civ S 90-0520 LKK-JFM P). See also Eric Lanes, *The Association of Administrative Segregation Placement and Other Risk Factors with the Self-Injury-Free Time of Male Prisoners*, 48 J. OFFENDER REHABILITATION 529, 539-40 (2009) (presenting findings that prisoners in solitary harm themselves on average 17 months earlier than prisoners in general population).

² See, e.g., Cochran, S.D. et al., *Lifetime prevalence of suicide symptoms and affective disorders among men reporting same-sex sexual partners*, 90(4) AM. J. PUB. HEALTH. 573, 578 (Apr. 2000); Mills, T.C. et al., *Distress and depression in men who have sex with men: the Urban Men's Health Study*. 161(2) AM. J. PSYCHIATRY 278, 285 (2004); Paul, J.P. et al., *Suicide attempts among gay and bisexual men: lifetime prevalence and antecedents*. 92(8) AM. J. PUB. HEALTH 1338, 1345 (2002).

³ See, e.g., WOMENSHEALTH.GOV, *Lesbian and bisexual health fact sheet*, available at <http://womenshealth.gov/publications/our-publications/fact-sheet/lesbian-bisexual-health.html> (last updated July 16, 2012) (reporting that “lesbian and bisexual women report higher rates of depression and anxiety than other women do. Bisexual women are even more likely than lesbians to have had a mood or anxiety disorder. Depression and anxiety in lesbian and bisexual women may be due to . . . [s]ocial stigma, [r]ejection by family members, [a]buse and violence, [u]nfair treatment in the legal system, [s]tress from hiding some or all parts of one's life, [l]ack of health insurance[.]”)

⁴ *Id.*

⁵ See, e.g., Tsao, J.C. et al., *Stability of anxiety and depression in a national sample of adults with human immunodeficiency virus*, 192(2) J. NERV. MENT. DIS. 111, 118 (2004); NAT'L INST. OF MENTAL HEALTH, *Depression and HIV/AIDS*, available at <http://www.nimh.nih.gov/health/publications/depression-and-aids/depression-and-hiv-aids.pdf> (last accessed Feb. 20, 2014) (noting that “[s]tudies show that people who are infected with HIV are more likely than the general population to develop depression”).

⁶ See GRANT, JAMIE M. ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION STUDY 2* (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

On top of causing severe psychological harm, solitary confinement divorces LGBT and HIV-positive prisoners from the resources that support their health and well-being—exactly the opposite effect that it is supposed to have. Prisoners in solitary confinement are usually denied access to facilities and privileges available to the general population, including educational, vocational, and rehabilitation programs, phone use, and regular shower access.⁷ The restrictions placed on LGBT prisoners in protective custody are often identical to those placed on inmates in solitary confinement for punishment. While inmates in the general population may be able to pursue a GED, participate in drug treatment programs, work, or attend religious services, inmates placed in “protective” solitary confinement are generally denied these opportunities. Moreover, because protective custody units are often not monitored by cameras, LGBT prisoners in protective custody become even more vulnerable to unchecked harassment, physical assault, and sexual assault by prison officials and staff.⁸ This combination of punishment based on LGBT status and increased vulnerability is both dangerous and dehumanizing.

It is unconstitutional to deny a prisoner necessary medical care when it is possible to provide it.⁹ Prisoners in solitary confinement are cut off from virtually all networks and, thus, may have greater difficulty advocating for their health care needs than inmates in the general population. The denial of medical care can have both physical and psychological consequences, especially for transgender and HIV-positive prisoners, who often need regular hormone treatment or HIV medication. The largest data collection from transgender individuals to date shows that 12% of respondents in jail or prison reported having been denied routine non-transition-related healthcare, and 17% reported having been denied hormone treatment.¹⁰ The denial of healthcare to prisoners in the general population suggests that these numbers are even higher among transgender prisoners in isolation.

⁷ See *Meriwether v. Faulkner*, 821 F.2d 408, 416-17 (7th Cir. 1987) (citing *French v. Owens*, 777 F.2d 1250, 1256 (7th Cir. 1985) (“[P]risoners confined in protective custody have no right of equal access to the same vocational, academic and rehabilitation programs as those in the general prison population.”); see also SYLVIA RIVERA LAW PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE MISTREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS, 17-19 (2007); NYCLU.ORG, *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement* (Feb. 19, 2014), <http://www.nyclu.org/news/nyclu-lawsuit-secures-historic-reforms-solitary-confinement>.

⁸ “IT’S WAR IN HERE,” *supra* note 7, at 18.

⁹ *Estelle v. Gamble*, 429 U.S. 97 (1976); see also *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir. 2011) (holding that a Wisconsin statute barring prisoners from receiving medically necessary gender-transition-related care violated the Eighth Amendment’s ban on cruel and unusual punishment); *Phillips v. Mich. Dep’t of Corr.*, 731 F. Supp. 792, 800–01 (W.D. Mich. 1990) (granting transgender prisoner’s request for a preliminary injunction requiring prison officials to provide her with estrogen therapy where she had taken estrogen for the 16 years prior to incarceration); *Gammett v. Idaho State Bd. of Corr.*, No. CV05-257-S-MHW, 2007 U.S. Dist. LEXIS 55564 (D. Idaho July 27, 2007) (*unpublished*) (granting prisoner’s request for a preliminary injunction to provide estrogen therapy).

¹⁰ See GRANT, *supra* note 6.

A transgender man, whom we'll call Diego, called Lambda Legal's Help desk for assistance. Diego was on probation for two charges for driving while intoxicated and was having difficulty recovering from alcoholism. As a condition of probation, Diego needed to participate in a rehabilitation program at a residential facility. However, Diego's parole officer could not find a facility that would accommodate him, which, the parole officer said, meant Diego's probation was being revoked. Diego was sent to jail, where he was told he could not be placed with either men or women because he is transgender. Diego was placed in solitary confinement. When he told prison officials he had been taking testosterone regularly and needed hormone treatment, Diego was told that hormone treatment was not medically necessary.

LGBT prisoners like Diego are all too frequently denied access to programs and resources, simply because of their LGBT status. LGBT and HIV-positive prisoners also often have mental and physical healthcare issues that can be exacerbated by solitary confinement, especially when solitary confinement is linked to a denial of healthcare services. The harms that solitary confinement causes are amplified for LGBT and HIV-positive prisoners not only because of their overrepresentation within solitary confinement but also because it compounds the physical and psychological harms that are already disproportionately suffered by those who are LGBT and HIV-positive.

The Department of Justice ("DOJ") has recognized that the mental, physical, and emotional harms caused by protective custody and solitary confinement mean that protective custody and solitary confinement are in no way solutions to systemic safety risks to LGBT prisoners. In 2012, the DOJ finalized regulations pursuant to the Prison Rape Elimination Act ("PREA").¹¹ As part of these regulations, the DOJ took special care to prohibit agencies from "plac[ing] lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings," including solitary confinement or protective custody, "solely on the basis of such identification or status" unless the placement is court-ordered.¹² This provision explicitly responds to the disproportionate use of solitary confinement and protective custody to separate LGBT prisoners from the rest of the prison population, and recognizes that this is an urgent issue for prisons, jails, and detention facilities to address. Despite the implementation of PREA, Lambda Legal continues to receive calls from the families of detainees—particularly those in immigration detention—held in solitary confinement ostensibly for their protection.

LGBT Detainees Deserve Real Protection While Incarcerated

LGBT individuals are particularly vulnerable when incarcerated. A 2013 report by the Bureau of Justice Statistics ("BJS") found that non-heterosexual male prison and jail inmates were more than ten

¹¹ National Standards to Prevent, Detect and Respond to Prison Rape, Docket No. OAG-131, (May 16, 2012) (codified at 28 C.F.R. § 115 *et seq.*), available at http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf.

¹² 28 C.F.R. § 115.42 (g) ("The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.").

times more likely to be the victims of inmate-on-inmate sexual assault than their heterosexual counterparts.¹³ Non-heterosexual female inmates were nearly three times more likely to suffer inmate-on-inmate sexual assault than their heterosexual counterparts, and both groups were more than twice more likely to be sexually assaulted by a staff member than their heterosexual counterparts.¹⁴

Transgender prisoners are especially vulnerable. Of the 6,450 transgender respondents in the 2011 report *Injustice at Every Turn*, 16% of transgender respondents in prisons or jails were physically assaulted, and 15% were sexually assaulted.¹⁵ Among black transgender respondents, 34% reported sexual abuse while in prison or jail.¹⁶

Transgender prisoners placed into sex-segregated facilities based on their sex assigned at birth, rather than their lived gender, are particularly vulnerable to harassment, abuse, and even assault. PREA requires correctional officers to undertake an individualized assessment of transgender inmates taking their gender identity into consideration, and not simply to assign them to a particular housing facility based on their genitals.¹⁷ Oversimplified reliance on gender assigned at birth or genitals often leads to transgender women being assigned to men's facilities and transgender men being assigned to women's facilities, and their unnecessary, prolonged confinement in isolation.

Jason, a transgender man,¹⁸ contacted Lambda Legal's Help Desk for help. After being arrested in Georgia, Jason told his arresting officer that he was a transgender man and that he should be placed in a men's facility. In spite of that, Jason was made to strip naked in front of a female officer, who decided to book him as female. In the women's facility, Jason was held in solitary confinement, on lockdown 23 hours a day, "for his own safety."

Another caller, whom we will call Larissa, is a transgender woman who was arrested in Texas after a fight with her ex-boyfriend. Even though Larissa's passport and Texas driver's license both reflected her female gender, when the arresting officers realized that Larissa was transgender, they

¹³ BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12 BJS NATIONAL INMATE SURVEY 30, May 2013, available at <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

¹⁴ *Id.*

¹⁵ GRANT, *supra* note 6, at p. 167.

¹⁶ *Id.*

¹⁷ 28 C.F.R. § 115.42(c) ("In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems."); *see also* § 115.42(e) ("A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.").

¹⁸ A transgender man is a person assigned female at birth, who identifies as male. A transgender woman is a person assigned male at birth, whose gender identity is female.

booked her as male and coerced her into signing forms that said she was “homosexual” and in need of protective custody. After “parading” Larissa around both the men’s and women’s prisons and telling the inmates that she was “a half-and-half,” the officers put Larissa in solitary confinement.

Jason and Larissa’s stories highlight the factors that lead prison officials disproportionately to place LGBT and HIV-positive prisoners into solitary confinement: purported concerns for the prisoner’s safety, purported concerns for the safety of other prisoners, and ignorance as to where to place transgender and gender non-conforming prisoners. Rather than protecting LGBT prisoners, however, solitary confinement as protective custody exposes them to a host of greater harms.

Solitary Confinement is Especially Harmful to LGBT and HIV-Positive Youth and Immigrant Detainees

When they enter detention centers, LGBT youth face many of the same challenges that LGBT adult prisoners face. LGBT youth are often segregated from the general population in detention facilities. According to the American Psychiatric Association, isolation of youth within juvenile justice facilities “is a form of punishment and is likely to produce lasting psychiatric symptoms.”¹⁹ Compounding these symptoms for LGBT youth is the perception—often a correct one—that the only reason they are being segregated is their LGBT status.²⁰

Sometimes, LGBT youth are segregated “for their own safety.”²¹ Sometimes, they are isolated because they are perceived as a safety risk to others.²² Neither of these is a valid reason to subject LGBT youth to solitary confinement. To protect gay youth from assault and harassment in juvenile justice facilities, facility and staff should not punish them by placing them in solitary confinement; rather, staff must implement more effective safety measures. What’s more, isolating LGBT youth from the rest of the prison population can make gay youth more vulnerable by drawing attention to them.²³ And there is

¹⁹ KATAYOON MAJD ET AL., HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS, 106 (2009) (citing AMERICAN PSYCHIATRIC ASSOCIATION, *News Release No. 09-12: Incarcerated Juveniles Belong in Juvenile Facilities* (Feb. 27, 2009), available at http://www.njjn.org/uploads/digital-library/resource_1050.pdf.)

²⁰ *See id.* at 107.

²¹ *Id.* at 106-07.

²² *Id.* at 107 (“Interviewees from several jurisdictions reported that facilities routinely segregate LGBT youth from others, not to protect them, but because they hold a common but discredited stereotype that LGBT youth are sexually predatory. One youth, Frankie, put it simply, ‘They were afraid that I would rape my cellmate [because of my sexual orientation and gender identity.]’”).

²³ *Id.* (“Several youth explained that by isolating them, the facility only drew attention to the youth and made them more vulnerable to abuse. Twenty-two-year-old Tyler [a Native-American gay male youth] explained: ‘It was horrible because I was the only one in detention that had my own room and everyone was wondering, ‘Why doesn’t he have a roommate?’ Of course, if you’re smart you try to keep to yourself and not talk about why you are in there. But that is kind of a dangerous situation because then the rumors start. . . .’”)

no need to “protect” the general population from gay youth; the idea that gay youth pose a special risk to other youth, or that they are predatory, is untrue and defamatory.

HIV-positive detainees also have a history of being segregated from the general prison population. One striking story is that of a gay Peruvian asylum seeker, who in 2011 was held in solitary confinement for almost six weeks on the sole basis that he was HIV-positive. Officers frequently prohibited him from leaving his cell to get his HIV medication. When he did seek medical treatment, the escorting officer refused to remove the shackles on his feet, waist, and hands, despite pleas from his doctor. He was only released from solitary confinement after winning his immigration case.²⁴ This kind of treatment is shocking and appalling. We and other organizations have taken the issue of segregating HIV-positive prisoners to the courts before, and prison officials and departments of corrections are realizing that it is unjustifiable.²⁵

Immigrant detainees face many of the same challenges that prisoners and jail inmates face. While a new directive issued by the Department of Homeland Security in September 2013 explicitly forbidding placing immigrants in solitary confinement solely because of gender identity or sexual orientation is a step in the right direction, it remains to be seen how great an impact this directive will have when the vast majority of immigrant detainees lack representation to challenge the conditions of their confinement.²⁶ We are still receiving calls from Immigration and Customs Enforcement (“ICE”) detainees who are being placed in solitary confinement because of their LGBT status. Within the past two weeks, we received a phone call from an ICE detainee, whom we will call Marta, who is being kept in protective custody because she is a transgender woman. In lockdown 23 hours a day, Marta has extremely limited access to resources, such as common space and telephones, made readily available to other detainees. As a result, she is unable to communicate with her family and her attorney to the same extent as other detainees. This disparity of treatment on the basis of sexual orientation and gender identity serves no legitimate purpose and is unconscionable.

Conclusion

Solitary confinement affects many people incarcerated in U.S. jails, prisons, and detention facilities, but it takes a particular toll on LGBT and HIV-positive inmates and immigrant detainees.

²⁴ NAT’L IMMIGRANT JUSTICE CENTER, *Mass Civil Rights Complaint Details Systemic Abuse of Sexual Minorities in U.S. Immigration Detention* (April 13, 2011), https://www.immigrantjustice.org/press_releases/mass-civil-rights-complaint-details-systemic-abuse-sexual-minorities-us-immigration-d.

²⁵ See, e.g., Brief for Lambda Legal Defense and Education Fund Inc. et al. as Amici Curiae Supporting Respondents, *Davis v. Hopper*, Case No. 98-9663, cert. denied, 528 S. Ct. 1114 (2000); ACLU.ORG, *Henderson et al. v. Thomas et al.*, <https://www.aclu.org/hiv-aids-prisoners-rights/henderson-et-al-v-thomas-et-al> (last accessed Feb. 21, 2014).

²⁶ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SECURITY, *11065.1:Review of the Use of Segregation for ICE Detainees* (2013), available at http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

LGBT prisoners are still often involuntarily committed to solitary confinement solely on the basis of their LGBT status. The United States must discontinue the discriminatory use of solitary confinement for housing LGBT and HIV-positive prisoners and detainees. Instead of isolating these prisoners, prison officials and staff must commit to implementing more effective safeguards to prevent abuse and harassment.

We applaud the Committee for reflecting on the severe harms and costs of solitary confinement, and we hope your review takes into serious consideration the uniquely deleterious effects of solitary confinement on LGBT and HIV-positive prisoners.

Most respectfully,

Lambda Legal Defense and Education Fund, Inc.

Jennifer C. Pizer, Senior Counsel and
Director, Law & Policy Project

4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512
jpizer@lambdalegal.org
213.382.7600

Jael Humphrey
Staff Attorney
jhumphrey@lambdalegal.org

Andrew Kravis*
Transgender Rights Project Law Fellow
akravis@lambdalegal.org

120 Wall St., 19th Fl.
New York, NY 10005
212.809.8585

* JD, bar admission pending