

The Future of the Judiciary: Advancing Progressive Goals through New York State Courts

Thursday, **October 10, 2019** | 6:30-8:00 p.m.

Orrick, Herrington & Sutcliffe LLP

51 West 52nd Street, 23rd Floor | New York, NY 10019

1.0 CLE Credit in Areas of Professional Practice

Appropriate for Experienced and Newly Admitted Attorneys

Featuring:

RICHARD SAENZ | *Senior Attorney, Criminal Justice
and Police Misconduct Strategist, Lambda Legal*

DAWN L. SMALLS | *Partner, Boies, Schiller Flexner LLP;
Member, ACS National Board of Directors*

LILIA I. TOSON | *Assistant Attorney General, Office of the
New York State Attorney General*

LIA C. MINKOFF (*Moderator*) | *Diversity Chair,
ACS New York Lawyer Chapter*

Presented by:



In partnership with:



The Future of the Judiciary:
Advancing Progressive Goals through New York State Courts

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CLE Program presented by LeGaL, ACS NY Lawyer Chapter, and the Metropolitan Black Bar Association

AGENDA

This program will provide an overview of how the New York State court system operates, how judges get on the bench in New York City, and the kinds of civil legal issues in state courts that progressive-minded litigants could push in a more just, more equitable direction with directed attention and litigation.

- I. 6:30 - 7:00 p.m. – Welcome and Introduction to Panel** (Matt Shahabian, *Co-Vice Chair of ACS NY Lawyer Chapter*)
- II. 7:00 - 7:10 p.m. – Overview of the New York State court system and selection of judges** (Toson)
- III. 7:10 - 7:45 p.m. – Discussion of structure and legal issues in the New York state court system, including discrimination law, housing and benefits law, and family court** (Saenz, Smalls, Toson)
- IV. 7:45 - 8:00 p.m. – Questions and Answers** (Minkoff)

SPEAKER BIOS

LIA C. MINKOFF, ESQ. is a public interest lawyer and activist. She is outgoing Chair of the New York Lawyer Chapter and current Diversity Chair. She has spent her legal career as an attorney with the New York Legal Assistance Group's LegalHealth Division, providing general civil legal services to clients in hospitals across New York City as part of a medical-legal partnership. She has appeared in housing court, family court, and before ALJs, representing clients on matters including Social Security, Medicaid, home care, and public benefits. She is currently focusing on organizing around the 2020 election and moderating panels for ACS.

RICHARD SAENZ, ESQ. is a Senior Attorney and the Criminal Justice and Police Misconduct Strategist at Lambda Legal, the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those living with HIV.

He focuses his work on the criminal justice system, coordinating Lambda Legal's litigation and policy work on behalf of incarcerated people. Currently, Richard is leading Lambda Legal's response to the Trump Administration's changes to the federal Bureau of Prisons Transgender Offender Manual. Richard was lead counsel in *Dorn v. Michigan Department of Corrections*, that resulted in substantive changes to a Michigan Department of Corrections policy directive that unlawfully discriminates against incarcerated people living with HIV. In addition, Richard was a lead member of the litigation team in *Hicklin v. Precythe*, a successful challenge to Missouri's Department of Corrections "freeze frame" policy denying appropriate health care to transgender people in its custody, in one of the first court decisions to rule specifically that "freeze-frame" policies are unconstitutional as they are in violation of the Eighth Amendment's prohibition on cruel and unusual punishment. Richard also helped secure a settlement with the City of New York on behalf of a gay man attacked by Rikers Island jail officials while visiting his partner (*Hamm v. City of New York*).

He has filed numerous amicus briefs addressing anti-LGBT biases in the legal system. In *Rhines v. Young*, a capital case in South Dakota, Richard was co-author of an amicus brief urging the U. S. Supreme Court to allow Mr. Rhines to present evidence that anti-gay bias was a factor in some jurors' decisions to sentence him to death. Richard was also co-author of amicus briefs on the right to medically necessary care for incarcerated transgender people, the rights of sex workers and the rights of incarcerated LGBT people to have their cases reviewed.

He is a member of the National LGBT/HIV Criminal Justice Working Group and is a frequent speaker on criminal justice and policing issues at national conferences, law schools, and bar associations. In addition, he served as a panelist on the 2016 White House LGBT/HIV Criminal Justice Briefing.

Richard has been named a Hispanic National Bar Association's Top Lawyers Under 40 and a National LGBT Bar Association's Best LGBT Lawyers Under 40. Richard is also a member of the NYC Anti-Violence Project's Board of Directors.

He received his Juris Doctor from Fordham University School of Law, where he was a Stein Scholar for Public Interest Law and Ethics. He holds a Bachelor of Arts from Georgetown University.

DAWN L. SMALLS, ESQ. is a partner at Boies Schiller Flexner LLP, where she has fought for undocumented immigrants, victims of financial crime, and voters facing intimidation. As one example, in the lead up to the 2016 election, Ms. Smalls served as counsel for several State Parties in a proactive attempt to fight then-candidate Trump's attempts to intimidate voters at the polls prior to the Election.

For the last three and a half years, Ms. Smalls has served as a Commissioner of the Joint Commission on Public Ethics. Ms. Smalls also has extensive experience in the federal government having served two Democratic Administrations, first as Assistant to the White House Chief of Staff and then as Executive Secretary of the Department of Health and Human Services, where she helped improve access to affordable health care.

Ms. Smalls has also worked in philanthropy for the Open Society Foundations and the Ford Foundation, where she managed approximately \$40 million of grants promoting civic engagement, political reform, and grassroots activism.

Ms. Smalls was a candidate for New York City Public Advocate in New York in February 2019.

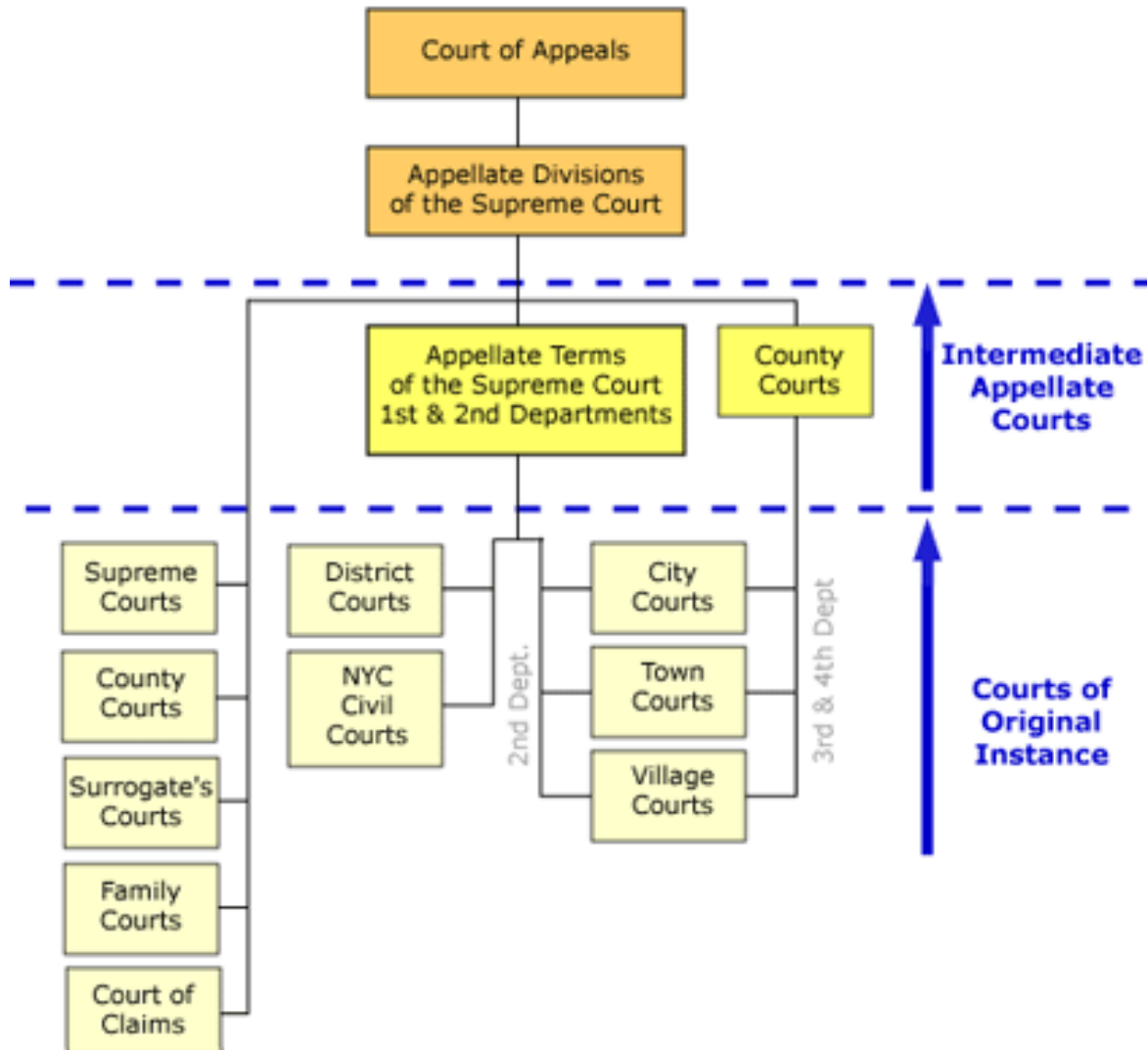
Ms. Smalls currently serves as an ACS National Board member. She co-founded the student chapter at Stanford Law School, and upon graduation, she co-founded the New York Lawyer Chapter.

LILIA I. TOSON, ESQ. is an incoming Supervising Attorney in the Civil Law Reform Unit of the Legal Aid Society and a former Assistant Attorney General with the New York State Office of the Attorney General.

In her most recent position, Lilia litigated cases implicating health care and civil rights policy, including against the federal government. She argued for summary judgment on behalf of New York State, seven other states, and New York City in a "sanctuary cities" case challenging DOJ's imposition of immigration-related conditions on federal funding for states and localities. The plaintiffs won, receiving an award of \$29.5 million in grant money for 2017. She also argued in a suit challenging HUD's delay of a rule to promote integration that the Obama administration promulgated under the Fair Housing Act. Additionally, earlier this year, she filed a complaint challenging an HHS rule that would make it easier for providers to deny patients medical treatment, services, and information for religious, moral, ethical, or other reasons.

Lilia was previously a Senior Counsel in the Affirmative Litigation Division of the New York City Law Department, a litigation associate at Cleary, Gottlieb, Steen & Hamilton LLP, and a clerk for the Honorable Duane Benton of the United States Court of Appeals for the Eighth Circuit. While at the Law Department, Lilia was first chair for the City in a federal contraband cigarette trafficking trial against common carrier UPS, which resulted in a \$247 million verdict for the City and State of New York. Lilia was also a member of the Law Department's diversity committee. Lilia graduated from the NYU School of Law where she was an Articles Editor of the Law Review, an AnBryce Scholar, and a member of BALSA. She received her B.A. in political science from William Jewell College. She lives in Brooklyn, New York, with her husband Jamal, son Malcolm, and daughter Naomi.

CIVIL COURT STRUCTURE



COURT AUTHORITY AND STRUCTURE

Cases start in the trial courts. Though most cases are decided at the trial-court level, parties will occasionally ask a higher court to reconsider the case (an “appeal”). Most appeals are first heard in the intermediate appellate courts, which review the decisions of lower courts to make certain that the law was properly applied. In New York, the highest court is the **Court of Appeals**. Listed here are brief descriptions of the various trial and appellate courts that make up the New York State court system.

THE TRIAL COURTS

IN NEW YORK CITY

The Civil Court of the City of New York decides lawsuits involving claims for damages up to \$25,000 and includes a small claims part for cases involving amounts up to \$5,000 as well as a housing part for landlord-tenant matters.

The Criminal Court of the City of New York handles misdemeanors (crimes punishable by fine or imprisonment of up to one year) and lesser offenses. Criminal Court judges also conduct arraignments (initial court appearances following arrest) and preliminary hearings for felonies (crimes punishable by imprisonment of more than one year).

OUTSIDE NEW YORK CITY

District Courts, located in Nassau County and the five western towns of Suffolk County, arraign defendants accused of felonies and handle misdemeanors and lesser offenses as well as civil suits involving claims up to \$15,000.

City Courts arraign defendants accused of felonies and handle misdemeanors and lesser offenses as well as civil suits involving claims up to \$15,000. Some City Courts have small claims parts,

where matters involving claims up to \$5,000 are handled, and/or housing parts, which handle landlord-tenant matters.

Town and Village Justice Courts handle misdemeanors and lesser offenses. Although the County Courts try felony cases, town and village justices first arraign defendants in Town and Village Courts. Town and Village Courts also hear civil suits involving claims up to \$3,000.

County Courts, located in each county outside New York City, have exclusive authority to conduct trials in felony matters, while sharing authority with local City and Town and Village Courts to handle trials in misdemeanor cases and other minor offenses. County Courts also have limited authority over cases involving claims for money damages up to \$25,000.

TRIAL COURTS OPERATING IN AND OUTSIDE NEW YORK CITY

The Supreme Court generally hears cases outside the authority of the lower courts, such as civil matters involving higher dollar amounts; divorce, separation and annulment proceedings; and criminal prosecutions of felonies. (Outside New York City, Supreme Courts hear civil matters while the County Courts hear criminal matters.)

The Family Court hears matters involving children and families including adoption; guardianship; foster care approval and review; juvenile delinquency; family violence; child abuse and neglect; and child support, custody and visitation.

The Surrogate's Court hears cases relating to individuals who have passed away, including the validity of wills and the administration of estates. These courts are also authorized to handle adoptions.

The Court of Claims has exclusive authority over lawsuits seeking money damages against the State of New York. The Court of Claims

also has jurisdiction over lawsuits seeking money damages against certain state-related entities such as the New York State Thruway, the City University of New York and the New York State Power Authority (for claims related to the taking of real estate only).

APPELLATE COURTS

INTERMEDIATE APPELLATE COURTS

Appellate Terms of the Supreme Court in the First and Second Departments* hear appeals of decisions in cases starting in the New York City Civil and Criminal Courts. In the Second Department, the Appellate Terms also hear appeals of decisions in cases that started in the District, City or Town and Village Courts. The County Courts in the Third and Fourth Departments, while primarily trial courts, hear appeals of decisions in cases starting in the City Courts and Town and Village Courts.

There are four Appellate Divisions of the Supreme Court, one in each judicial department.* The Appellate Divisions hear civil and criminal appeals from the trial courts as well as civil appeals from the Appellate Terms and County Courts.

HIGHEST APPELLATE COURT

The Court of Appeals, New York's highest court, hears civil and criminal appeals from the State's intermediate appellate courts, and in some instances from the trial courts. The Court of Appeals also hears appeals of decisions reached by the State Commission on Judicial Conduct, which is responsible for reviewing allegations of misconduct brought against judges. In addition, the Court of Appeals makes rules governing the admission of attorneys to the New York State bar.

* For administrative purposes, the court system is divided geographically into four judicial departments and 13 judicial districts. The First Judicial Department includes districts 1 and 12; the Second Judicial Department, districts 2, 9, 10, 11 and 13; the Third Judicial Department, districts 3, 4 and 6; and the Fourth Judicial Department, districts 5, 7 and 8.

* See directory on pages 11–15 for a list of counties comprising each district.

GUIDELINES FOR SELECTION OF PANEL

- A. No organization primarily engaged in activities for profit shall be selected as an organization to designate panel members.
- B. The request for the designation of each panel member shall be made to the chief executive officer of the organization, who shall make such designation in writing either on behalf of the organization or acting in his or her individual capacity. However, if the chief executive officer reasonably believes that he or she is a relative, partner, associate, employer or employee or has a business, financial or close personal relationship with any person who may appear before the panel, such officer shall delegate the selection of the organization's representative to another person of such organization who does not have such relationship. In no event shall the person making the designation, designate himself or herself as a member of the panel or any person in partnership or otherwise professionally associated with him or her in the practice of law.
- C. No person shall be designated or serve as administrator or as a member of the panel who:
 - 1. Is an officer or executive board member of a political club or who held such office during the three years preceding the year of panel service;
 - 2. Was a candidate for or who held elective party office (including delegates to a judicial district convention) or public office, other than the office of County Committee member, during the three years preceding the year of panel service, or who will do so during that year, or who was reported out of a judicial screening panel or was a candidate for judicial office in a primary election during the five years preceding the year of panel service, or during that year;
 - 3. Is an employee of the courts;
 - 4. Is a government employee or appointee who holds employment or appointment at the pleasure of an elected official;
 - 5. Is a government employee or appointee, whether compensated or not, who holds his employment or appointment for a term of years, except for community board members;
 - 6. Has solicited support for or supported a candidate for any judicial vacancy to be filled during the election year in question, or was actively involved in the primary election campaign of a candidate for judicial office during the preceding three years;
 - 7. Has been found guilty of or is presently subject to a proceeding involving professional misconduct (other than a civil action for damages) or of a Class B misdemeanor or more serious crime (or the equivalent under the law of any other jurisdiction).

- D. No person shall serve as a member of the panel if such person reasonably believes that he or she is a relative, partner, associate, employer, or employee or has a business, financial or close personal relationship with any person who may appear before the panel for the purpose of being screened. If after the panel convenes any member learns of such relationship, such member shall disclose such relationship to the Administrator and shall, if practical, be replaced or if not so replaced, shall be disqualified from voting.
- E. Each organization invited to participate on the Panel shall be advised in writing of these guidelines.

Jury Selection and Anti-LGBT Bias

Best Practices in LGBT-Related Voir Dire and Jury Matters

Dec 2015



Bias against people who are lesbian, gay, bisexual or transgender (LGBT) can influence jurors' decisions.¹ Such prejudice can play out in any matter involving LGBT people, including sexual assault, hate crime, intimate partner violence or other criminal cases, as well as discrimination, tort or even contract disputes. But lawyers can conduct effective voir dire to uncover possible bias among prospective jurors. This guide is designed to help practitioners address both express and implicit bias during jury selection, conduct LGBT-inclusive voir dire, and challenge the discriminatory use of peremptory strikes.

CHALLENGES FOR CAUSE

The right to challenge a potential juror for cause as a means of excluding bias is an important component of ensuring due process and a fair trial.² Even as attitudes are changing in many parts of the country, some jurors still openly admit anti-LGBT bias in voir dire.³ Even more troubling, courts will not always excuse for cause a juror who has expressed anti-LGBT views,⁴ and may permit those jurors to remain in the pool if they simply state that they can be fair. Advocates should challenge for cause jurors who express anti-LGBT bias, and should remind the court that its factual determination of whether a juror can be fair should be based not only on the juror's verbal claim of impartiality, but also on the juror's "demeanor and credibility," including body language and evidence of discomfort with LGBT issues.⁵



PROXY QUESTIONS TO UNCOVER IMPLICIT BIAS

Even if a juror does not voice prejudices overtly, research suggests that proxy questions can help to uncover anti-LGBT bias.⁶ These questions may be more effective than asking jurors directly whether they are biased, or whether they can be fair. In addition, providing jurors with an opportunity to respond privately (via questionnaire or outside of the presence of the other venire persons) may produce more forthcoming responses. Some possible areas of voir dire include:

Association with LGBT People

Studies show that people who have close friends who are LGBT tend to demonstrate less anti-LGBT bias.⁷ By contrast, having an LGBT relative is not necessarily a good indicator of a juror's attitudes.⁸ Some sample questions to illicit anti-LGBT bias may include:

Examples:

- "Do you have any close friends who are lesbian, gay, bisexual or transgender?"⁹
- "How would you feel if a same-sex couple moved in next door to you?"¹⁰
- "How would you feel if you had to work closely with someone who was lesbian, gay, bisexual or transgender?"¹¹

Political Ideology

Research also demonstrates that jurors who describe themselves as "politically conservative" tend to have more anti-LGBT attitudes.¹²

Example:

- "Politically, are you liberal, middle-of-the-road, or conservative?"¹³

Attitudes on LGBT Rights Issues

Some jury consultants recommend questioning jurors about relatively uncontroversial LGBT rights issues. They reason that these questions will expose the most anti-LGBT jurors, without "outing" strong allies.¹⁴ At a time when attitudes on LGBT issues are in flux, however, the substance of what constitutes a non-controversial question might be highly contingent on the jurisdiction.

Example:

- "Do you think employers should be able to refuse to hire someone because of the person's sexual orientation or gender identity?"¹⁵
- "How comfortable are you with same-sex couples raising children together?"

Religiosity

Happily, religiosity may become a less useful indicator of anti-LGBT attitudes. Recent surveys demonstrate that support for LGBT rights is growing among some religiously observant groups.¹⁶

Nonetheless, surveys indicate that jurors who attend religious services every week, or who report that their religious beliefs are “often important” or “always important” in guiding their daily decisions, tend to hold more negative attitudes about LGBT people.¹⁷

Examples:

- “Do you try to attend religious services at your place of worship every week?”¹⁸
- “How important are your religious beliefs in guiding your daily decisions?”

Jurors may be challenged for cause or removed with a peremptory strike if they exhibit anti-LGBT bias, even if it is rooted in religious or moral beliefs. However, whether striking a juror based solely on religious affiliation violates the U.S. Constitution is an open question, and a number of states bar the practice.¹⁹



ETHICAL CONSIDERATIONS FOR ATTORNEYS

Rules of professional conduct and judicial canons prohibit bias and discrimination in court and can be used to pursue fairness in jury selection. Under the ABA Model Rules of Professional Conduct, adopted in most states, a lawyer may not “engage in conduct that is prejudicial to the administration of justice.”²⁰

Comment 3 to MRPC 8.4 states that “A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates [this rule] when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate [this rule].”

Judicial canons in many states prohibit bias and discrimination on the basis of sexual orientation and/or gender identity and expression. While not all state canons and codes explicitly include sexual orientation and/or gender identity and expression, they all require that judges not show bias or prejudice and

demand the same of court staff. Additionally, a growing body of law interprets prohibitions against discrimination on the basis of sex to include bars against discrimination based on gender identity or sexual orientation.

Relevant Code of Judicial Conduct

Rule 2.3 of Canon 2 of the Code of Judicial Conduct states:

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

DEALING WITH STANDARD VOIR DIRE QUESTIONS

Marital Status Questions

As a result of the Supreme Court ruling in *Obergefell v. Hodges*, same-sex couples may marry nationwide. Nevertheless, research shows that standard voir dire questions regarding marital status (“Are you single, married, or divorced?”) often make LGBT people uncomfortable, cause them to feel excluded, and taint their perceptions of the legal system and the case in front of them.²¹

Unless specifically relevant to a case, the marital status inquiry may undermine the credibility of the judicial process in several ways:

- By failing to reach information on household members, it may deprive the court and lawyers of valuable information about relationships necessary or useful for a fair jury selection or court process.
- If there are follow-up questions that would disclose the

sex of the spouse, marital status questions may force LGBT jurors to disclose their sexual orientation.

- The marital status question may foster a perception among LGBT court users that their subsequent experiences in courts may not be fully informed or fair.

Where voir dire is broad enough to encompass all close relationships, LGBT potential jurors may feel validated and believe that the judicial system is accessible.²²

Though people may now access marriage without discrimination based on sexual orientation, some jurisdictions also have alternative relationship recognition statuses such as civil unions and domestic partnerships, so the standard question should at a *minimum* include those statuses.

Examples:

- “Are you single, married, in a civil union, divorced...”
- “Do you have a spouse, domestic partner, significant other...”

The best approach may be to focus on the point or goal behind the question and directly ask about it. Typically, the marital status inquiry seeks to capture who else is living within the home or is otherwise in a position to influence the potential juror's opinions, experiences and conceptions of the persons and events at trial.

Example:

“In the following questions I will be using the terms ‘family,’ ‘close friend’ and ‘anyone with whom you have a significant personal relationship.’ The terms ‘family’ and ‘anyone with whom you have a significant personal relationship’ include a domestic partner, life partner, or anyone with whom you have an influential or intimate relationship that you would characterize as important.”²³

INVOLUNTARY OUTING AND VISIBILITY AS LGBT

The landscape of legal, political and social acceptance has changed significantly since privacy concerns led one commentator to counsel against asking about sexual orientation and by extension relationship status.²⁴ Yet, despite the general improvement in legal protections and courtroom dynamics, increased visibility of LGBT people in society and the decrease in jurors’ privacy concerns, those changes are likely to be regional.

Choosing whether to reveal one’s sexual orientation is very different from being forced to disclose it, and losing control of that decision can produce significant anxiety.²⁵ One empirical study showed that most lesbian and gay jurors who were out in all other aspects of their lives still did not want to have their sexual orientation disclosed in court.²⁶ Moreover, a significant number felt compelled to disclose their sexual orientation against their will due to questioning in court.²⁷ Accordingly, during voir dire, lawyers are well advised to avoid pressing potential jurors to disclose their sexual orientation involuntarily.

EXPERIENCES OF LGBT PEOPLE IN COURT

In 2012, Lambda Legal, with the help of more than 50 supporting organizations, completed a national survey to assess how well courts and other government institutions are protecting and serving LGBT people and people living with HIV.²⁸ The results show some of the ways the promise of fair and impartial proceedings is tainted by bias against LGBT people and individuals living with HIV.

As is often the case, respondents with multiple marginalized identities—that is, LGBT people who are also low-income, people of color or disabled—reported significantly higher instances of discrimination.



Nineteen percent (19%) of people who responded reported hearing a judge, attorney or other court employee make negative comments about a person’s sexual orientation, gender identity or gender expression.

Sixteen percent (16%) of respondents indicated that their own sexual orientation or gender identity was raised when it was not relevant.

Fifteen percent (15%) of respondents reported having their HIV status raised when it was not relevant.

USING PEREMPTORY CHALLENGES TO ADDRESS ANTI-LGBT BIAS

In addition to challenges for cause, attorneys have a limited number of peremptory strikes (usually 3 to 6), which can be used to remove jurors whom they perceive to be biased, even if that perception may not sustain a challenge for cause.

Eliminating a juror for cause can be difficult for a variety of reasons:

- Jurors may be reluctant to reveal the extent of their biases;
- Judges may place limitations on the scope of voir dire;
- Judges may be disinclined to dismiss many jurors for cause; and
- If given the right to object and question, opposing counsel may attempt to rehabilitate the juror.

As mentioned previously, even when an attorney establishes a clear record during voir dire that a prospective juror holds anti-LGBT attitudes, some judges may nevertheless attempt to rehabilitate the juror by asking if the individual can set those prejudices aside and neutrally consider the facts. Given some of the limitations placed on the use of for-cause challenges, peremptory strikes are not only valuable, but may serve as a last opportunity for counsel to remove jurors who harbor anti-LGBT bias.

Of course, while peremptory challenges generally can be made without giving any reason, they are “subject to the commands of the Equal Protection Clause.”²⁹ In the 1986 case of *Batson v Kentucky*, the Supreme Court held that peremptory challenges cannot be used to systematically strike otherwise qualified jurors from the panel on the basis of race.³⁰ Since then, the Court has prohibited the use of peremptory challenges on account of a jurors’ sex in *J.E.B v Alabama*,³¹ or any other classification subject to heightened judicial scrutiny.³² *Batson* has been extended to apply to criminal defense attorneys as well as prosecutors³³ and private civil litigants.³⁴

CHALLENGING LGBT-BASED PEREMPTORY STRIKES

LGBT people have suffered a long history of discrimination in both the public and private spheres. As with other groups targeted with invidious discrimination, far too often discrimination against LGBT people has found its way into the courtroom, denying them equal access to justice and an equal opportunity to participate in civic life.

The Supreme Court has not expressly ruled on whether the Equal Protection Clause of the U.S. Constitution precludes using peremptory challenges to strike prospective jurors on the basis of sexual orientation or gender identity. However, in the 2014 case *SmithKline Beecham Corp. v. Abbott Labs*, the Ninth Circuit Court of Appeals became the first federal court to rule that jurors cannot be disqualified based on their sexual orientation.³⁵

The unanimous three-judge panel—relying on the Supreme Court’s ruling in *U.S. v Windsor*—held that discrimination based on sexual orientation is subject to heightened scrutiny, and that equal protection prohibits exercising peremptory strikes based on sexual orientation.³⁶ The court remanded for a new trial based on its finding that, where attorneys struck a man from the jury venire after he made several references to his male partner during voir dire, the record established a prima facie case of intentional discrimination. This broad and significant ruling applies to all federal courts in the Ninth Circuit and thousands of state courtrooms, and should provide persuasive precedent in other federal and state courts.

At the federal level, existing statutory law explicitly bars discrimination in jury selection on the basis of race, color, religion, sex, national origin and economic status.³⁷

Even in a jurisdiction without clear statutory authority or binding precedent, counsel should be prepared to object early

and often to the opposing party’s use of peremptory challenges to strike jurors based on their sexual orientation or gender identity. Counsel should also elicit the factual record necessary to preserve the issue for appeal and provide the court with briefing to support a determination that these discriminatory challenges violate federal and state constitutional guarantees.

SUPPORTING A BATSON CHALLENGE BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY

Counsel should draw upon the Ninth Circuit decision in *SmithKline Beecham Corp. v. Abbott Labs* and the Supreme Court’s logic and reasoning in *Batson* and its progeny to challenge the use of peremptory strikes based on sexual orientation and gender identity.³⁸

Sexual Orientation

With its ruling, the Ninth Circuit noted, “Gays and lesbians may not have been excluded from juries in the same open manner as women and African Americans, but our translation of the principles that lie behind *Batson* and *J.E.B.* requires that we apply the same principles to the unique experience of gays and lesbians.”³⁹ The court went on to examine the history of discrimination faced by gays and lesbians and, looking to the issue of juror exclusion, notes:

“Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation’s most cherished rites and rituals. They tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently. They deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve.”

The court recognizes the need to ensure that “individuals are not excluded from our most fundamental institutions because of their sexual orientation” and that to allow such discrimination in jury selection demeans the dignity of the individual and undermines the integrity of the courts.⁴⁰

In addition to the decision in *SmithKline*, counsel may draw upon recent rulings that recognize that bans on sex discrimination include discrimination based on sexual orientation.⁴¹

Gender Identity

It is clearly established that the rule of *Batson* is violated when a peremptory challenge is used to strike a juror based on sex.⁴² Many jurisdictions and agencies have confirmed that bans against sex discrimination prohibit differential treatment for failing to conform to gender stereotypes, for gender transition, and for discrimination based upon gender identity or being transgender,

since gender identity and sex are inherently related.⁴³ As several courts have held with respect to gender identity, “governmental acts based upon gender stereotypes—which presume that men and women’s appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny because they embody ‘the very stereotype the law condemns.’”⁴⁴ Thus, failing to apply *Batson* to prohibit discriminatory peremptory challenges based on gender identity violates core equal protection principles.

State Protections

Counsel may also consider state constitutional guarantees of equal protection and guarantees related to trial by jury when making out a *Batson* challenge. For example, in *People v. Wheeler*, the Supreme Court of California held that the right to an impartial jury under the California Constitution prohibits the use of peremptory strikes to exclude jurors simply based on their membership in a “cognizable group.” The court concluded that the statutory right to peremptory challenges must give way to the constitutional right.⁴⁵ In *People v. Garcia*, the California Court of Appeal applied *Wheeler* to peremptory strikes on the basis of sexual orientation.⁴⁶ This ruling was later codified and extended to explicitly ban gender-identity challenges.⁴⁷

MAKING A BATSON CHALLENGE

When faced with the opposing party’s use of a peremptory challenge to eliminate a juror on the basis of sexual orientation or gender identity, counsel should object and follow the three-step approach outlined in *Batson*.

Batson Step 1

First, the party challenging the peremptory strike must assert that the strike was improperly exercised by demonstrating that the totality of the relevant facts “raise an inference” of purposeful discrimination. It is best to request to be heard at the bench and out of the earshot of jurors to avoid affecting the impartiality of potential jurors. Counsel’s burden is one of production, not persuasion.⁴⁸ Purposeful discrimination does not need to be the most likely explanation, or even more likely than not; rather it must be supported by sufficient evidence to allow a judge to draw an inference that discrimination has occurred.⁴⁹ There are no bright-line tests for determining what evidence will suffice.⁵⁰ States have been afforded some discretion in determining how to make this showing, and counsel should become familiar with jurisdiction-specific requirements.⁵¹

Counsel should carefully make out a record based on all relevant circumstances, which may include:

- Numerical data that demonstrate a discriminatory pattern of elimination;
- The line of questioning used by the strike’s proponent;

- Deviation from a previous line of questioning;
- A lack of questioning; and/or
- Evidence of similar characteristics shared by the stricken juror and a party.⁵²

Batson Step 2

Once the court determines that the party challenging the peremptory strike has made out its prima facie case, the burden shifts to the striking party to present a neutral explanation for the challenge. Some possible neutral reasons might include the prospective juror’s occupation, education, family connections to a party, attitudes, personal beliefs, and prior litigation experience. However, even if the striking party produces only a “frivolous or utterly nonsensical” justification for its strike, the case does not end—it merely proceeds to step three.⁵³

Batson Step 3

Finally, the party challenging the strike must convince the court that the explanation given by the striking party is a pretext for “purposeful discrimination.”⁵⁴ If a violation is found, the trial judge will decide whether the juror will be returned to the pool or if a new jury pool or panel may be needed.⁵⁵ Counsel should make sure to elicit the factual record necessary to preserve the issue for appeal in the event that a violation is not found. That said, the broad discretion provided means that few cases are reversed based on a claim that the trial judge erred during jury selection.⁵⁶

In developing a complete record of the challenge, be sure to⁵⁷

- Maintain full and accurate notes on each juror;
- Make the challenge right away;
- Request a judge to hear and rule on the challenge if one is not present during voir dire, in order to ensure the decision is subject to appellate review;
- Request a court reporter and state for the record all facts supporting the challenge;
- If the challenge is denied, be sure to object again on the record before the jury is sworn in (doing so outside the presence of the jury).

CONCLUSION

Bias and discrimination in the context of jury selection are particularly harmful, as they reinforce historical invidious discrimination in the court system, interfere with the litigants’ right to a fair trial, and undermine the integrity of the judicial system. Developing effective voir dire techniques will help protect the rights and dignity of LGBT prospective jurors while identifying harmful anti-LGBT prejudice that could taint a verdict. While this resource is intended to help attorneys and courts navigate voir dire and other jury matters, it is important to remember that best practices will require a contextualized and localized approach.

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Protected and Served?

The executive summary of Lambda Legal's national survey that explores discrimination by police, courts, prisons and school security against lesbian, gay, bisexual, transgender (LGBT) people and people living with HIV in the United States.

For the complete report, data and recommendations, visit www.lambdalegal.org/protected-and-served

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INTRODUCTION

"I was arrested and charged with prostitution at a local casino. While the case was subsequently dismissed without going to court, during my arrest, I was physically and verbally assaulted by the arresting officers and others. I was put in handcuffs so tight that my wrists swelled up and turned purple. My face was shoved into a wall while I was handcuffed. The officers threatened, mocked and demeaned me for being transsexual."

—Natalie, Las Vegas, NV

LGBT people and people living with HIV still face serious discrimination and abuse of power directed against them—often by the very government institutions that are supposed to protect them and ensure their civil rights.

In 2012, Lambda Legal—a national organization committed to achieving full recognition of the civil rights of LGBT people and those living with HIV through impact litigation, education and public policy work—conducted a national study to explore government misconduct by the police, courts, prisons and school security against LGBT people as well as people living with HIV in the United States. A total of 2,376 people completed the individual survey (for more details, see *How the Survey Was Conducted*, page 5).

Our study, like others, has found that LGBT people and people living with HIV experience significant discrimination at the hands of government entities. Police and other government entities, through their actions and inactions, continue to treat LGBT people and people living with HIV as second-class individuals and criminals. Compounded by factors such as race and income, this discrimination can take many forms, such as harassment and violence by police or prison guards, discriminatory statements by court personnel, hostility by school security and disproportionate discipline by school administrators.

Many government and law enforcement entities still operate under policies, practices and attitudes that have historically characterized

LGBT people—and in some cases, people living with HIV—as criminals. Currently, over 30 states have laws that criminalize the sex lives of people living with HIV.

Even when the laws have changed, longstanding practices can contribute to the continuing criminalization of LGBT people and people living with HIV, such as:

- the targeting of gay men in bar arrests or sex stings;
- the profiling of LGBT people by the police for stops and searches; and
- the use of condom possession as evidence of sex work, which disproportionately impacts transgender women.

In addition, operating systems and processes have not been reformed to ensure that the rights of LGBT people and people living with HIV are respected and that they are treated with dignity.

Numerous studies have shown that transgender people face disproportionate and pervasive discrimination.

Transphobia and lack of understanding and respect on the part of police, court staff and other civil servants can result in a host of abuses, including misnaming and misgendering (which can place transgender people in physical danger), harassment, abuse and violence. Rates of violent crime against members of the LGBT community, especially against transgender people, remain alarmingly high, and police response to this violence is too often inadequate.



The prevalence of such mistreatment can

- make segments of our communities distrustful of law enforcement and criminal justice institutions;
- disadvantage students by forcing them to drop out of school leaving them undereducated, or unfairly involving them in the juvenile justice system (a phenomenon known as the "school-to-prison pipeline"); and
- further brand portions of the community as criminals simply because of who they are.

These forms of government misconduct compromise the health, safety, psychological well-being and overall sense of belonging in society of LGBT people and people living with HIV and, as a result, weaken our democracy and our society.

Lambda Legal has a proud history of standing up when law enforcement officials target LGBT people and people living with HIV for abuse. Lambda Legal has challenged criminal laws directed at or disproportionately applied against members of our community, and has sought recourse when legal authorities violate the rights of LGBT people and people living with HIV. It is Lambda Legal's hope that the findings in this survey will support other research, advocacy, litigation and policy efforts to improve the treatment of LGBT people and people living with HIV by police departments, courts, prison systems, schools, and other government agencies.

HOW THE SURVEY WAS CONDUCTED

In 2012, Lambda Legal launched a national Government Misconduct campaign to assess the current issues and legal needs of LGBT people and people living with HIV regarding police accountability and government misconduct—in order to help shape Lambda Legal's future agenda for litigation, education and policy work and support other research, advocacy, litigation and policy efforts.

With the help of Strength in Numbers Consulting Group, Lambda Legal held initial focus groups and interviews with people from over 35 organizations to identify the most pressing areas of concern with regard to government misconduct against LGBT people and people living with HIV. Among the national and local organizations were LGBT rights groups, university programs, anti-violence initiatives, youth organizations, HIV/AIDS advocacy and service organizations. The participants

in these discussions were leaders, staff members and volunteers.

From this information, Lambda Legal staff narrowed the list of possible government misconduct issues to those based on the needs expressed and connection to Lambda Legal's mission and scope of work. A first survey was created focusing on the interactions of LGBT people and people with HIV with police, courts, prisons and school security and school discipline. A second survey was created for organizational representatives to report the needs of the communities they represent along with issues they currently work on and the areas they believe should be high priorities for national LGBT organizations.

Both surveys were then posted on the Lambda Legal website in English and Spanish (remaining there for five months) and promoted to Lambda

Legal members and supporters via email and social media. Over 50 partner organizations also promoted the surveys. The organizational survey was completed by 35 organizations. The data in this report focuses on responses from the individual survey.



In total, we collected **3,095** individual survey responses.
Of those, **2,376** met these criteria for inclusion in the final survey sample:

- they identified as one or more of: LGB, questioning, queer, SGL, other sexual orientation, transgender, two-spirit, genderqueer, gender-nonconforming, other gender identity, HIV-positive;
- they reported their age as 18 years old or older;
- they live in United States or its territories; and
- they completed at least 1/3 of key demographic questions.

Respondents were also given the opportunity to share their own accounts of their experiences with government misconduct. A subsequent “Share Your Story” project was launched in 2013; some of those stories are incorporated into this report.

TOP FINDINGS

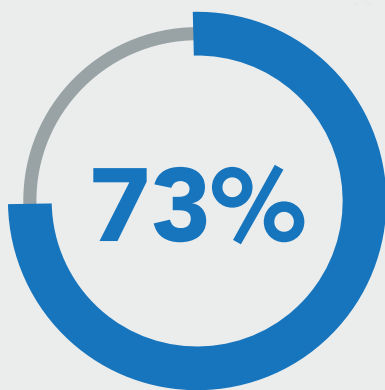
Lambda Legal’s survey found a wide range of complaints and reports of disrespect, bias and discrimination from LGBT people and people living with HIV in the areas explored by the survey. Among the most noteworthy findings:

POLICE SEARCHES, HARASSMENT AND ASSAULT

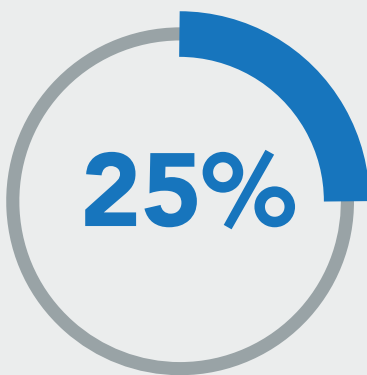
“I was called a faggot and beaten up by police officers right here in the nation’s capital, then charged with assaulting them and forced to plead guilty to being under the influence of my HIV meds.”

—Andrew, Washington, DC

Of all survey respondents:



reported face-to-face contact with police in the past five years



reported at least one type of police misconduct

harassment such as verbal assault, being accused of an offense they did not commit, sexual harassment or physical assault.

- 10% of respondents with recent police contact reported being physically searched by police or asked to empty their pockets, purse or backpack.
- 14% of (or approximately one in eight) respondents with police contact in the past five years reported being verbally assaulted—shouted at, taunted, called names—by a police officer.
- One out of every five respondents (21%) with police contact in the past five years reported that police had a hostile attitude toward them.
- Respondents were also subjected to sexual harassment (3%) and physical assault (2%)—including being hit or attacked with a weapon.

In our survey, almost three-quarters of respondents (73%) reported having face-to-face contact with the police in the past five years. An alarming percentage of them reported negative, hostile and violent interactions. One quarter of respondents with police contact reported at least one type of misconduct or

An overwhelming majority of those who made a complaint about police misconduct (71%) said that the police failed to fully address that complaint.

INADEQUATE POLICE RESPONSE

When respondents as crime victims sought out police, many felt police did not fully respond.

- 62% of respondents who had been victims of personal assault reported experiencing at least one incident in which police failed to fully address their complaints about personal assault.
- 41% of respondents who had been victims of intimate partner violence (IPV) reported experiencing at least one incident in which police failed to fully address their complaints about IPV.
- More than one-third (39%) of respondents who were victims of sexual assault reported that the police did not fully address their complaints about sexual assault.

BIAS IN COURT

"When I went to the court to file my divorce, the clerk tried to require proof of my transgender spouse's birth, forcing me to out her as a trans person. When I said this, the MA state employee began telling me I needed to submit proof of birth to make sure I wasn't lying. This happened in front of a whole packed lobby full of people."

—Linda

This survey is one of only a few that has explored the bias and discrimination LGBT people and people living with HIV experience in the court system.

Consistent with the data about police interactions, it points to some of the ways the promise of fair and impartial proceedings is tainted by homophobia, transphobia and HIV bias. For the 43% of *Protected and Served?* survey respondents who had been involved in the court system in the previous five years, negative experiences included:

- Hearing a judge, attorney or other court employee make negative comments about a person's sexual orientation, gender identity or gender expression (19%).
- Feeling their own sexual orientation or gender identity was raised by an attorney or judge when it was not relevant (16%).
- Having their HIV status raised when it was irrelevant (15%).

The survey results pointed all too frequently to a trend of discriminatory behavior across government agencies toward all LGBT people and people living with HIV. However, as with all forms of discrimination, respondents with multiple marginalized identities—such as being a lesbian living with HIV, a gay man with a disability or a low-income transgender person of color—were more likely to report misconduct and abuse by police, courts, prisons, and school security and staff. This section looks at ways respondents who identified as people of color, transgender or gender-nonconforming (TGNC), low-income, living with HIV and as having a disability experienced disproportionate rates of misconduct and discrimination.

MISTREATMENT BY JAIL AND PRISON STAFF

LGBT people and people living with HIV are particularly vulnerable and are often targeted when incarcerated.

This survey highlights the fact that in a climate that is already unsafe, prison guards and other staff often contribute to and exacerbate the danger by committing acts of violence against LGBT and HIV-positive people in their custody and by failing to protect them from dangerous or potentially dangerous situations. Five percent of all survey respondents had been incarcerated in jail or prison in the previous five years. Among them:

7% reported being sexually assaulted by jail or prison staff.

12% reported being physically assaulted by jail or prison staff.

27% reported being sexually harassed by jail or prison staff.

57% reported being verbally assaulted or harassed by jail or prison staff.

60% of those who identified as transgender or gender-nonconforming (TGNC) reported being placed in a single-sex prison or section of jail or prison that did not match their gender identity.

Nearly one-third (**30%**) of respondents who experienced harassment or assault by jail or prison staff reported their negative experiences to another jail or prison staff member, official or monitoring board.

Only **9%** of those who reported misconduct felt their complaints were fully addressed.

MISTREATMENT BY SCHOOL SECURITY AND DISCIPLINE IN MIDDLE AND HIGH SCHOOL

“Throughout middle and high school I was bullied and teased for the way I talked, walked, wore my clothes, etc. One day I was in middle school English class when I got into an altercation with another classmate. He yelled out to me, ‘You and your mom are faggots.’ My reaction was so quick. Before I knew it, I slapped him across the face. Both of us were taken to the vice principal’s office, and our parents were called in. We explained our sides of the story, and he admitted to using a gay slur. But in the end, he received one day of in-school suspension and mandatory anger management, whereas I received a week of out-of-school suspension and mandatory anger management. I was so upset that no one supported the fact that I was being teased and ridiculed in front of twenty other students.”

—Patrick, Arlington, VA

It has been well documented that high numbers of lesbian, gay, bisexual and questioning (LGBTQ) middle and high school students experience bullying and harassment. As security and police presence has become more commonplace in middle and high schools, this survey looked at the effects of school security and discipline on LGBTQ students.

Our survey shows that LGBTQ students are often additionally harassed and victimized by the security officers and administrators who are supposed to provide protection and support. Respondents between the ages of 18 and 24 were asked about their experiences in middle and high school. Of those, 68% reported having security personnel or police in their middle or high schools.

Among 18- to 24-year-old survey respondents who had security personnel in their middle or high schools:

9% reported being verbally assaulted by school security or police.

14% reported that school security were hostile toward them.

23% said they had heard school security or police use anti-LGBTQ language.

In addition, 18- to 24-year-old survey respondents reported high rates of discipline, including detention and suspension.

- Over half (57%) of reported being sent to detention in middle and/or high school.
- 20% reported being suspended.
- 19% reported that they felt they were treated harshly by school officials because of their LGBTQ identity.

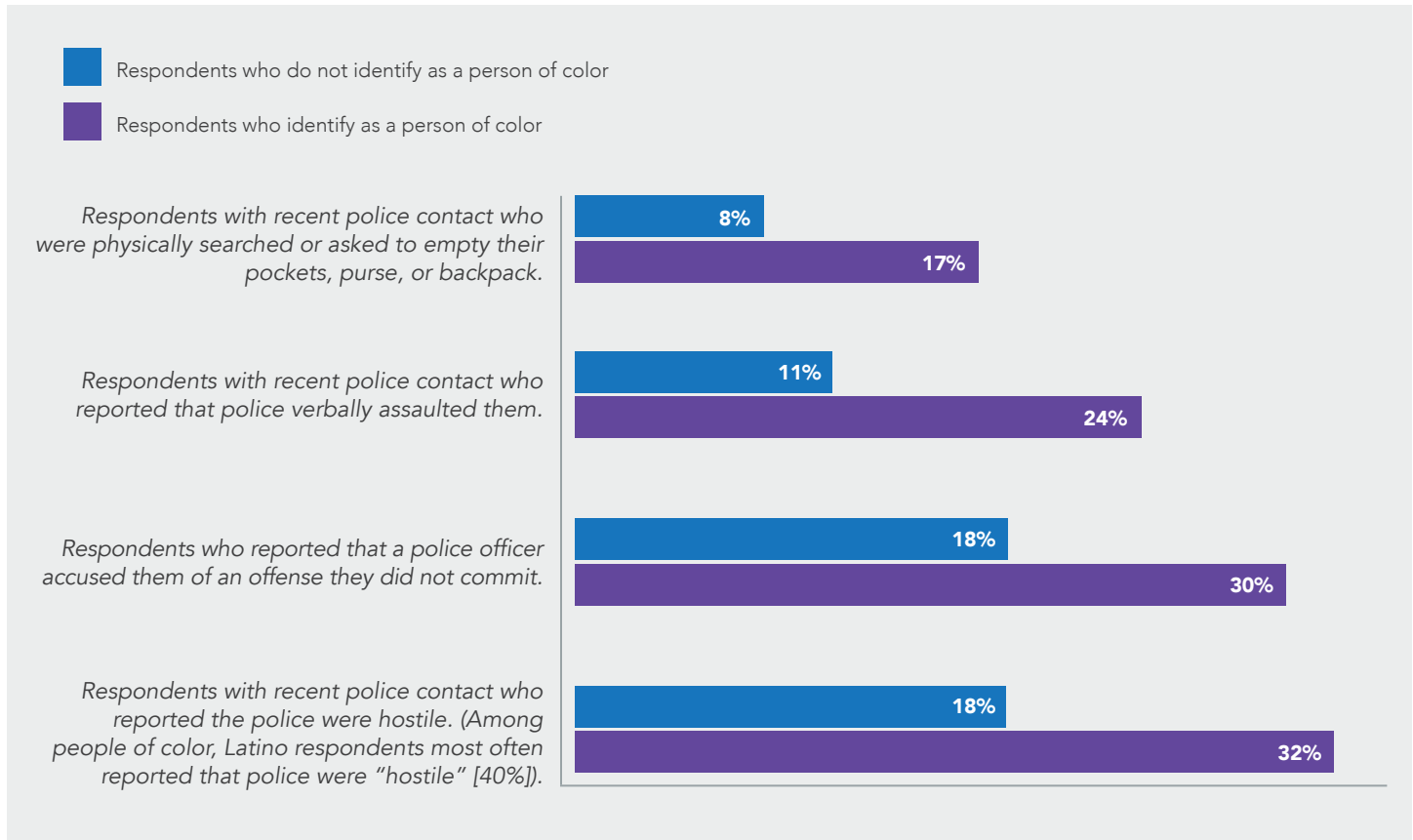
DISPROPORTIONATE RATES OF MISCONDUCT REPORTED BY MARGINALIZED GROUPS

The survey results pointed all too frequently to a trend of discriminatory behavior across government agencies toward all LGBT people and people living with HIV. However, as with all forms of discrimination, respondents with multiple marginalized identities—such as being a lesbian living with HIV, a gay man with a disability or a low-income transgender person of color—were more likely to report misconduct and abuse by police, courts, prisons, and school security and staff. This section looks at ways respondents who identified as people of color, transgender or gender-nonconforming (TGNC), low-income, living with HIV and as having a disability experienced disproportionate rates of misconduct and discrimination.

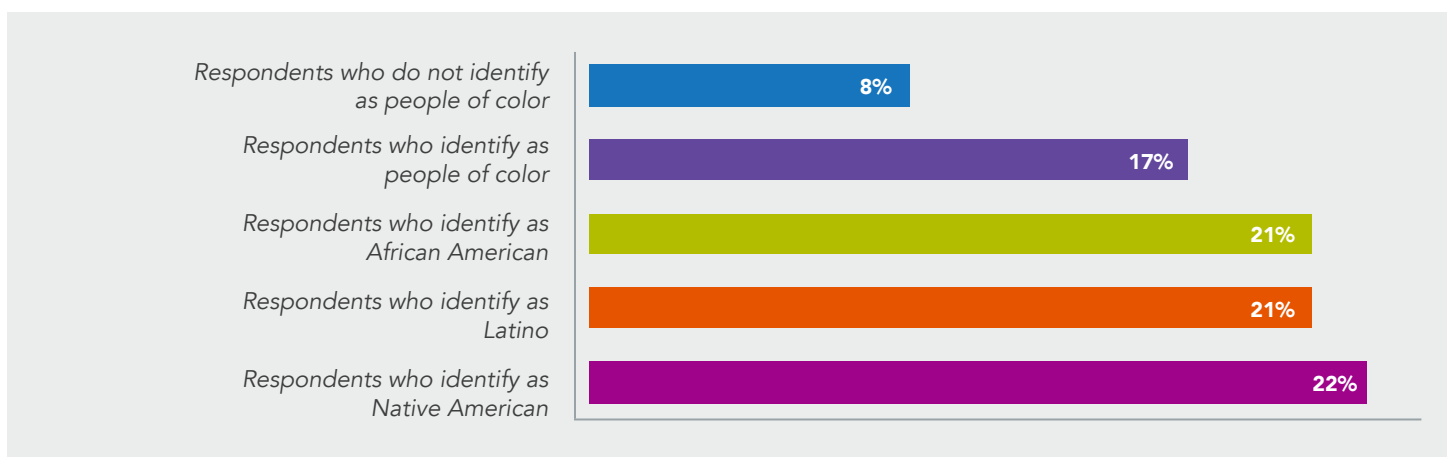


DISPARITIES BASED ON RACE AND ETHNICITY

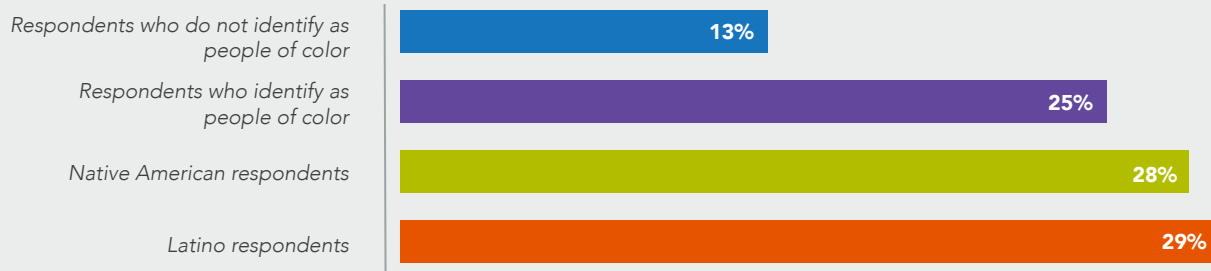
In many instances, respondents of color were much more likely to report negative and discriminatory interactions with the police compared to respondents who did not identify as people of color. When describing their most recent face-to-face contact with police:



Among certain respondents of color, the rates of physical search were higher than for people of color overall:



Respondents of color were much more likely to report that their LGBTQ identity was raised in court when it was not at issue:



Survey respondents of color experienced disproportionate rates of incarceration and were much more often placed in single-sex housing that did not match their gender identity.

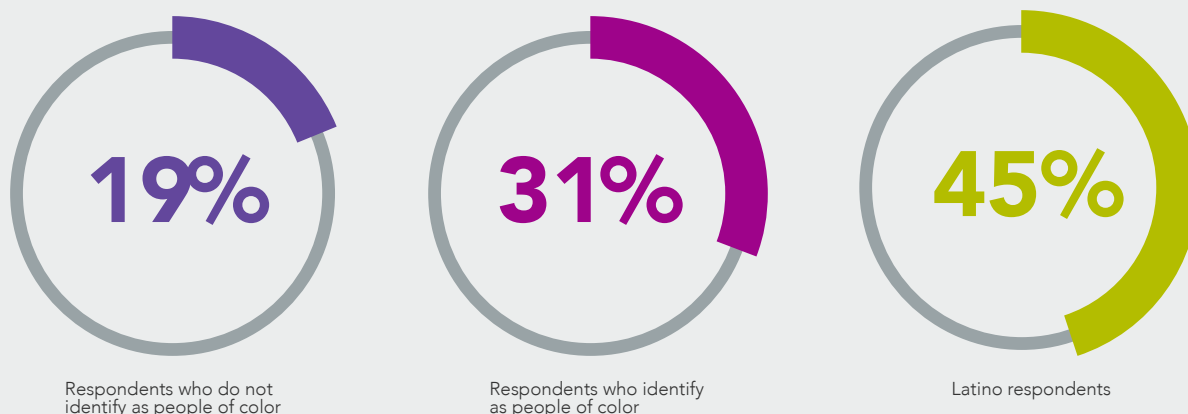
- 9% of respondents of color, compared to 4% of respondents who did not identify as people of color, reported that they had spent time in jail or prison over the previous five years.
- Among certain respondents of color, the rates of incarceration were higher than for people of color overall, including Latinos (10%), African Americans (12%) and Native Americans (13%).
- Respondents of color who had spent time in jail or prison were nearly twice as likely to report being placed in a single-sex jail or section that did not match their gender identity (36%) compared to their counterparts who did not identify as people of color (19%).



Respondents of color, particularly Latino respondents, were much more likely to attend schools with a security presence. Latino respondents in particular were disproportionately subjected to negative and discriminatory treatment from school security.

Of the 18- to 24-year-old respondents who answered our questions about middle and high school, 79% of respondents of color had security in their schools, compared to 63% of respondents who did not identify as people of color. 77% of African American respondents and 91% of Latino respondents reporting the presence of school security and police.

Respondents with school security who reported hearing school security use anti-LGBTQ language such as "fag" or "dyke."



DISPARITIES BASED ON GENDER IDENTITY OR GENDER EXPRESSION

Transgender and gender-nonconforming (TGNC) respondents disproportionately reported a range of negative and discriminatory interactions with the police, including searches, harassment and assault. TGNC respondents of color were often even more likely to report police misconduct.

DEFINITIONS

TGNC: Transgender refers to people whose gender identity, one's inner sense of being male, female, or something else, differs from their assigned or presumed sex at birth; **Gender-nonconforming** people don't meet society's expectations of gender roles.

Cisgender: Refers to people whose gender identity is the same as their assigned or presumed sex at birth.

Physical searches by police:

Transgender respondents were twice as likely as cisgender (non-transgender) respondents to report being searched by police. 18% of transgender compared to 9% of cisgender respondents were physically searched or asked to empty pockets or bags by police in their most recent interaction with police.

25% of TGNC respondents of color and 36% of TGNC women of color reported being searched by police.

Hostile attitudes from police:

32% of TGNC respondents and 39% of TGNC people of color who had recent face-to-face contact with police reported that police were hostile, compared to 19% of respondents who were not TGNC.

An overwhelming majority of transgender women (72%) reported hostile police attitudes.

False accusations by police:

36% of transgender respondents reported that a police officer accused them of an offense they did not commit, compared to 18% of cisgender respondents.



Assault and harassment by police:

22% of transgender respondents, 27% of TGNC people of color and 36% of TGNC women reported being verbally assaulted by police, compared to 13% of cisgender respondents.

4% of transgender and 7% of TGNC people of color respondents reported being physically assaulted by police, compared to 2% of cisgender respondents.

TGNC respondents were more than twice as likely to report sexual harassment by police. 8% of transgender, compared to 3% of cisgender respondents reported being sexually harassed by police and 10% of TGNC respondents of color and 16% of TGNC women of color respondents claimed they were sexually harassed by police.

Consistent with the deadly trend of violence against transgender people across the country, TGNC respondents were more likely to report that they had been victims of violent crimes in the previous five years.

- 21% of TGNC respondents reported having experienced personal assault in the past five years, compared to 11% of non-TGNC respondents.
- 18% reported having experienced intimate partner violence, compared to 11% of non-TGNC respondents.
- TGNC respondents told us they had experienced sexual assault at nearly three times the rate of non-TGNC respondents: 16% versus 6%.

Transgender survey respondents who sought out police when they were the victims of crimes disproportionately reported that police did not adequately respond.

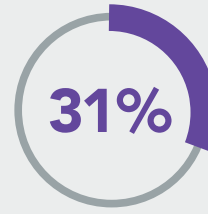
- 55% of transgender respondents, compared to 36% of cisgender respondents, said they experienced at least one incident in which police failed to fully address their complaints about intimate partner violence.
- 52% of transgender respondents, compared to 33% of cisgender respondents, felt police did not fully address a complaint about sexual assault.
- 61% of transgender respondents, compared to 47% of cisgender respondents, said police had not fully responded to a complaint about property crime.

Transgender respondents were at least twice as likely—and transgender women at least four times more likely—to report misconduct in the courthouse than their cisgender counterparts.

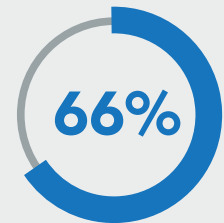
Respondents who reported their LGBT identity was raised as an issue in court when it was not relevant.



Cisgender



Transgender



Transgender Women

4% of transgender respondents and 13% of transgender women respondents stated that their HIV status was raised in court when it was not relevant, compared to 2% of cisgender respondents.

29% of transgender respondents and 31% of transgender women reported that their LGBT identity was disclosed *against their will* during a court proceeding, compared to 8% of cisgender respondents.

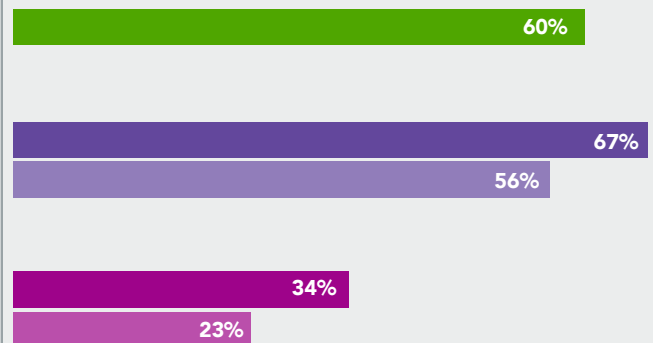
TGNC respondents, especially those who identified as women and people of color, were more likely to have spent time in prison, were nearly always placed in sections that did not match their gender identity and more often reported assault and abuse by prison staff.

- TGNC respondents were more than twice as likely to report having been incarcerated in jail or prison (10%) compared to those who did not identify as TGNC (4%).
- TGNC women (12%) were even more likely to have been to jail or prison.
- TGNC respondents of color were four times more likely to report spending time in jail or prison (20%) than cisgender respondents who did not identify as people of color (5%), while TGNC women of color respondents were more likely to have spend time in jail or prison (27%).

A majority of TGNC respondents reported having been placed in a single-sex jail or prison or a single-sex section that did not match their gender identity.

67% of TGNC respondents who had been in jail or prison stated that they had been verbally assaulted by prison staff, compared to 56% of non-TGNC respondents who had been in jail or prison.

34% of TGNC respondents who had been in jail or prison stated they had been sexually harassed by staff compared to 23% of non-TGNC respondents who had been in jail or prison.

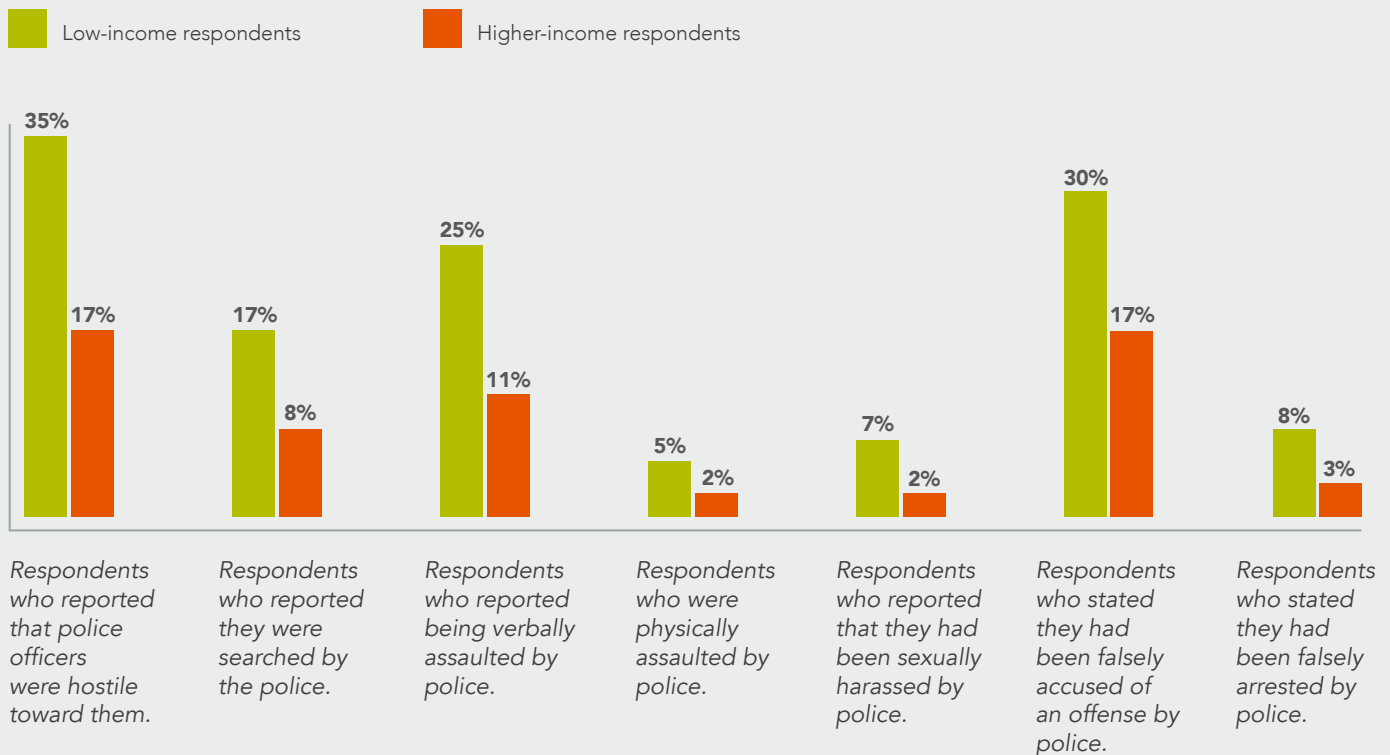


Transgender respondents more often reported that they were disciplined in middle or high school:

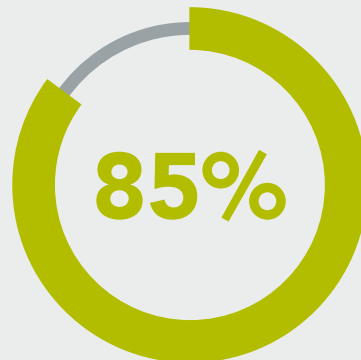
- 67% of transgender respondents, compared to 56% of cisgender respondents, reported spending time in detention during middle or high school.
- Transgender respondents were more than twice as likely to report being suspended in school. 37% of transgender, compared to 17% of cisgender respondents, were suspended in middle or high school.

DISPARITIES BASED ON INCOME

Low-income survey respondents (annual income of \$20,000 or less) were also much more likely to experience some forms of discrimination and mistreatment from police, in courts and in prison. In nearly every instance surveyed, low-income respondents experienced negative and discriminatory treatment from police at least twice as often as respondents with higher incomes.



When filing complaints about misconduct to police authorities, low-income people were also more likely to feel their complaints were not fully addressed.



Low-income respondents were also at a significant disadvantage in court and were often twice as likely to be improperly exposed as LGBT or living with HIV by attorneys, judges or other court employees.

- 28% of LGBT respondents said that their LGBT identity was raised when it was not relevant during a court proceeding in the past five years while 13% of higher-income respondents had this experience.
- 5% of low-income respondents stated their HIV status was raised when it was not relevant, compared to 2% of higher-income respondents.
- 20% of low-income respondents said their LGBT identity was disclosed against their will, compared to 8% of higher-income respondents.
- 4% of low-income respondents reported their HIV status was disclosed against their will, while only 1% of higher-income respondents reported this experience.

There were also disparities in the way low-income respondents were treated while incarcerated.

- Low-income respondents were much more likely to report being sexually harassed by prison staff (38%), compared to those with higher incomes (17%), and were more likely to report being disciplined by prison staff for an offense they did not commit (33%), compared to other respondents (20%).
- Low-income respondents were also twice as likely to report that they had been placed in a jail, prison or section that did not match their gender identity, with 38% reporting this type of discrimination compared to 18% of higher-income respondents.

DISPARITIES BASED ON HIV STATUS

The *Protected and Served?* data points to ways respondents living with HIV disproportionately experience misconduct and discrimination in the criminal justice system, particularly by police and in jails and prisons. Respondents living with HIV were more likely to experience police neglect when they were victims of violence, and they were much more likely to be searched, harassed or assaulted by police than other respondents.

- 73% of respondents living with HIV who sought out the police because they were victims of personal assault felt the police did not adequately respond, compared to 59% of other respondents.
- 54% of respondents living with HIV felt police did not fully respond when they were victims of intimate partner violence, compared to 36% of other respondents.
- Respondents living with HIV were nearly twice as likely to say they had been searched during a recent encounter with the police (16%), compared to 9% of respondents not living with HIV.
- 21% of respondents living with HIV were verbally assaulted by police, compared to 13% of those not living with HIV; 6% were physically assaulted, compared to 2% of those not living with HIV; and 5% were sexually harassed by police, compared to 3% of those not living with HIV.

Respondents living with HIV were nearly three times more likely to report having spent time in jail or prison in the previous five years. Once incarcerated, they more often were harassed and assaulted by prison staff.

- 11% of respondents living with HIV had recently been in jail or prison, compared to 4% of those not living with HIV.
- 71% of respondents living with HIV were verbally assaulted by prison staff, compared to 51% of other respondents; 18% stated they were physically assaulted by prison staff, compared to 11% of other respondents; and 39% (compared to 24%) were sexually harassed by prison staff.

DISPARITIES BASED ON ABILITY

Our survey asked if respondents have a physical, mental or learning disability. Disability was self-defined, and for some respondents that definition may include living with HIV. Respondents who identified as having a disability experienced significant disparities in terms of police interactions, mistreatment in court, school discipline and mistreatment in jail or prison.

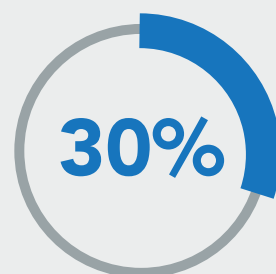
Respondents with disabilities who were victims of crimes were more likely to report that police did not fully address their complaints:

- 54% of those with disabilities compared to 48% of those without disabilities felt police neglected their complaints of property crime;
- 74% compared to 56% of those without disabilities felt police neglected their complaints of personal assault.
- 49% compared to 34% felt police did not fully respond to complaints about intimate partner violence;
- 46% of those with disabilities felt police did not fully respond when they were victims of sexual assault, compared to 31% of respondents without disabilities.

Respondents who thought police were hostile in their recent interactions.



Respondents
without
disabilities



Respondents
with
disabilities



Respondents with disabilities were often twice as likely to report they had been harassed and assaulted by police:

- 17% said they had been searched by police compared to 18% of respondents without disabilities.
- 24% said they were verbally assaulted by police compared to 12% of other respondents.
- 6% said they were sexually harassed by police compared to 3% of other respondents.

Respondents with disabilities who had been in a court proceeding during the previous five years were twice as likely to have their LGBT identity or HIV status improperly exposed in court.

- A quarter of respondents with disabilities said their LGBT identity was raised in court when it was not relevant, compared to 13% for those without disabilities.
- 17% of respondents with disabilities said their LGBT identity was disclosed against their will in court, compared to 9% of those without disabilities.
- 4% of respondents with disabilities said their HIV status was raised as an issue in court when it was not relevant, compared to 2% of their counterparts without disabilities.
- 3% of respondents with disabilities had their HIV status disclosed against their will in court, compared to 1% of those who did not have disabilities.



Respondents who answered our questions about their middle and high school experience and also identified as having a disability experienced significantly higher instances of suspensions and felt they were treated harshly by school staff because they were lesbian, gay, bisexual, transgender or questioning (LGBTQ).

- 27% of respondents with disabilities were suspended from school, compared to 18% of those without disabilities.
- 24% of respondents with disabilities felt they were treated harshly by teachers, administrators, schools security and or school police because they of their LGBTQ identity, compared to 19% of other respondents.

Respondents with disabilities were somewhat more likely to have been in jail or prison and significantly more likely to report having been assaulted or harassed in jail or prison.

- 30% of respondents with disabilities say they have been incarcerated, compared to 24% of respondents without disabilities.
- Two-thirds (67%) of those with disabilities were verbally assaulted by prison staff, compared to half (51%) of respondents who were not disabled.
- 21% of those with disabilities were physically assaulted by staff in jail or prison, compared to 9% of non-disabled respondents.
- 38% of respondents with disabilities were sexually harassed by prison staff, compared to 21% of respondents without disabilities.
- 55% of respondents with disabilities said they were accused of an offense they did not commit while in jail or prison, compared to 35% of those without disabilities.
- 42% of respondents with disabilities said they were disciplined for an offense they did not commit, compared to 19% of those without disabilities.



SUMMARY OF RECOMMENDATIONS

The issue of government misconduct directed against LGBT people and people living with HIV is complex, and there is no single solution. Many factors in addition to sexual orientation, gender identity and HIV status affect an LGBT or HIV-positive person's experience with courts, schools and interactions with police and prison officials. Because homophobia, transphobia, racism and other forms of discrimination are still entrenched in our culture, multiple long-term approaches are needed to ensure that everyone is treated fairly under the law.

In this report, we recommend strategies to safeguard against discrimination and misconduct, as well as to foster institutional change. With increased focus nationwide on police misconduct, we consider these recommendations dynamic and evolving. We welcome feedback on these approaches, which include changes affecting policies, advocacy and education.

All government agencies included in the *Protected and Served?* survey, including police departments, courts, prisons and schools, should adopt comprehensive nondiscrimination policies that do the following:

- prohibit bias and discrimination based on sexual orientation, gender identity and expression and HIV status.
- ensure that culturally competent services and treatment are provided to LGBT and HIV-positive detainees. Police, court, jail/prison and school staff should undergo significant cultural competency trainings about sexual orientation, gender identity and expression and HIV status so they will be able to treat all members of the LGBT community and people living with HIV in a respectful, nondiscriminatory manner.
- provide a transparent and accessible oversight process for reporting and redressing discrimination complaints, combined with clear and enforced disciplinary procedures.
- include employment policies to improve the hiring and retention of LGBT and HIV-positive employees as well as contribute to a more LGBT- and HIV-supportive environment.

POLICE

Police departments should:

- 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.
- include explicit procedures for the respectful treatment of transgender people.
- hire and promote qualified police officers and leaders who demonstrate the necessary interpersonal skills to interact professionally, regardless of any person's background and with a proven track record of working effectively and collaboratively with diverse communities.
- institute "early warning systems" to flag and retrain/discipline/reassign officers who engage in insensitive or abusive behavior.
- implement mandatory cultural competency training about LGBT and HIV issues, with community input, for all employees.
- adopt a community-based complaint mechanism about police misconduct and discrimination, with options for anonymous reporting, and severely punish any retaliation by officers or commanders.
- capture, track and report regularly on complaints alleging racial and other profiling or bias with regard to sexual orientation, gender identity or expression or HIV status.
- work with LGBT community advocates to maintain training and to ensure implementation of policies.
- implement effective policies and practices to utilize body-worn cameras and in-car cameras as a tool for monitoring, evaluating and investigating police behavior and practices, while ensuring the privacy of community members.
- incorporate assessments of implicit bias, and institute training and measures to address this type of bias with regard to race, gender, national origin, ethnicity, actual or perceived sexual orientation, gender identity or expression, HIV status, disability, religion, immigration status, age and housing status.

COURTS

Lawmakers, judicial governing bodies, and/or legal associations should adopt the following rules, policies and practices to help protect LGBT people and people living with HIV participating or otherwise involved in judicial proceedings:

- adopt measures to safeguard the privacy of people who are LGBT or living with HIV.
- incorporate in judicial canons and attorneys' rules of professional responsibility prohibitions on language and conduct by any court participants manifesting bias or discrimination based on sexual orientation, gender identity or expression, and HIV status.
- Institute clear and accessible procedures for complaints about bias by judges, lawyers, court officials and court staff.
- conduct studies, with community input, of courts' treatment of individuals based on sexual orientation, gender identity or expression or HIV status.
- encourage diversity, including in sexual orientation and gender identity or expression, in the appointment and election of judges.
- support and/or enact laws that explicitly prohibit discrimination in jury selection on the basis of sexual orientation, gender identity or expression, and HIV status.
- interpret discrimination on the basis of sex to include discrimination on the basis of sexual orientation and gender identity, and adopt policies and procedures that implement this understanding.

In addition, attorneys and judges should:

- promptly respond to jokes or disrespectful comments about an individual's actual or perceived sexual orientation, gender identity or expression or HIV status.
- address transgender and gender-nonconforming (TGNC) individuals according to their preferred pronouns ("he" and "him," or "she" and "her").
- oppose the introduction of evidence of actual or perceived sexual orientation, sexual conduct, gender identity or expression or HIV status unless these characteristics are relevant to an issue in the proceeding.
- conduct voir dire (screening of potential jurors) that respects people's right to confidentiality regarding their sexual orientation, gender identity or expression and HIV status, and that avoids involuntary outing.
- ensure that jurors are not discriminated against on the basis of sexual orientation, gender identity or expression or HIV status.

Judges should:

- when instructing jurors that biases are to play no role in their decisions, explicitly include bias, prejudice and other preconceived notions about sexual orientation, gender identity or expression and HIV status.

Attorneys should:

- when appropriate, ask questions during voir dire to expose juror biases and prejudices based on sexual orientation, gender identity or expression and HIV status, and seek to remove biased jurors for cause.
- challenge peremptory strikes (removals of jurors without explanation) that appear to be based on sexual orientation, gender identity or expression, or HIV status.

JAILS/PRISONS

Correctional departments, jails and prisons should:

- ensure that transgender people receive an individualized assessment for housing placement in accordance with the federal Prison Rape Elimination Act (PREA), taking into account the person's gender identity and safety.
- adopt and fully implement policies, including PREA, to protect LGBT people from sexual abuse and other violence while incarcerated.
- prohibit the use of solitary confinement as routine or standard protective placement for people who are LGBT or people living with HIV.
- eliminate policies and procedures that provide for differential treatment or enhanced disciplinary measures based solely on an inmate's HIV-positive status.
- follow PREA standards regarding searches, and train staff in conducting professional and respectful searches, particularly as they affect transgender individuals.
- ensure that transgender people and people with HIV have access to all medically necessary health care. For transgender people, that may include hormone therapy and surgeries. For people living with HIV, that means uninterrupted access to the medication and the range of care they need.
- implement transparent and effective complaint review processes.
- require correctional staff to undergo cultural competency trainings about sexual orientation, gender identity and expression and HIV.

SCHOOLS



Schools should:

- limit interventions that push students out of school—such as expulsions, disciplinary transfers, out-of-school suspensions, referrals to law enforcement, and school-based arrests—to conduct that poses a serious, prospective safety threat to students and staff.
- refrain from imposing discipline as a means of policing gender. Schools should not interfere with students' access to restrooms in accordance with their gender identity, or with students' dressing and grooming according to their gender identity.
- create anti-bullying policies that specifically include sexual orientation and gender identity and expression and make these policies easily accessible in student handbooks and online.
- implement comprehensive curricula supporting diversity and respect for all.
- train administrators, educators, school safety officers and other staff to address anti-LGBTQ bullying and harassment. Trainings should include information about how to interrupt and to report bullying and harassment by students, staff and security personnel.
- support LGBTQ-affirming clubs like gay-straight alliances, and promote safe spaces for LGBTQ youth in schools.
- consider 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.
- at the district level, ensure that significant control and accountability for school security remains with the school or school district so teachers and administrators can interrupt and report harassment and bullying by security.
- at the district level, comply with or create a public reporting system for school discipline data including expulsions, in- and out-of-school suspensions, school-based arrests and referrals to law enforcement.



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Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.

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