Out for Justice: Promoting LGBT Equality through the Rule of Law Worldwide

In June 2016, the global community united in an outpouring of sympathy, anger, and condemnation over the worst mass shooting in modern American history which had unfolded in Florida’s gay club Pulse Orlando. The tragedy sent shockwaves through the entire LGBT community and stood as a painful and very public reminder that the threat of hate crimes and persistent human rights abuses against lesbian, gay, bisexual, transgender, queer, and intersex people lurks in every corner of the world.

Sadly, in the vast majority of cases these attacks go unnoticed and many are perpetrated, or starkly overlooked, by the very people who have taken oaths to uphold the rule of law and justice for all – the police, prosecutors, judges, and other justice system actors. Some of these violations are deeply entrenched in national legal systems in clear defiance of the universal principles of equality and non-discrimination which serve as the cornerstones of international human rights law. According to the United Nations, over 70 countries still have laws that criminalize private, consensual same-sex relationships, exposing millions of individuals to the risks of repressive policing practices, arrest, prosecution, imprisonment, and – in some countries – the death penalty.

In 2016 alone, state lawmakers in the U.S. introduced over 40 bills targeting the rights of transgender people; Indonesia’s national broadcasting commission banned TV and radio programs that portray the lives of LGBT people as “normal;” and a Russian court found a sexual rights activist guilty of violating the country’s notorious “gay

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Greetings! Welcome to *The Equalizer*, the newsletter of the American Bar Association’s Commission on Sexual Orientation and Gender Identity (SOGI)!

It cannot be denied, it has been a trying time for the LGBT Community since the events that took place at the Pulse nightclub in Orlando Florida on June 12. During the month where the LGBT Community celebrates its accomplishments we were all ripped back to reality. The ABA stood firmly with the Citizens of Florida and the LGBT and Hispanic Communities. ABA President Paulette Brown had this to say about the tragic events:

_The American Bar Association condemns the recent terrorist attacks in Orlando. Our thoughts and sympathies are with the families and friends of the victims as well as all of the communities devastated by this tragic attack._

As an association committed to fairness and equality, the ABA is horrified by any acts that target particular groups for their lifestyles, beliefs, background or ethnicity. The ABA will redouble our efforts to ensure that hatred, bigotry and violence do not take control of our nation. Our country’s commitment to the rule of law needs to prevail as we work to heal from this tragedy.

Where the first issue of *The Equalizer* celebrated the historic *Obergefell* marriage decision, and the second issue focused on transgender rights, this third edition will highlight individual personal reflections on the events in Orlando, while touching on the great accomplishments we have seen one year after the *Obergefell* decision.

Yes, it is healthy to mourn and to reflect. But there is much to be hopeful about. The ban on transgender individuals serving in the military has been lifted. President Obama and Department of Education officials took steps to protect trans youth with their guidance supporting trans students’ access to appropriate bathrooms in schools. And while that guidance is now the subject of two lawsuits, Massachusetts has passed landmark legislation allowing transgender people to use bathrooms and locker rooms in accordance with their gender identity and banning discrimination in public accommodations based on gender identity.

The SOGI Commission remains dedicated to effectuating change in the LGBT community through the rule of law. In this newsletter you will read about how some of those efforts are expanding to the global LGBT Community. In addition, here are just some of the other things that are going on that you should know:

**Model Rules of Professional Conduct:** We continued in our efforts to amend the Model Rules of Professional Conduct to prohibit discriminatory conduct by attorneys, including harassment and intimidation as a form of bias. Harassment and bullying of witnesses, employees, and opposing counsel on the basis of sexual orientation and other protected categories should not be tolerated. The model rule resolution went before the ABA House of Delegates at the Annual meeting in San Francisco and was passed and adopted into ABA policy.

**International Efforts:** We have begun working with the Rule of Law Initiative, the Center for Human Rights, and the Fund for Justice and Education on a number of issues ranging from aiding migrants seeking asylum as LGBTs, to programming to ensure that civil society organizations and governments have effective tools, resources and capacity to reduce, prevent and respond to anti-LGBTI bias-motivated violence.

**Ally Training:** On Friday, July 29th, we will sponsor an education program as part of our How to Be an Ally toolkit that will examine Transgender Allyship in the workplace and beyond. We are also continuing to grow and expand the Ally toolkit.

**Transgender Name & Gender Marker Changes:** We are working with the National Center for Transgender Equality to create state-specific scripts that will walk individuals through the legal name and gender marker change procedures.

We on the SOGI Commission continue to work hard on behalf of the LGBT community. If you are interested in being a part of this very exciting and essential work, please do not hesitate to contact me, or any member of the Commission, our liaisons, or our outstanding staff.

_MARK JOHNSON ROBERTS_
Chair, ABA Commission on Sexual Orientation and Gender Identity
told my friend, a poet, that I didn’t know how to write this piece—I didn’t know how to be eloquent, heartsick, damn mad, and hopeful all at the same time. I still don’t. So, I’ll simply say what I know and what I hope.

I know that the newest, but likely not the last, face of hate is Omar Mateen. He’s not the face of hate because he professes to be Muslim; most Muslims are as horrified by his crime as are people of other faiths. He’s not the face of hate because he’s an immigrant or foreigner. He’s an American. He’s not the face of hate because he’s heterosexual. He’s apparently bisexual. However, the shock and disgust for this atrocity are not defined by sexual orientation or gender identity. He’s the face of hate because he walked into a nightclub with an assault rifle and murdered, in cold blood, 49 of our fellow citizens, our brothers and sisters, and irrevocably injured scores more. He’s the face of hate because he’s a terrorist.

I know that this sort of violence and hatred is fueled—no, driven—by example and by inflammatory rhetoric. Parents, politicians, religious fanatics and others who demonize and degrade; who refuse to respect the individual dignity and civil and natural rights of every person.

I know that when modern-day bullies tell marginalized and disaffected members of our society what they want to hear and invoke their rage, their bigotry, and their votes in the crassest and most vituperous language, that none should be surprised at the consequences. Scape-goating worked for Hitler. It still works.

I know that we have too many non-sporting guns in our society. I know that Congress doesn’t have the guts to do anything about it. And, I know that until it does, there will be more Orlandos, Newtowns and San Bernadinos; more vigils; more grieving parents, spouses, siblings and friends.

I know, like Doctor King that “injustice anywhere, is a threat to justice everywhere.” And, I know that the tragedy and injustice of Orlando threatens justice everywhere in our Country. Not just in LGBTQ communities, but everywhere for everyone. I know that we must demand change; that we must change—lest, as my friend predicts, our hate “will haunt us until the Empire is smoking rubble.”

Do I hope? Yes. But, it is informed by the experience of years and profession; by the certain knowledge that we forget the lessons of history and tragedy far too soon and too easily.

I hope there will be no more Mateens and Orlandos. I hope we will finally recognize that we are all more alike than different. I hope that this Orlando will finally mean something more than mouthed platitudes, dripping candle wax and flowers—transient memorials to fellow human beings that our hate has forever destroyed.

I hope that the ashes of this Orlando will birth love and respect. At least this time. Please, this time.

JAMES C. NELSON
Montana Supreme Court Justice (Ret.)

Orlando. This Time. Please.
I met President Paulette Brown about a year ago, during SOGI’s annual business meeting, held at the ABA offices in Washington, D.C. Pres. Brown not only introduced herself and the plans for her term, but she also sat-in on portions of SOGI’s business meeting, making it clear that she was interested and committed to SOGI’s work and role within the ABA. When we took a walk to buy stronger and better coffee than what the ABA caterer offered, our conversation was light and comfortable. Therefore, when SOGI’s Director, Malcolm “Skip” Harsch, emailed me asking whether I would be interested in interviewing Pres. Brown for SOGI’s newsletter – The Equalizer – I jumped at the chance.

President Paulette Brown is the first African American woman to serve as president of the American Bar Association. With her term nearing its end, SOGI was pleased to interview her about her tenure as president and, in particular, about her diversity and inclusion work. Our conversation during the morning of June 16, 2016 began with Pres. Brown’s path to this historic position. Here’s what she had to say:

PRESIDENT PAULETTE BROWN (PB): So, I didn’t start off looking to be that (the first African American woman president), obviously. I’ve been around the ABA since I graduated from law school in 1976. I’ve done a number of different things within the ABA. I’ve been in the House of Delegates since 1997 and I have served on the Governance Commission and the Executive Committee of the Board of Governors. When I sat on the Program, Planning, and Evaluation committee of the Board of Governors, I learned about every single entity in the ABA. And so that gave me such an in-depth knowledge. Then, I had an opportunity to chair that committee and be on the Executive Committee of the Board of Governors, which gave me a lot of additional training and insight into what other roles I might be able to play within the American Bar Association. I also listened when people suggested that I run for higher office within the ABA.

I had developed initiatives along the way and I also served as president of the National Bar Association, which helped with my leadership skills as well. I also needed support from real key people, like my firm, my family, and other leaders within the ABA.

TJ: What does it mean to you that you hold this position, especially in light of where we are in the United States in terms of the elections, the mass killing of LGBTQ people at Pulse Nightclub, Black Lives Matter. Do you think of your work in that context as well?

PB: I think about the fact that the American Bar Association has so many policies concerning anti-discrimination. I think about the fact that Goal III is to enhance diversity and inclusion in the profession and I think about all the other things we have in place as an organization that allow us to speak and advocate about various issues when it comes to not discriminating against any particular group of people. I think that because of Goal III and these policies, we can be a strong voice in some of these issues. Now, the ABA doesn’t become involved in any type of political issues, but there are some things that transcend political issues, and we will continue to speak about those issues.

TJ: I think that’s a really important point that you made about the ABA’s extensive policies and commitment to antidiscrimina-
tion and diversity and inclusion. The ABA is positioning attorneys to do the work that attorneys have always done in the U.S., for as long as there have been attorneys, which is working to bring equal rights and protection to people.

I want to shift a little bit to your analysis of your tenure as president. What do you think has been your greatest accomplishment? **PB:** I don’t like to think of “greatest.” I am pleased about certain things that have happened that are tangible, that will have long-lasting effects, I hope.

We developed an interactive online toolkit for young lawyers that is constantly updated. At Midyear, we rolled out the portion of the toolkit that is for lawyers with 0-3 years’ experience and we will roll out portion for lawyers with 3-6 years’ experience in August. Lawyers with 6-9 and 9-12 years’ experience will also have access to the toolkit. The online toolkit addresses the issue of young lawyers having to hang out their own shingles, but other lawyers will also benefit from it. I’m really proud that we were able to do that and that we designed the toolkit to not just a book that we sit on a shelf, but that it is something that can updated on a constant basis, keeping it alive and relevant and keep it live and relevant.

I’m also really pleased about And Justice for All and ABA Day of Service, which launched during National Pro Bono Week. We had tens of thousands of lawyers dedicate their time to providing free services to people who could not afford them. I hope these efforts will continue.

We provide free member benefits for all of our members every day of the year through our ABA Every Day program. I think that is something that will continue.

I’m really proud of my commitment to going to all 50 states to connect with our members. I will go to my 50th state on July 27th. I also go to the Boys and Girls Club in most the states. I’ve gone to about 33 Boys and Girls Clubs so far.

And then, finally, my Commission on Diversity and Inclusion 360. I asked them to do an extraordinary amount of work within a one-year time period and we will come away at the end of this year with numerous tangibles from our four working groups: (1) looking internally at the ABA (2) pipeline (3) economic case and (4) implicit bias. All of them will have tangible products that will have an impact far into the future.

We also created videos on implicit bias. We rolled out a video for judges in February 2016 which actually won a big award - a Telley award. We won second place-bronze out of about 13,000 applicants. We will have videos for prosecutors and public defenders, and training materials to go along with it.

There’s a new Diversity and Inclusion portal on the ABA website where people can go and get almost anything they need for diversity and inclusion.

So, I’m more pleased about all of those things. I could go on, but I’m limited on time. **TJ:** Congratulations on the Telley award! It’s extremely important the implicit bias videos target attorneys within the criminal justice system because it is a system that has very long lasting effects on people’s lives.

What do you think are the next steps for the Diversity 360 Commission after your tenure? **PB:** The Commission sunsets on August 9th, but we have homes for the various components to make sure that things continue to be implemented and have a long-lasting impact and to make sure policy proposals become ABA policy.

**TJ:** What’s your impression of SOGI? **PB:** SOGI has been really important to the Diversity 360 Commission. Skip and Jim [James] Holmes, who formerly chaired SOGI, are on the Commission. What we tried to include on the 360 Commission people from all aspects of the profession, people with disabilities, academics, all sorts of people, so we could have as many perspectives as possible. Jim Holmes will tell you how I have crashed SOGI meetings and I think you were there at one of one those meetings I crashed.

One of the things that I think is really important that SOGI has been able to do bring to light the heightened impact of discrimination and bias on LGBT people, LGBT people of color, and transgender people. SOGI has also done a lot of work on bullying especially in school, which is something that we [at the 360 Commission] have looked at, through our pipeline discussions. SOGI has highlighted the high rates of suspension and expulsion of LGBT students, which we have tried to incorporate into our pipeline working group. SOGI also had the 2015 Advocacy Day, in which I also participated. I view SOGI as an example for other entities that want to have their separate ABA Day [in Washington, D.C.]. I say, “You should talk to SOGI because they really know how to be effective.”

**INTERVIEW CONDUCTED BY TAKEIA R. JOHNSON**

Chicago Attorney and Ph.D Student in Sociology at University of Illinois at Chicago SOGI Commissioner
propaganda” law. This is, of course, just the tip of the iceberg.

Multiple studies have demonstrated that discrimination against LGBT people is not only a violation of universal human rights and fundamental freedoms, it is also a major impediment to the achievement of sustainable development goals, including positive public health outcomes, decent work, and economic growth. For example, it is well documented that people who are forced to live on the margins of society are not only at a significantly higher risk of HIV exposure, infection, and transmission; they are also disproportionately affected by HIV and its impacts. In many countries with punitive laws around sodomy, negative associations of HIV with “being gay” still drive people away from HIV testing and treatment because of the fear of being subjected to criminal sanctions and severe forms of discrimination in private and public life. This, in turn, hampers prevention efforts and exacerbates the spread of the epidemic.

Discrimination against LGBT people also has a negative impact on the world’s business climate. Clearly, “inequality robs workplaces of talented people as much as it robs LGBT people of the opportunity to work and sustain themselves independently,” says Jessie Tannenbaum, Senior Legal Analyst at the ABA Rule of Law Initiative (ABA ROLI). But there is more to it. A recent study commissioned by the World Bank has found that economic costs of discrimination can be quantified and that homophobia costs India up to 1.7% of its gross domestic product. For this and other reasons, the world has begun witnessing a growing corporate backlash against discriminatory laws and policies targeting people with diverse sexual orientations and gender identities (SOGI).

The legal profession is also emerging as a powerful ally in the fight for LGBT equality. In the past two decades, violations of sexual rights have come to the forefront of human rights advocacy and impact litigation in many countries around the world. From challenging highly punitive laws, policies, and practices around same-sex sexual relations, through promoting freedom from violence, torture, and inhuman treatment, to ensuring equality in marriage, employment, and access to essential services, cadres of lawyers and social justice advocates have made great strides to advance the rights of LGBT people. In the United States, the American Bar Association (ABA) has long promoted and supported these efforts. Its Resolution 114B explicitly condemns anti-LGBT discriminatory laws and practices and urges attorneys as well as other bar associations not only to defend victims of such practices, but also to recognize and support their colleagues who take equality cases as human rights advocates.

In 2013, ABA ROLI – a public service project of the ABA with headquarters in Washington, D.C. and with programs and offices in nearly 60 countries – began a concerted effort to challenge LGBT inequality around the world through targeted technical legal assistance programs. These programs, supported primarily by the U.S. Department of State, empower and strengthen the capacity of local lawyers, paralegals, civil society organizations, and justice system actors to embrace the rights of LGBT people, enhance their access to justice, and eventually, reduce social stigma and garner public acceptance for sexual rights. For an organization whose mission is to “promote justice, economic opportunity, and human dignity through the rule of law,” advancing the legal status of some of the most marginalized populations was a natural, inevitable fit. Important groundwork for this programming was laid out a year earlier in ROLI’s HIV/AIDS Legal Assessment Tool, which dedicates six chapters to key populations, including men who have sex with men and transgender people.

While ROLI does not purport to establish itself as an LGBT organization, its long-term presence in developing countries, well-established access to key decision-makers, and strong reputation as a rule of law reform leader, makes it uniquely positioned to elevate the discourse on LGBT equality and mainstream it into its host countries’ legal development efforts. In China, for example, ROLI’s breadth of experience in justice system strengthening since 2004–1998 allows it to equip the LGBT movement with legal strategies that have proven successful in addressing other highly sensitive complex legal issues, such as domestic violence. It also allows it to introduce leading Chinese lawyers to the LGBT rights space.

“Our critical strategy in this work has been to build a cadre of lawyers and community-based advocates able and willing to take discrimination and hate crime cases on behalf of the LGBT community,” says Elizabeth Andersen, Director of ABA ROLI. To accomplish this goal, ROLI works in close partnership with local LGBT organizations to form legal networks, train lawyers and paralegals, and connect them to those in need of legal aid and counseling. In Moldova, for instance, the National Partnership for Equal Rights (NPER) program, implemented by ROLI and its partner GENDERDOC-M, created
the very first pool of LGBT-friendly lawyers who then became focal points on anti-discrimination and SOGI issues within their law firms. Moreover, the program empowered the LGBT community to assert their rights, leading to a number of strategic litigation cases. NPER pursued 21, and won 18, cases contesting hate speech, hate crimes, and other forms of discrimination. As a result of these groundbreaking lawsuits, the Moldovan government and municipal authorities ceased to pose legal barriers to, and ensured full police protection for, local Pride marches. In addition, six transgender people were able to change their gender on government-issued identification cards, six public officials were found liable for hate speech, and Moldova’s notorious hate group “Occupy Pedophilia” largely ceased operations after its leader got arrested and left the country. Iulia Marcinschi, who served as NPER Program Coordinator on the ground, thinks that the program’s anti-hate crime initiative could be extremely beneficial if replicated in other countries of the former Soviet bloc. Many of these countries continue to classify violence against LGBT people as hooliganism or assault, without taking into account the element of bias.

In 2014, a similar project was initiated in China where ROLI, together with local partners, has supported public education initiatives and conducted a series of first-of-a-kind legal advocacy trainings for lawyers and civil society actors. According to Darius Longarino with ROLI China, these trainings “forded lawyers and LGBT advocates into a community and many lawyers have reported that the trainings helped them in their own personal growth and exploration.” One of the lawyers remarked, “Without the ABA, we would not be participating in LGBT work. We just would never have had the chance to get involved.” Notably, the program has catalyzed the creation of a network of over 200 lawyers and LGBT advocates nationwide, who support each other and work to provide critical legal services to LGBT persons in such areas as family law, inheritance, and blackmail. Further, Chinese lawyers trained by ROLI have achieved historic results by bringing a number of pioneering, high-profile cases in cutting-edge LGBT issues such as employment discrimination and same-sex marriage. The program has also helped fuel a robust discussion in Chinese media about LGBT rights and raised awareness about the plight of sexual minorities in mainstream society.

Efforts to facilitate dialogue and cooperation among key stakeholders are also underway in El Salvador where murder rates of LGBT people are soaring. ROLI and its local partner De la Mano Contigo (Holding Your Hand – Foundation of Family and Friends for Sexual Diversity) are leading a working group of LGBT organizations which is drafting a common advocacy strategy to advance the human rights of sexual minorities in this country. ROLI also works to increase the capacity of El Salvador’s justice institutions to protect the LGBT community from violence and discrimination and to foster a constructive dialogue between LGBT organizations and government institutions.

ABA ROLI has presence in countries with varying legal frameworks and levels of openness toward LGBT issues. In many parts of Africa, where extremely restrictive laws and prohibitive social norms send LGBT people and their allies underground, ROLI and its partner Heartland Alliance for Human Needs and Human Rights took a much more grassroots approach. “We are implementing one of the first initiatives in West Africa aimed at providing paralegal services to LGBT communities,” says Jennifer Tsai, ROLI’s Senior Access to Justice Advisor, proudly showing the “Paralegal Trainers Manual” and “Paralegal Reference Guide.” These tools have been developed to facilitate a network of trained paralegals servicing the legal needs of community members who experience human rights violations based on their real or perceived sexual orientation or gender identity or expression. Some of the most common abuses are “unlawful and arbitrary arrest, criminal prosecution, blackmail and extortion, assault and battery, abuse of sex workers, and discrimination in formal settings such as employment and access to services.” Community-level paralegal and mediation services “are now among the most popular methods to increase access to justice in the world,” adds Tsai. “Lawyers are on hand as a back-up.” Kristin Kirouac, who also works on the program, explains that “this is a truly trailblazing program” in a region where the mere handling of cases involving sexual rights may put lawyers and advocates at risk of violence, prosecution, and jail time.

As crucial as it is, mobilizing the legal profession and civil society to fight for LGBT equality is not sufficient. No matter how committed and knowledgeable the lawyers and advocates are, they cannot, on their own, change public perceptions and secure justice. According to Nolen Deibert, ROLI’s newest Program Officer, “working with judges to more fairly interpret anti-discrimination laws to protect LGBT people” is equally critical. So is “working with the police to ensure the LGBT community receives the same level of protection
as other communities." In this vein, ROLI promotes vigorous investigation, prosecution, and adjudication of bias-motivated violence. In El Salvador, ROLI employs a multi-disciplinary approach by training justice system operators alongside healthcare providers on how to identify and process hate crimes; in addition, ROLI highlights common trends of victimization and empowers these actors to play the role of a watchdog. In Moldova, where ABA ROLI trainings on LGBT equality and the country’s 2012 anti-discrimination law have reached nearly 200 judges, prosecutors, police officers, and members of the National Equality Council, the LGBT community reports feeling better protected by law enforcement and generally safer.

When asked to describe one of her favorite success stories from NPER, Kristi Kontak, Program Manager at ROLI, recounted a touching moment in a focus group of program beneficiaries that had attended in Chisinau. During the discussion a young Moldovan lesbian said, "My mom worries less about me now." Kontak reflected, "My mom worries a lot about me too and I am not a lesbian in a country where hate crimes are sometimes committed against LGBT persons with impunity. That our program made this impact is something I will never forget." According to Kontak and Marcinschi, some of the most impactful elements of NPER were the coming-out stories shared by LGBT people during justice system trainings. Hearing first-hand about how painful and nerve-wracking it is for sexual minorities to reveal their true identities to friends and family was a turning, perception-shifting point for many participants. "This is the relatability piece that may otherwise be missing from their lives," says Kontak adding that the "heartrending stories of personal acceptance (...) changed hearts and minds within the course of one training."

Public opinion is a crucial piece of a very complex puzzle in promoting the rights of LGBT people around the world. Hate, stigma, and systemic discrimination are deeply rooted in the portrayal of LGBT people as "immoral" and "reprehensible." Challenging these profoundly harmful stereotypes and creating a lasting attitudinal change is an important part of ABA ROLI’s programs. In China, for example, ROLI harnessed the power of high-profile media outlets to educate over 7.9 million viewers about LGBT rights, focusing on such issues as employment discrimination, marriage inequality, and conversion therapy. In a similar vein, ROLI’s program in Moldova trained journalists on LGBT equality and aired four LGBT-positive public service announcement videos “Because I Live Here.”

These short films highlight the invaluable contributions of LGBT people to society and emphasize the need to live in harmony despite personal differences. In addition, ROLI offered educational sessions to Moldovan mental health providers, some of whom learned for the first time that diverse sexual orientations and gender identities were not psychological disorders.

The final piece of the equality puzzle is the law itself. ROLI has long strived to ensure that its host countries create clear, stable, fair, and human rights-oriented legal and policy frameworks that are sufficiently strong to protect vulnerable and marginalized populations. In Southeast Asia, ROLI assisted LGBT groups in challenging sodomy laws though impact litigation, advocacy, and public opinion surveys. And in Moldova, ROLI prompted the creation of a Legislative Working Group at the Ministry of Justice to draft amendments that would strengthen legal provisions on hate crimes and explicitly extend them to LGBT people. These amendments are presently pending government submission to the Moldovan Parliament.

Poised to replicate these successes globally, ROLI is in the incipient stages of implementing a program Justice Works in collaboration with ABA’s Center for Human Rights. Justice Works will provide technical assistance and expertise to governments and civil society organizations to strengthen their responses to bias-motivated violence and hate crimes targeting LGBT persons, as well as related forms of discrimination. The program will focus on prevention and accountability.

High-impact legal and institutional assistance to developing countries can be a very powerful tool in addressing discrimination based on sexual orientation and gender identity. As Kontak succinctly puts it, “the rule of law is more important for LGBT people – it’s essential.” However, concrete strategies employed to promote LGBT equality will inevitably vary from country to country, dependent on the legal systems, political buy-in, and societal attitudes. “We need to clearly assess and accept each country at the level at which they currently find themselves, and work in that context,” says Mark Wallem, Co-Chair of ROLI’s Gender Practice Group and Director of the Internet Freedom Program in Southeast Asia. In many countries LGBT people “view the law and its practitioners as the enemy” given decades of persistent victimization by law enforcement, courts, and other authority figures. In those countries, “ROLI needs to make a clear case as to why working with the legal community makes sense for LGBTs.” Even though every international development program “contains some element of risk,” ROLI must ensure
that “what we are asking of the LGBT community does not place them unnecessarily in harm’s way.” Moving forward, Wallem suggests, a key element of ABA ROLI’s work should be mentoring openly LGBT lawyers and LGBT people who are considering entering the legal profession. “Seeing other LGBT lawyers and straight allies comfortable with taking on LGBT-related cases can provide confidence and courage,” he underlines.

Identifying safe, conducive environments to work on SOGI issues can be very challenging in many parts of the world, but in Deibert’s view, “there are a number of avenues to support the LGBT community even if the programs cannot explicitly work with them.” He points out that “gender-based programming is one avenue, but even raising visibility of (...) the LGBT community in all programs will go a long way to start changing people’s acceptance of LGBT individuals.” Hence, “when working with lawyers and judges, or even in legal education programming,” it is important to “make training spaces into safe spaces” and to “clarify that anti-discrimination protections include LGBT people.” Kontak agrees, stressing that in Moldova, “open space” was created by framing sexual rights within “a broad, human rights-grounded anti-discrimination framework.” When the space is opening, ROLI can “gradually seek to widen [it] by focusing more explicitly on LGBT rights.”

 Needless to say, numerous challenges remain. “This is trickier,” Kontak ponders. “Ideally, we could mainstream LGBT rights just as we seek to mainstream gender in general, but depending on the operating environment, this may put local staff’s safety as well as some key local partnerships at risk.” Consequently, in some places ABA ROLI may determine sexual rights to be “too sensitive (...) to work on, lest we lose our other programming.” This is not a hypothetical problem. In southern Africa, where ABA ROLI trained magistrates on access to justice and equality under the law, a local judges’ association threatened to boycott the trainings unless all references to LGBT people were removed from the training modules.

“LGBT people are fighting for their own survival” in every corner of the globe, reminds Wallem. Often, it is “a very basic struggle to stay alive in the face of severe threats and intimidation.” It is also an uphill battle “for a wide array of legal and civil rights which many of us take for granted.” There is no doubt that discrimination and hate have profoundly negative impacts not only on the lives of LGBT people but also on public health, economy, foreign policy, and more generally – on the well-being of entire societies. There is also no doubt that despite numerous obstacles ABA ROLI will continue to promote sexual rights and LGBT equality around the world. “How gratifying to think that ABA ROLI can help reduce discrimination and make the world safer,” notes ABA ROLI Director. “Because, after all, love is love.”

About ABA ROLI
ABA ROLI is a public service project of the ABA with headquarters in Washington, DC and with programs and offices in nearly 60 countries around the globe. Our mission is to promote justice, economic opportunity, and human dignity through the rule of law, and we do so by implementing technical legal assistance programs with local state and non-state actors in four areas: 1) Governance and Justice System Strengthening; 2) Human Rights and Access to Justice; 3) Inclusive and Sustainable Development; and 4) Transitions, Conflict Mitigation and Peacebuilding. ABA ROLI has been promoting LGBT equality worldwide since 2013. We ensure that our staff receives proper training and guidance on diversity and SOGI both in the workplace and through truly inclusive and integrated programs.

PAULA RUDNICKA
ABA ROLI Senior Legal Analyst and Co-Chair of Gender Practice Group
Obergefell and Transgender Marriage

Almost any writer or reporter, activist or newscaster speaks of Obergefell as a win for lesbians and gays. It goes without saying that the win was equally valuable for bisexuals who are currently in a same-sex relationship. But it also affects transgenders who are married or who will become married; thus, Obergefell must be seen as an LGBT win, not merely and LG win.

A transgender may enter an opposite-sex relationship, but after transition be in a same-sex relationship. Or the TG person may begin in a same-sex relationship, and after transition be in an opposite-sex relationship. As an example, a female to male (FTM) person still living as a woman may marry a man: this couple is viewed by society as being heterosexual. Later, after this FTM transitions to become the transman that his brain told him he was meant to be, and if the female partner stays true to her vow, this transman and woman will be seen by society as a heterosexual couple.

Before Obergefell, the first heterosexual couple could get legally married and remain so after the transition as, I would argue, no one had standing to challenge the validity of the marriage. But the second homosexual couple, after transition and appearing to be heterosexual, a legal marriage was an uncertainly due to the phobia of some states’ legislative laws or judicial rulings. “This is explained in great detail in “Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now,” 64 ALBANY L. REV. 1031 (2001)

In my personal life, I have been married to the same woman for 43 years. I was a man for our first three, legally married years, and she remained true to her vow and with me since. Before Obergefell, I felt certain that our marriage could withstand a challenge, but you never know when one married partner dies and the family gets a chance to challenge in probate for the right to the deceased’s property. And you never know when one partner is seriously ill and an insurance company sees the opportunity to drop that person from the other’s insurance. And we were uncertain what Social Security would do with our marriage when one of us passed.

When Obergefell was announced last year, my wife and I felt like a burden was lifted from our 43 year marriage. Under Obergefell, no one could ever challenge our marriage.

Truly Obergefell is a victory for the entire LGBT AND T community.

Phyllis Randolph Frye is an Eagle Scout, a former member of the Texas A&M Corps of Cadets, a US Army veteran (1LT-RA 1970-72), a licensed engineer, a licensed attorney, a father, a grandmother and a lesbian wife. She is the first, out, transgender judge in the nation. Ms. Frye is also known as the “grandmother of the national transgender legal and political movement” and was featured on the front page. Above the fold, of the August 31, 2015, New York Times.

Attendees of The Stonewall Award Reception at the 2016 American Bar Association Midyear Meeting in San Diego.

PHYLLIS RANDOLPH FRYE
Our Thoughts, Our Deeds

From Stonewall to Pulse, before, in between, and right now, LGBTQ people have been and are looking for safe spaces, for places where we could be known as ourselves. On June 12th, we awoke to the reminder that our spaces are not safe. That being who we are is not safe. For many of us this was a shock. It tore down the celebration-filled walls we were building up from all our victories. But, in each month of 2015 at least two LGBTQ people or people living with HIV were murdered in hate violence in the U.S. The majority were people of color. The majority were transgender or gender non-conforming. The majority were both. We received these statistics from the National Coalition of Anti-Violence Programs two days after the hate violence murders of LGBTQ people had already doubled for 2016. The horrifying murders at Pulse in Orlando happened on Latin Night. The vast majority of people murdered that night were Latinx. We know that people with multiple intersecting marginalized identities are targeted for violence more often than those without. The victims and survivors in Orlando and all the others deserve our thoughts, but also our deeds.

As attorneys we can work toward ending this violence by understanding our clients’ multiple identities and how they impact and shape the cases we work on. If we can’t understand that our clients may not have the money to make it to our office for a meeting or that when they get there they may have to provide security an ID that doesn’t match the way they look and who they are, then we will not be able to effectively represent them. We will contribute to the problem. According to a national survey conducted by Lambda Legal, 19 percent of LGBT-identified people reported that they had heard discriminatory comments about sexual orientation or gender identity in the courtroom. Sixteen percent reported that their LGBT identity was raised in court when it was not relevant. Those numbers increase dramatically when it comes to the responses of LGBT people of color. For transgender and gender non-conforming people of color surveyed, 53 percent reported hearing discriminatory comments in the courtroom. Allowing this to continue, unchecked, creates situations of extreme danger for our clients and for pro se litigants, witnesses, and jurors in the courtroom. Understanding our clients and advocating for basic fairness is not all we should do, but it is something we can do right now. We must turn sorrow and anger into actions large and small that add up to a daily push for security, equality, and dignity.

Ethan Rice

Ethan Rice is the Fair Courts Project Community Educator for Lambda Legal, the oldest and largest national legal organization committed to achieving full recognition of the rights of LGBT people and people affected by HIV. The Fair Courts Project focuses its work on issues of judicial independence, judicial diversity, access to justice, and combating bias in the legal system.

When asked to reflect on Orlando, at first all I could think about is that day. A day so many awoke to the horrific news and their lives forever changed. My day feels so trivial in comparison because I don’t know anyone directly who was killed. But I know so many people who do know someone who was killed. I’ve worked on LGBT equality in Florida for most of my life. I am a Florida native, a former board member of Equality Florida, a current board member of TransAction Florida, and a law student in Florida. This is my community. This is where I struggled with coming out. So many of my friends are from Orlando. But this summer I am far away from Orlando in DC. After the news hit I wanted to get in my car and go back to Florida to do something. Anything. I wanted to talk to and grieve with my family and friends. But I didn’t. I couldn’t because I was in DC - selected to work on equality this summer at the National Center for Transgender Equality. I turned to my brand new colleagues for support. We talked about what happened that Monday. As the names were released, the tragedy hit our office again as a team member found she lost a good friend. And as many people throughout this country did in the days that followed, I went to vigils. When I looked around at the strangers in the DC crowds I found something unexpected. I felt comfort. I found community where I was. Most of us stood silently. Some of us stood with candles or rainbow flags. A few folks spoke to the crowds. I don’t really remember. The first week after that day was a blur. I realize now that the vigils began my grieving process and I don’t know what that process will bring. But for now, I have work to do.

Nathan assists the National Center for Transgender Equality (NTSE)

NATHAN S. BRUEMMER

As the Andrew S. Cray Law Fellow, Nathan assists the National Center for Transgender Equality (NTSE).
The Equalizer / Commemorating the 50th Anniversary of the ABA Section for Civil Rights and Social Justice

This year, the American Bar Association’s (“ABA”) Section for Civil Rights and Social Justice (“CRSJ”) is celebrating its 50th anniversary. To commemorate this monumental milestone, CRSJ hosted a national event at the American University Washington College of Law on April 21, 2016. The event was a day-long celebration of not only how far the ABA, CRSJ, and the law have come in the past 50 years, but also a reflection on where our country and communities are headed socially and legally in the next 50 years.

To begin, the anniversary program had a luncheon keynote address from Dahlia Lithwick, Slate Senior Editor and Legal Correspondent. This was followed by a screening of the documentary, Crisis: Behind a Presidential Commitment. Crisis follows President John F. Kennedy, and his brother, Attorney General Robert Kennedy, and their efforts towards desegregation in 1963. Specifically, the film examines the work of the Kennedys for the enrollment of two African-American students at the University of Alabama in spite of then Governor George Wallace’s ban. After the documentary, the attendees engaged in an interactive discussion regarding the role of the legal profession in civil rights, and the difficulties and successes the ABA and CRSJ have faced and overcome, as well as the ongoing social justice and concerns which require the Bar and Section’s attention and involvement.

Finally, the national event concluded with an evening reception during which CRSJ presented its Civil Rights Hero Award to five recipients whose dedication to civil rights and social justice is truly exemplary:

1. Mark D. Agrast, Executive Director and Executive President of the American Society for International Law and former Chair of CRSJ and Commissioner with the ABA Commission on Sexual Orientation and Gender Identity (“SOGI”);
2. U.S. Department of Labor Secretary Tom Perez;
3. Marian Wright Edelman, President and Founder of the Children’s Defense Fund;
4. Marcia Greenberger, Co-President of the National Women’s Law Center; and,

CRSJ also presented the Civil Rights Hero Award to two posthumous recipients, Vivian Malone, one of the two first African-American students enrolled at and the first African-American student to graduate the University of Alabama, and Esther Lardent, Founder, President, and CEO of the Pro Bono Institute.

Without question, the 50th Anniversary of CRSJ is particularly poignant for the SOGI Commission. For example, the SOGI Committee of CRSJ was created in 1977. Then, in 2003, the CRSJ SOGI Committee won the CRSJ (then called the ABA Section for Individual Rights and Responsibilities) Committee Excellence Award for its outstanding work advancing civil rights. Ultimately, in 2007, the SOGI Commission was created to secure equal treatment for all people in the ABA, the legal profession, and the justice system, without regard to sexual orientation or gender identity. Today, the SOGI Commission continues to enjoy a powerful working relationship with CRSJ and its SOGI Committee.

Still, notwithstanding the significant strides which have been made towards LGBT and SOGI equality in the past 50 years, many people at the CRSJ national event, including former and current leaders of CRSJ and the bar, spoke specifically to the difficulties...
endured during the past 50 years for LGBT and SOGI people. For instance, many attendees discussed examples of de facto and de jure discrimination towards attorneys, colleagues, and friends and family, who identify as LGBT and SOGI, in the law, in the community, and sometimes even in the organized bar. Yet, while the discussion recalled many troubling instances of harassment and prejudice, the conversation also revealed stories of transformation, stories of the power of conversation and education, and stories of unwavering dedication to equal justice and rights for all, sometimes from surprising sources.

In many ways, the work of SOGI is more important now than ever. Even in the past year, for all of the social and legal advancements and victories won, there have also been alarming steps taken and efforts made to silence and repress LGBT and SOGI communities, ranging from the introduction of harmful legislation intended to isolate LGBT and SOGI people to outright violence. The CRSJ 50th Anniversary celebration was a reminder that the foundation for the growth and success of a great movement, like that of LGBT and SOGI civil rights over the past 50 years, is often the result of many smaller hard fought battles and victories.

During his CRSJ Civil Rights Hero Award acceptance speech, U.S. Department of Labor Secretary Tom Perez emphasized that, “We the People’ doesn’t have asterisks.” SOGI is dedicated to continuing the movement towards social and legal equality in the ABA, the legal profession, and the justice system, until “We the People” includes all the people in the LGBT and SOGI communities.
Where Right Meets Privilege

The “religious liberty” movement, best exemplified by various state’s Religious Freedom Restoration Acts (RFRAs) in recent months, has a history dating back formally several decades and informally back to the founding of the country and is preparing to change and adapt once more.

An appeal to “religious freedom” in a Constitutional setting does not appear much before the 1960s. To put it bluntly, up until the time of the Civil Rights Movement, there was no need to have a Constitutionally-validated defense to openly and outwardly wielding religion to justify prejudice, because the American conception of “civil rights” in popular ethos or in jurisprudence had not yet evolved to a point of demanding it. The formal religious liberty movement appeared contemporaneously and not-so-coincidentally with the blossoming of formal civil rights law.

Courts applied the Free Exercise Clause sparingly prior to the 1960s. However during that time religion was used to justify keeping slavery, denying women suffrage, and remaining segregated.

Rev. Richard Furman defended slavery on the grounds that “…the right of holding slaves is clearly established by the Holy Scriptures, both by precept and example.” And Jefferson Davis declared that “[Slavery] was established by decree of Almighty God…” An editorial in the New York Herald in 1850 indicated that the abolitionist and suffragist Lucretia Mott was seeking to “dispense with Christianity and the Bible” in her efforts to abolish slavery and secure woman’s suffrage. The list goes on.

The narrow view of the Free Exercise Clause changed in the 1963 decision of Sherbert v. Verner, 374 U.S. 398. Sherbert granted strict scrutiny review to laws infringing on the exercise of religion. Throughout the 1960s, this interpretation prevailed. But as the 1970s and 1980s wore on, the Court began applying a more diluted form of strict scrutiny or not applying the test at all. Then, in 1990, Justice Scalia, writing for the majority in Employment Division v. Smith, 494 U.S. 872 (ending the “compelling interest” test in favor of one that only applied strict scrutiny where a law singled out a particular religion), suggested that to give religious liberty the benefit of strict scrutiny was “courting anarchy” by creating “a system in which each conscience is a law unto itself.”

The decision was not well received by either the right or the left, and thus the federal RFRA was born of bipartisan support shortly thereafter. Democrats, concerned over the rights of minority religious groups, joined Republicans to pass the bill almost unanimously in both houses of Congress. Yet that passage was held up for two years, interestingly, by anti-abortion groups that were worried that a religious right to an abortion might be claimed by the pro-choice movement. Thus, the final version that got passed in 1993 was ambiguous, even citing strict scrutiny where a law singled out a particular religion, suggested that to give religious liberty the benefit of strict scrutiny was “courting anarchy” by creating “a system in which each conscience is a law unto itself.”

Less than five years later, the applicability of the federal RFRA in state and local spheres was struck down by City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that RFRA extended into the domain of state sovereignty).

Congress attempted to resurrect the law as the Religious Liberty Protection Act (RLPA) through the hooks of the spending and commerce clauses by tying in federal dollars, but by this point the LGBT rights movement had grown and eroded Democrat support.

The RLPA ultimately failed.

After that, a patchwork of states enacted or amended state RFRAs, but claims under these laws were infrequently brought and even less frequently victorious. Many of the current state RFRAs were loosely modeled after the federal version and after fifteen years of haphazard application and the development of further case law in LGBT rights, state RFRAs as they currently exist are a legal mire of uncertainty.

And while there is a recent resurgence of interest in state RFRAs, changes in public opinion, a strong LGBT civil rights infrastructure, and the general reluctance of the courts to apply strict scrutiny in these cases, even in the wake of a reinvigorated federal RFRA via the Hobby Lobby decision, can make these laws politically (and economically) costly.

The current of the religious liberty movement is flowing elsewhere: the First Amendment Defense Act (FADA).

The rhetoric being employed in support of FADA is exactly that of the religious liberty movement in favor of the RFRA or RLPA.

A bill summary, prepared by the Congressional Research Service (CRS), explains that the bill:

Prohibits the federal government from taking discriminatory action against a person on the basis that such person believes or acts in accordance with a religious belief or moral conviction that: (1) marriage is or should be recognized as the union of one man and one woman, or (2) sexual relations are properly reserved to such a marriage.

It then goes on to describe dis-
criminatory action, primarily having to do with changes to federal benefits or status, such as altering tax status or withholding government contracts or grants.

A hearing on FADA was held on July 12, 2016. At the hearing, Rep. Mark Meadows (R-NC) remarked that the intent of the bill was “to stop discrimination.”

James Obergefell, the plaintiff in last year’s landmark marriage equality ruling, also gave a statement for the hearing:

Religious liberty is a core American value. Everyone in this country is free to believe (or not) and to live out their faith as they see fit, provided that they do not do so in a way that harms other people. As I see it, this legislation turns this value on its head by permitting discrimination and harm under the guise if religious liberty.

How can a law stand as a protection against discrimination for some and an endorsement of discrimination for others?

The answer may lie in one of the earliest opinions concerning the freedom of religion, that of West Virginia v. Barnette wherein the Supreme Court said:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizen to confess by word of act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

A thoughtful evaluation, in the context of the social climate and the case law, evinces the motivation of the religious liberty movement: a portion of this country has become deeply offended that what they consider immoral is to be considered legal nonetheless, because they are accustomed to being the prescribers of the orthodox.

Anyone is welcome to seek their beliefs where they may find them, including in their religion, but they are not welcome to prescribe them to others, particularly to their detriment.

What has been orthodox in this country has been prescribed for a great many decades by a very limited few. Much of the domestic struggle of this country centers on overturning such prescriptions.

Decisions like Obergefell do little more than constitutionally affirm the removal of a prescription of orthodoxy that was already in place and should not have been so. “Orthodox” is nothing more than a close cousin to “traditional,” a tagline of choice in the movement.

The religious liberty movement, then, is less about religious freedom and more about a struggle over the further delineation of the line, not between church and state as such but between morality and legality.

This author would argue that to seek to separate morality and legality, without condoning government intervention in matters of personal morality, is actually to protect religious freedom putting the scale back in balance with the great many who have non-orthodox beliefs.

That fixed star to which the Barnette Court gazes is no star at all, but rather a green light, blinking from across a harbor.

I encourage you to read a more in-depth discussion in the upcoming SOGI White Paper on RFRAs and the history and legality surrounding them.

MATT MECOLI
Matt Mecoli is a Summer Associate at Sweeney & Sheehan, P.C. and JD student at Drexel University School of Law.
ALLY TOOLKIT PROGRAM
Held for staff on July 7, 2016 at the ABA Chicago location

Sponsored by the ABA Staff Diversity Council

Each month, the ABA Staff Diversity Council features various diverse entities and programs so that ABA staff may learn about them. In lieu of LGBT Pride month, the SOGI Commission gave an interactive and informative presentation featuring the Ally Toolkit Program. Beginning with an “icebreaker”, which encouraged participants to discuss word associations and learning about stereotypes. Also discussed were the basic “Do’s and Don’ts” for interacting and communicating with persons of the LGBT community. Awareness of the diversity within the LGBT community was also highlighted, as there are acceptable terminologies and pronouns which can be tricky. Examples of how to be an ally, interact, and support fellow colleagues and contacts belonging to the LGBT community proved to be a very successful take away of the presentation.

TINA GUEDEA
SOGI Program Associate