On April 22, the Supreme Court granted certiorari in three cases dealing with the question whether Title VII of the Civil Rights Act of 1963 protects employees from discrimination based on their sexual orientation or trans status. This grant took place after each case was continually rescheduled for conference. The cases were considered at eleven separate conferences before the grant took place.

In Altitude Express v. Zarda, the Court will review a holding by the en banc Second Circuit that Title VII prohibits discrimination based on an employee's sexual orientation. In Zarda, a New York Skydiving Company dismissed one of its instructors, Daniel Zarda, who brought suit alleging that the basis for the dismissal was his sexual orientation. The Second Circuit held that Title VII, which prohibits discrimination “because of sex” does apply, and that Zarda therefore had properly alleged a valid cause of action.

The Court granted a second case on the same question: Bostock v. Clayton County, Georgia. There the Eleventh Circuit reached the opposite conclusion. In that case, Gerald Bostock, a child welfare services coordinator argued that the County fired him when it discovered he was gay. The continued on page 9
The Gay/Trans Panic Defense: What It is, and How to End It

The gay/trans panic legal defense legitimizes and excuses violent and lethal behavior against members of the LGBTQ+ community. The defense is defined by the LGBT Bar as “a legal strategy which asks a jury to find that a victim’s sexual orientation or gender identity is to blame for the defendant’s violent reaction, including murder.” This legally sanctioned discrimination against one’s sexual orientation and gender identity must cease.

Here’s why, and how, you can help these bans succeed.

In the United States, the LGBTQ+ community makes up 3.5% of the total population yet is vastly overrepresented in hate crime statistics. In 2007, sexual orientation ranked as the third highest motivator for hate crime incidents at 17% of total attacks, behind race (51%) and religion (18%). Over the course of lesbian, gay, or bisexual people’s lifetimes, one in five will experience hate crimes, and one in four transgender people will as well. Those individuals at the intersection of homophobia, transphobia, and racism, face worse statistics. Between 2013 and 2017, of the 102 known transgender people killed in hate crimes in the United States, 75 were black or African-American. Although these numbers are already highly over representative of the LGBTQ+ community compared to the U.S. population, they could be higher; often crimes against the LGBTQ+ community are not recorded as hate crimes by all official sources.

Fears of retaliation, discrimination, harassment, or being outed to friends and family are also concerns that may inhibit LGBTQ+ victims from reporting crimes against them.

Despite these grim statistics, there is hope. As of July 1, 2019, eight states have passed legislative bans on the use of gay/trans panic as a legal defense: California, Illinois, Rhode Island, Nevada, Connecticut, Maine, Hawaii, and New York. It must be noted that gay/trans panic is not an affirmative legal defense; it is a tactic to strengthen the defense by playing on prejudice. It has, however, been used to not only explain a defendant’s actions, but to excuse them as well.

Typically, the defense has three variations: defense of insanity or diminished capacity, defense of provocation, and defense of self-defense. The insanity or diminished capacity defense argues that the victim’s sexual orientation or gender identity is to blame for the defendant’s break down into a panic. The provocation defense argues that the victim’s proposition of a “non-violent sexual advance” could be sufficiently provocative to induce the defendant to kill them. The final variation, of self-defense, claims that because of the victim’s sexual orientation or gender identity, the victim must have been about to cause the defendant serious bodily harm. Despite debunking “gay panic disorder,” and its removal from the DSM by the American Psychological Association in 1973, legal defense teams continue to use it.

In the 1954 murder of William T. Simpson in North Miami, FL, the defendants claimed that they shot Simpson, a gay man, while “resisting his advances,” thus utilizing the provocation defense. Even though the defendants were criminals who frequented that area of highway to rob drivers, and intentionally targeted homosexual victims, the defendants were convicted of manslaughter rather than first-degree murder. In the 1998 murder of Scott Amedure by Jonathan Schmitz, Amedure revealed that he had a crush on Schmitz while on the “Jenny Jones” show. After a friendly evening together, Amedure left Schmitz a provocative note. The defense again utilized the provocation defense, citing that the nature of the note and Amedure’s homosexuality was enough to send Schmitz into a panic and kill Amedure. Schmitz was convicted of the lesser offense second-degree murder rather than first-degree.

The gay/trans panic defense has not always been successful. In the 1998 murder of Matthew Shepard in Laramie, WY, the defendants again attempted to use the provocation defense, citing that the nature of the note and Amedure’s homosexuality was enough to send Schmitz into a panic and kill Amedure. Schmitz was convicted of the lesser offense second-degree murder rather than first-degree.

The gay/trans panic defense is not a defense allowed under the statutory insanity defense construct. The gay/trans panic defense was deemed inadmissible, not due to the illegitimacy of the gay/trans panic defense, but instead due to Wyoming’s statutory insanity defense construct.
Currently, there are several other state legislative efforts to ban and denounce the legitimacy of the gay/trans panic defense. The status of these efforts is as follows: Washington State (in committee), New Mexico (in committee), Texas (in committee), Minnesota (in committee), Pennsylvania (in committee), New Jersey (in committee), Massachusetts (in committee), and the District of Columbia (in committee). At the federal level, the Equality Act, which bans the gay/trans panic defense, has just been introduced.

We must show solidarity with the LGBTQ+ community. It is harrowing that currently, one’s sexual orientation or gender identity can still provide even an inkling of a legal defense in their murder trial. Help to end this discrimination by supporting legislative bans on the gay/trans panic defense.

The steps you can, and should, take are as follows:

1. Contact legislators and governors in states currently trying to ban the gay/trans panic defense. Be sure to reach out to federal legislators as well.
2. Be an advocate in states where there is currently no proposed gay/trans panic ban legislation.
3. Let your politicians know that equality under the law should apply to the victims of hate crimes as well.
4. Support organizations that work to protect and uplift the LGBTQ+ community, like the LGBT Bar, or the American Bar Association’s Commission on Sexual Orientation and Gender Identity.
5. Litigate cases which can promote the protection and empowerment of the LGBTQ+ community.

**ENDNOTES**


5. Id.


7. Id.

8. Id.

9. Id.


11. Id.

ALEXANDRA (LEXIE) HOLDEN
ABA CRSJ Intern 2019
Reflecting on the Last Three Years: An Interview with Three Outgoing Commissioners

The ABA Commission on Sexual Orientation and Gender Identity (SOGI) has a tradition of encouraging our outgoing commissioners to offer reflections on their time with SOGI and occasionally a little advice for those coming behind. The SOGI commission has opened this tradition to the broader community, featuring these conversations in The Equalizer. It has been my honor to serve on the commission with Meg Milroy, Ghenete Wright Muir, and Shannon Minter. The following interview offers an insider perspective on attorneys working to advance LGBTQ2 rights and their reflections on their leadership on the SOGI commission and within the profession. Please be aware that each commissioner provided lengthy and wonderful answers to the questions asked, but in the interest of space we have provided an edited version.

Good afternoon. Before we dive in, I’d like to learn a little more about your path to the ABA. What is your ABA origin story? How did you become involved in the ABA and the SOGI Commission?

Meg: I initially got involved in 1989 for substantive reasons related to my practice area at the time. I became active in the Business Law Section pretty much right away. Among other leadership roles, I was really excited to get the opportunity to chair the Diversity and Inclusion committee and was the co-drafter of the Business Law Section’s first diversity plan. It was one of the first big sections within the ABA to create such a plan. While continuing in leadership in the BLS, due to my interest in diversity and inclusion, I have served on nearly all of the ABA’s Goal III Commissions. I was very honored when the Business Law Section nominated me for the SOGI commission and have been so happy to continue my work as an ally in the ABA D&I space.

Shannon: Well, the NCLR does a lot of family law and we have always been focused on the Uniform Parentage Act (UPA) which is a strong tool for protecting family rights and applies to our families as well. Around 1999 a new version of the UPA was proposed that would have harmed many families and would have been particularly devastating for LGBTQ2 parents. When the new version was presented to the ABA for approval, NCLR mounted a campaign to discourage the ABA from supporting the revised UPA until those negative changes were remedied. The effort was
successful and resulted in changes that were extremely positive both for LGBTQ2 families and many other parents and children. That version was added and approved in 2001. That experience taught me how important and constructive the ABA’s voice can be—so I’ve been involved ever since.

**Ghenete:** I got involved through the Diverse Leaders’ Academy which is a program of the ABA Section of Litigation. I had always been very involved in Florida bar association activities, as a leader in the legal community and I wanted to get involved on the national level and started to research national bar associations. The ABA was the obvious choice. I selected SOGI because I wanted to serve the LGBTQ2 community and it seemed to be an excellent opportunity to serve. The Section of Litigation was very helpful with the learning process and Jim Holmes, one of the past SOGI chairs, helped me as well.

**What SOGI project or activity are you most proud of over the last three years?**

**Ghenete:** I would say working on the newsletter, the Equalizer, with you Kori! I’ve been a contributing writer and co-editor. In 2017, I helped with the inaugural LGBT Forum for the Section of Litigation, and wrote an article for The Equalizer introducing the LGBT forum and it was a cross-pollination of the two entities. It was a great experience and I really enjoyed the process.

**Shannon:** I’d say the publication of Banning Conversion Therapy on Minors: A Guide for Creating Tribal and State Legislation. I was so thrilled and proud the commission was able to support this incredible resource, which will help states and tribes protect young people from this deadly practice.

**Meg:** Working on SOGI resolutions before the ABA House of Delegates. While there were so many people involved in the process, I was happy to learn about drafting and the politics behind the resolutions. Now we have ABA policy that allows us to go out and take public stances on things like the Equality Act. While I’ve played a tiny role, it was really great work and probably some

**How has the discussion or progress of LGBTQ2 issues changed throughout your career?**

**Shannon:** It’s changed enormously. When I started practicing 25 years ago, LGBTQ2 parents still routinely lost custody of their children due to their sexual orientation or gender identity in many states. Marriage equality not only didn’t exist in any state, it wasn’t even seen as a remote possibility. Only a few states had anti-discrimination rights for LGBTQ2 employees. The trans rights movement was still small and had not been incorporated into the larger equality movement. Our country had no openly LGBTQ2 judges and barely any openly LGBTQ2 elected officials. The devastation wreaked by conversion therapy was largely invisible, and certainly there were no state or local laws addressing it. So much has changed, but we still need to enact federal anti-discrimination protections and more state law protections—and we still need to ensure that LGBTQ2 people are protected and respected in every part of this country and at every stage of their lives.

**Ghenete:** I wasn’t part of the community until recently. I came out as openly gay around five years ago. So in that short time great things have happened, despite some backsliding with the current administration. I wasn’t part of the community when folks were fighting for marriage equality. When I joined the community, Obama was president. I’m fortunate in that regard, still learning a lot about the progress we’ve made and grateful for the SOGI commission’s work, commissioner perspectives, and just the history that’s in the room when we meet.

**What do you think is the next big issue for the movement?**

**Meg:** I’d say this very troubling rollback of transgender protections, there had been some ground gained and now with this administration, we’re all seeing the horrible reversal of rights.

**Ghenete:** Well based on what I’m seeing; I think it’s discrimination in the workplace nationally.

**Shannon:** I agree with Ghenete. One very important challenge facing our community is what to expect from our newly reconfigured Supreme Court. The Title VII cases will be of monumental significance for decades to come.

**That’s interesting, discrimination is something we’ve all seen in the workplace. Do you have any advice for law students or prospective law students worried about whether to be out as LGBTQ2 in the profession?**

**Ghenete:** I think you have to test the waters in your workplace. If the workplace you’re in is welcoming, then great. One cue is whether the firm has an affinity group for LGBTQ2 associations. Do some research, ask around about the job and environment. I think you can still be out if it’s not welcoming, it will just be harder. I am gender nonconforming, and responses to my clothes was a real concern. But I decided to take the risk at work, wearing “masculine” coded clothes.
and it went well. There wasn’t an issue, but I think folks should do what works best for them at the time.

**Meg:** I think that Ghenete’s info is spot on. Go with your gut really, hopefully you land in a welcoming spot. Like Ghenete said, do some research. Check for affinity groups, see what kind of pro-bono work they do, if an amicus brief is filed in support of an LGBTQ2 cause that’s a good sign. And remember, you don’t have to be out if you’re not comfortable.

**Shannon:** Students should absolutely feel free and empowered to be out and open about who they are. In most cases, they will find that it opens as many doors as it closes. In my experience, being one’s authentic self is an essential part of being truly happy in your career.

**Do you have any advice for young attorneys considering getting involved in the ABA?**

**Ghenete:** Well, I heard someone speak when I was a young lawyer in the Black Bar Association. He said, at some point, always take a leadership role and that really resonated with me. I was already on that path, but didn’t realize it and kept that in mind when choosing where to get involved. Young lawyers should think about where they can make the most impact, seek leadership roles.

My other advice is to always put your family first and create balance where you can. I came in to the bar with kids, had my first child in law school so I was always a mom in the profession. I was able to do meaningful work, and there are always events in the legal community that allow children. Integrate your kid and family into the profession as much as you can, I still bring my sons on ABA trips and it’s a great experience for us as a family and for them as individuals learning about the world.

**Meg:** I agree with Ghenete; you can still be very active within the ABA as a parent. Seek leadership roles, seize every opportunity. Within the Business Law Section, we try to get young lawyers involved. If someone asks you to work on a CLE or be a panelist, do it. That starts you down the path to leadership. Find something you want to do, or like to do, an issue or group you’re passionate about, then show up and get involved.

**Shannon:** I would strongly encourage young attorneys to get involved with the ABA. Pick a committee or area where you can be active. It’s intellectually and professionally rewarding. It’s also an opportunity to have a real impact on the profession and our society. Policy positions the ABA take really matter in the broader society and it’s important to have dedicated and idealistic folks participating and holding us to our highest principles and values.

**KORI CORDERO**

SOGI Commissioner

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**TRANSgendERED PERSONS AND THE LAW, 2ND EDITION**

BY ALLY WINDSOR HOWELL, LL.M.

Transgender Persons and the Law, 2nd Edition further solidifies the ABA’s position as the forerunner and champion of combatting transgender discrimination and safeguarding the legal rights of all transgender individuals. This new edition is an excellent resource for lawyers as well as lay-activists engaged in transgender human and civil rights albeit in the courts or in legislative lobbying.

The following areas of the law are thoroughly explained in the book:

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**THE EQUALIZER • AN ABA LGBT PUBLICATION • WWW.AMBAR.ORG/SOGI**
Justice Works: Framework for Enhanced Responses to Bias-Motivated Violence Based on Sexual Orientation, Gender Identity, or Gender Expression

Acts of violence based on sexual orientation or gender identity are on the rise throughout the world. A report from the Organization for Security and Cooperation in Europe’s Office of Democratic Institutions and Human Rights shows a 63 percent increase in reported crimes based on sexual orientation or gender identity from 2014 to 2017. In 2015, the Inter-American Commission on Human Rights noted a life-expectancy among transgender women to be between 30 and 35 years whereas the expectancy of the general population was 75 years. In the United States alone, law enforcement agencies reported 7,175 hate crime incidents to the Department of Justice in 2017, an increase of over 1,000 from the year before. More than 20 percent of those reported hate crime incidents involved bias toward a person’s sexual orientation or gender identity.

More troubling, we know that these numbers are incomplete. Many law enforcement agencies do not record indicators of bias motivation based on sexual orientation or gender identity in official records of crimes. Many lesbian, gay, bisexual, transgender, and intersex (LGBTI) people globally also do not report to the police the violence they experience, fearing retraumatization by officers, reprisals from perpetrators, and inadequate responses from the criminal justice system.

In this context, the American Bar Association (ABA) Justice Works Program, a collaboration between the ABA Rule of Law Initiative (ROLI) and Center for Human Rights (CHR), provides technical assistance to civil society and justice sector actors seeking to better respond to bias-motivated violence based on sexual orientation or gender identity. As part of this effort, the Program developed the Justice Works Framework for Enhanced Responses to Bias-Motivated Violence Based on Sexual Orientation, Gender Identity, or Gender Expression (the Framework).

The Framework provides practical, operational guidance for enhanced, cross-sector responses by LGBTI civil society organizations, psychosocial support service providers, and justice sector actors to bias-motivated violence. The document identifies two distinct but overlapping purpose for documenting the indicators of bias. Documentation by both civil society organizations and officials for the purposes of monitoring the typology and extent of violence contributes to evidence-based policy and advocacy. Documentation by justice sector actors creates an official record that preserves evidence, including the indicators of bias based on sexual orientation or gender identity, which are necessary for a successful prosecution of offenders.

The Framework outlines the concerns various stakeholders should take when documenting bias-motivated violence based on SOGIE. The documentation should maintain a survivor-centric approach while also upholding the rule of law to protect the LGBTI community in a jurisdiction. Most importantly, when documenting indicators for the purpose of monitoring the typology and extent of violence, all personally identifying information should be stripped from any records. Delinking this information protects survivors from reprisals by perpetrators or, in places where homophobia and transphobia are widespread, by police officers. Additionally, managing the expectations of survivors by explaining the purposes of collecting information and the likelihood of a justice sector response can mitigate potential disappointment and thus encourage continued reporting for the purpose of monitoring.

The ideas and concepts in the Framework were developed in conjunction with a diverse group of experts, including advocates for the rights of LGBTI people, psychosocial support service providers, police departments,
prosecutors’ offices, judges, ministries of justice, and other legal practitioners. Through the course of the Justice Works Program, ABA staff consulted those on the forefront of cross-sector responses to bias-motivated violence, gaining perspective on what was happening in almost every region in the world.

In November 2017, the Justice Works Program convened 35 experts in Lima, Peru for an Expert Workshop on Comprehensive Responses to Violence. The three-day event involved focused discussions on the three phases of response to violence: immediate, intermediate, and long-term responses. The Expert Workshop provided ABA staff with the substantive information to draft the Framework. The emergent draft received extensive feedback from the program’s expert network, and the Framework was finalized in March 2019.

The document contains 16 illustrative case studies drawn from the consultations and the Expert Workshop. The case studies were provided by courageous individuals and organizations wishing to contribute to global efforts to better respond to bias-motivated violence against LGBTI people. Additionally, the case studies contain approaches that can be transposed and adapted to strengthen responses by civil society organizations, who are developing tools to work better with justice sector actors to protect LGBTI people.

In recognition of the 2019 International Day Against Homophobia, Biphobia, and Transphobia, the ABA partnered with the Human Rights Campaign in an event to formally launch the Framework. The Justice Works Roundtable was held in Washington, DC, and featured Judy and Dennis Shepard, who shared the way their son’s tragic death could be viewed in relation to the Justice Works Framework. Cynthia Deitle, a former Federal Bureau of Investigations Special Agent and Civil Rights Unit Chief, spoke of her experience implementing the Shepard Byrd Act upon its enactment in 2009. Finally, Ernesto Zelayandia, a Fellow with the Inter-American Commission for Human Rights, discussed the variance in state obligation to document bias-motivated violence across North and South America.

We hope that the Justice Works Framework inspires LGBTI people and the organizations that represent them and justice sector actors worldwide to increasingly engage and forge strong, meaningful relationships. We hope that, following the guidance in this Framework, these relationships can become a foundation for justice sector actors to better uphold the rule of law, take into account the interests of LGBTI survivors, and consider the impact on the entire LGBTI community in cases of bias-motivated violence.

To access the Framework and its accompanying materials, please visit ambar.org/justice works. For more information from the Program Director, Jordan Long, please email jordan.long@americanbar.org or JusticeWorks@americanbar.org.

JORDAN THOMPSON LONG
Director, ABA Justice Works Program, Senior Counsel, ABA Center for Human Rights, Director, Sexual Orientation & Gender Identity Programs, ABA ROLI

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Title VII Cases Update  
continued from page 1

County denied that was its motivation, but also moved to dismiss on the ground that Title VII does not cover sexual orientation discrimination. The trial court granted the motion, and the Eleventh Circuit Court of Appeals affirmed, following its precedent. Zarda and Bostock will be consolidated for purposes of argument.

A third case accepted for review raises the question whether Title VII prohibits discrimination based on gender identity or trans status. In R.G. & G.R. Harris Funeral Homes v. EEOC, prior to transitioning and while still presenting as a man, Aimee Stephens had spent several years successfully employed by a small funeral home. Upon notifying the owner that she would be transitioning and would be wearing women’s attire, she was fired in accordance with the employer’s view of “God’s commands.” The EEOC brought suit on Stephens’s behalf, alleging a violation Title VII. The EEOC and Stephens prevailed in the Sixth Circuit Court of Appeals. The Supreme Court granted cert, rephrasing the questions slightly, and will consider whether Title VII bars discrimination against employees because of their transgender status, or as sex stereotyping under the holding of Price Waterhouse v. Hopkins.

The Court’s decision to review these cases threatens to roll back protections already largely available to LGBTQ people. Federal courts and agencies have increasingly understood that discriminating against people based on their sexual orientation or the fact that they are transgender amounts to forms of sex discrimination that violate existing federal law. Indeed, the availability of these protections under Title VII and similar sex discriminations has been officially recognized by the ABA. On February 6, 2018, the ABA voted overwhelmingly to pass Resolution 116A, interpreting Title VII to prohibit discrimination based on sexual orientation or gender identity.

Thus, were the Court to retrench to a position permitting discrimination, as a practical matter it would be taking away rights from LGBTQ people that have been established by multiple federal courts, confirmed by the EEOC, advocated by the ABA, and accepted by the overwhelming majority of American people. SCOTUS would be forcing LGBTQ folks back into the closet, at least at work and ultimately in multiple other settings.

Luckily, plaintiffs in these cases have strong arguments. There are a number of reasons to recognize that Title VII prohibits discrimination based on both sexual orientation and trans status. First and foremost, the plain language of Title VII demonstrates that the statute should be interpreted to prohibit discrimination based on both sexual orientation and trans status. Specifically, it prohibits discrimination “because of” an individual’s sex. It is impossible to discriminate based on a person’s sexual orientation or trans identity without taking their sex, or perception of it, into account.

In addition, it is well established that discrimination based on sex-related stereotypes is a form of sex discrimination. When transgender people face discrimination because they don’t conform to employers’ expectations about how men and women should look, behave, or identify, that’s sex discrimination. When lesbian, gay, and bisexual people face discrimination because of their sex in relation to the sex of the people they form intimate relationships with, that’s sex discrimination as well.

Finally, it is clear that Title VII should cover gender transition when we understand that the same clause of Title VII prohibits religious discrimination (in the same words) and has long been understood to prohibit discrimination based on religious conversion.

Justices from across the political spectrum, including the conservatives, have been willing to apply arguments like these in other cases. For example, In Oncale v. Sundowner Offshore Services, Justice Scalia wrote for a unanimous Court and held that Title VII bars sexual harassment by one male against another male “because of sex.” In so holding, the Court paid particular attention to the text of the statute, and declined to give it a limited meaning simply because male on male harassment was not the main focus of the enacting Congress. Similar textual analysis here would mean that a decision based on someone’s transgender status or sexual orientation would similarly be “because of sex,” and that conclusion should not be changed because Congress was not thinking specifically of those situations when it enacted the law.

We will see if the increasingly conservative Court of the Trump era has the intellectual integrity to apply a similar rule in this context. Consistent with its view that Title VII prohibits discrimination on these bases, the ABA may be considering filing a brief in these cases.

THE SOGI COMMISSION
How do LGBTQ2I people end up incarcerated at three times the rate of the rest of the population? Why are 40% of incarcerated women queer?

Discriminatory police profiling contributes to the disparity.

Policing in the U.S. is not neutral. While this issue has been a focus for many communities of color, it is important to understand how it impacts the LGBTQ2I community as well. LGBTQ2I people in many communities are more frequently stopped by police than non-LGBTQ2I people. Police often engage in discriminatory profiling and criminalization of LGBTQ2I people, using loitering, identification, prostitution, lewdness, and other laws to target them for harassment, arrest, and incarceration. This is a historical and current-day, systemic and nationwide practice. Our community is at risk and those most affected are individuals that are of color, transgender and gender non-conforming, poor, and/or young.

In the U.S., transgender people are routinely profiled as sex workers and are “stopped and searched while doing nothing illegal, including walking home, returning from school, and waiting for the bus.” In Los Angeles, 60 percent of transgender Latinas surveyed reported being stopped by police while merely walking to the grocery store or to the bus. Profiling of transgender women, particularly transgender women of color, is “so pervasive that queer communities have coined the phrase ‘walking while trans’ to describe the experience of being targeted because of their gender and racial identities.”

Consider Linda Dominguez, who was profiled and criminalized for walking home while Latinx and trans. In 2018 in New York, Linda was arrested for walking through a park on the most direct route to her home, singled out by three police officers even though others from her bus were also crossing the park from the bus stop. Linda was then harassed and humiliated by police at the station because she is transgender, and was charged with for “false personation,” for giving police her legal first name. Even though Linda “explained that she was a transgender woman and had legally changed her name and gave the officer both her previous first name and her current first name, along with accurate information about her last name, date of birth, and home address.”

In 2013, Monica Jones, a Black transgender woman, activist, and social work student from Arizona State University was arrested in Phoenix for “manifesting intent to engage in prostitution,” after accepting a ride to a bar from undercover police. The arresting officer testified that his basis for arresting Ms. Jones was her presence in an area known for prostitution, which happened to be near her residence, and her outfit, a black form-fitting dress. Ms. Jones was convicted. However, unlike many profiled trans people, she was able to successfully challenge her conviction on appeal. Ms. Jones also reported being stopped and questioned by police four other, separate times on suspicion of engaging in prostitution - for merely walking down the sidewalk or having conversation with friends.

LGBTQ2I youth have a highly disproportionate rate of contact with the criminal justice system compared to their heterosexual peers. A 2011 study found LGB youth were 53 percent more likely to be stopped by the police, 60 percent more likely to be arrested before the age of 18, 90 percent more likely to have had a juvenile conviction, and 41 percent more likely to have had an adult conviction, than their heterosexual peers – even when controlling for race, socioeconomic status, and criminal behavior. Transgender youth, young gay men of color, gender non-conforming LGBTQ2I youth, and homeless LGBTQ2I youth are frequently profiled as sex workers by police and detained in the juvenile justice system. Young, masculine of center, queer women are profiled as violent and/or gang members. Some experts believe that police are more likely to arrest and charge LGBTQ2I youth because “they equate homosexuality with deviancy,” and vague laws such as disorderly conduct, public lewdness and loitering allow for significant discretion on the part of individual police officers.

Solicitation laws, and related criminal offenses such as lewd conduct and sodomy, have also been used for decades to police gay men’s non-commercial sexual activity while allowing the same heterosexual activity to occur with-
out sanction. Even after Lawrence v. Texas, and even in places like ‘liberal’ California, lewd conduct laws are selectively enforced against gay men by police. This disproportionate enforcement is often fueled by purposeful and implicit bias. In a 2008 study, 62 percent of police chiefs surveyed believed that “homosexuality constitutes ‘moral turpitude,’” and 56 percent viewed “homosexuality as a ‘perversion.’” Gay men do not more frequently engage in public sex than others; surveys suggest that people of all sexual orientations engage in public sexual activity, with one poll reporting nearly all people surveyed admitting to public or semi-public lewdness. Yet, as one Los Angeles police officer admitted, different-sex sexual partners who are caught engaging in public sex acts are rarely arrested, but if two men are consensually involved in a car, officers usually arrest them.”

The discriminatory profiling of LGBTQ2I persons raises serious constitutional questions. Federal courts increasingly recognize that government actions that target or harm LGB and transgender people are subject to heightened constitutional scrutiny both as impermissible sex discrimination, and because transgender status is a suspect classification. Profiling LGBTQ2I people because they act or dress in a manner that defies gender stereotypes is discrimination based on gender. The communication of messages about gender through clothing and dress is also First Amendment protected expressive activity.

This disproportionate profiling and selective enforcement has real-world consequences, including driving up the incarceration rate for LGBTQ2I persons, leading to reduced opportunities for education, housing, and jobs. Understanding the issue is a first step, but the legal profession must consider further legislation and litigation strategies to end these discriminatory practices.

TASHA HILL
Tasha Hill is an LGBITQ and prisoner civil rights attorney working at The Hill Law Firm and teaches TQ Criminalization and Incarceration at UC Irvine School of Law. While at the ACLU of Southern California, Ms. Hill co-authored an amicus brief for the Ninth Circuit (Erotic Service Provider Legal Education and Research Project v. Gascon (9th Cir. 2018) 880 F.3d 450) addressing these issues, and much of the information in this article is drawn from that work.

OUT AND ABOUT: THE LGBT EXPERIENCE IN THE LEGAL PROFESSION

Out and About: The LGBT Experience in the Legal Profession is a collaboration between the American Bar Association Commission on Sexual Orientation and Gender Identity (SOGI) and the National LGBT Bar Association (LGBT Bar). Both SOGI and the LGBT Bar went to great lengths to identify and encourage authors to share their stories. This joint publication is an anthology of first person narrative accounts. These moving accounts introduce new insights and perspectives. Out and About is a primer that will inspire new conversations and shine light where it has not shone before. This unique book is of interest to both LGBT and non-LGBT readers alike.

While developing this book, SOGI and the LGBT Bar sought diversity in all its forms—differing sexual orientation and gender identities as well as differing ages, races, geographic locations, practice settings, law schools, years of experiences, and more. This book’s goal is to promote full and equal participation in the legal profession by persons of differing sexual orientations and gender identities.

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In January, New York joined 14 other states and the District of Columbia in banning the use of conversion therapy on minors—a controversial practice aimed at changing an individual's sexual orientation or gender identity.

New York was also the first state to address the practice through executive action, working with three state agencies to ban private health care insurers and Medicaid from covering conversion therapy and to prohibit state-licensed mental health facilities from providing it to minors.

“We have been working to ban this practice in New York for quite some time,” says Alphonso David, counsel to New York Gov. Andrew Cuomo. “The American Psychological Association concluded that these efforts, these ‘sexual orientation change’ efforts, pose a significant health risk to LGBT people, leading to a variety of conditions, including depression, suicide and substance abuse.

“We have looked at this issue from a health perspective because in at least the last four decades, the idea of reparative therapy, as it used to be called, has not produced any scientific research to substantiate the claim that it results in acute.”

In addition to the American Psychological Association, many other professional mental and medical health organizations have condemned conversion therapy, including the American Academy of Child and Adolescent Psychiatry, the American Academy of Pediatrics, the American Counseling Association and the American Medical Association.

Guiding the Way

The ABA took a stand on conversion therapy in 2015, recognizing “the basic right of LGBTQ people to be free from harmful and ineffective ‘treatments’ to change the core of who they are,” as stated in a report attached to Resolution 112. The adopted resolution urged governments to enact laws that prohibit state-licensed mental health professionals from using conversion therapy on minors.

The ABA's Commission on Sexual Orientation and Gender Identity continued those efforts, organizing a panel of legal and advocacy experts, including David, to discuss the state of conversion-therapy ban laws and policy at the 2019 ABA Midyear Meeting in January.

The SOGI Commission also plans to release Banning Conversion Therapy on Minors: A Guide for Creating Tribal and State Legislation, a resource that will be available online and in printed form. The intention is that legislative staffs use it to develop state statutes and tribes use it to develop tribal codes that ban the use of conversion therapy on minors.

The primary goal of the guide is to provide suggestions on how laws can be drafted to offer safety and support for children who are lesbian, gay, bisexual, transgender, queer or two-spirit, a term used by Native Americans, as well as to incorporate local cultural traditions and meet requirements of relevant federal laws.

Kori Cordero, a tribal justice specialist for the Tribal Law and Policy Institute in West Hollywood, California, and a
member of the SOGI Commission, called on experience in tribal code development to co-author the guide, which can be used by “advocates on the ground who are trying to take this approach that is important to the ABA.”

Now that there are laws at the state as well as municipal levels, Cordero hopes to also supply tribes with the resources they need to create their own tribal laws banning conversion therapy. “Here is an actual tool for what you can do and how you can do it,” Cordero says. “With conversion therapy, there is a lot of possibility in terms of being safely within the constitutional bounds with certain actions that states can definitely take now, and tribes can definitely take now, to protect minors.”

Not a Practice of the Past
Shannon Minter, the legal director for the National Center for Lesbian Rights in San Francisco, is also a member of the SOGI Commission who spoke on the panel and worked on the guide. He contends there is an ongoing misconception that conversion therapy is a practice of the past. Conversion therapy dates to at least the 1890s, and according to the guide has involved many “aversion” methods, such as forcing individuals to hold ice or hot coils while looking at pictures of LGBTQ people or to face isolation in locked rooms.

“The more extreme treatments have fallen away for the most part, but what has survived—and in fact increased—is just ordinary counseling that purports to be able to change a person’s sexual orientation or gender identity,” Minter says. A 2018 study by the Williams Institute at UCLA School of Law estimates that about 698,000 LGBTQ adults in the U.S. have received conversion therapy, including about 350,000 who received it as adolescents. The study’s researchers also estimate that 20,000 LGBTQ youths will undergo conversion therapy from a licensed health care professional before age 18.

Minter says conversion therapy continues to affect thousands of youths across the country because some mental health professionals have been able to exploit families who don’t know how to support a LGBTQ child. “They tell them that no child is really gay or transgender, they’re just mixed up, they’re confused,” he says. “For parents who don’t have a ton of information, they believe them. Most people believe medical professionals who are licensed by the state.”

Legislation is one of the most effective tools in helping these families, says Minter, who is also involved with the National Center for Lesbian Rights’ Born Perfect campaign, launched in 2014 to encourage states to pass laws that ban conversion therapy.

Legislative Momentum
In the past few months, 14 more states have introduced bills related to conversion therapy for minors, according to the campaign. Minter is optimistic that Maine, Massachusetts and Utah will also take steps to ban the practice this year.

“We hope to pass more state laws, and part of what is so powerful about doing that is all of the public education and coalition-building work that goes into those efforts,” he says. “The more visibility and the more groups such as the ABA that we get involved in these coalitions, the greater the opportunity to reach more families.”

David adds that the SOGI Commission’s guide will assist public policymakers throughout the country who are evaluating the issue and need direction on how to substantiate their state’s interest. Even though states have different constitutions, statutes and regulatory schemes, he says, the commonality between the legislation passed by the 15 states and the District of Columbia provides a useful model.

“To the extent someone is looking to challenge any piece of legislation, one of the main factors a court will look at is whether or not the state has a vested interest in legislating in this area,” David says. “The American Psychological Association has given us sufficient information to substantiate the state’s interest, and in addition to that, the ABA guidance materials are extremely helpful in providing support to those states that are looking to address this issue.”

This article was published in the April 2019 ABA Journal magazine with the title “Protecting LGBTQ Minors: ABA develops guide for drafting laws to ban controversial conversion therapy”, www.abajournal.com/magazine/article/aba-draft-law-conversion-therapy.

BY AMANDA ROBERT
A legal affairs writer, joined the ABA Journal staff in 2019. She previously worked for the Chicago Daily Law Bulletin and Chicago Lawyer as an assistant editor and staff writer, and for Legal Newsline as a contributing writer. Robert also handled communications for a national intellectual property law firm and was a reporter for Illinois Times and the Centralia Daily Sentinel in Southern Illinois. She earned a Master of Arts degree in journalism from Indiana University and a Bachelor of Arts degree in communication, with a certificate in social justice, from Saint Louis University.
Another Successful LGBT+ Forum

The ABA’s Section of Litigation held its second biannual LGBT+ forum on April 30th & May 1st in Manhattan. Coming less than two months before the 50th anniversary of the Stonewall Inn riots, the forum brought together lawyers, academics, students, and LGBT+ advocates from around the country and provided a range of sessions and speakers including lawyers at the forefront of LGBT legal issues who have navigated their way to the top of the profession. The forum’s plenary sessions focused on litigating LGBT issues before the U.S. Supreme Court after Justice Anthony Kennedy’s departure and how the Stonewall uprising has shaped the LGBT+ civil rights movement.

The forum was kicked off by ABA President Bob Carlson whose remarks focused on three key points. The ABA’s official endorsement of the Equality Act, lawyer wellness and issues related to substance use and abuse, anxiety, depression and other mental illnesses in our profession, and the ABA as the champion for due process and the rule of law.

The opening plenary session “LGBT+ Issues in a Post-Kennedy World,” featured among others, Melissa Sherry, a Latham & Watkins partner and member of the law firm’s Supreme Court & Appellate Practice, who is also a former assistant to the U.S. solicitor general; as well as Joshua Matz, an attorney at Gupta Wessler, a former law clerk to Justice Kennedy, and publisher of “Take Care,” a blog focusing on “incisive analysis of the legal issues raised by Donald Trump’s presidency,” according to Gupta Wessler’s website. At the heart of the program was how Kennedy’s departure could affect the future of LGBT+ litigation. Including the exclusion of transgender persons from the military; the application of state parentage laws in light of Obergefell v. Hodges and Pavan v. Smith; and the applicability of Title VII.

Rounding out the two days was a plenary session titled, “From Rebellion to Rights: An Overview of How the Stonewall Uprising Sparked the LGBT+ Civil Rights Movement.” The program, moderated by Section chair-elect James Reeder, Jr. featured legendary LGBT+ activists, Perry Brass and Martha Shelley. Both Perry and Martha are authors/activists and early members of the Gay Liberation Front New York. Each had a front row seat to the Stonewall Riots and events that unfolded in the days after the riots took place. Perry referred to the Stonewall Riot at the LGBT+ communities, “I’ve had enough moment.” Martha ended her remarks with this, “Everyone has a contribution to make, what risks will you take...?”

SKIP HARSCH
Director, ABA Commission on Sexual Orientation and Gender Identity
MARK AGRAST
EXECUTIVE VICE PRESIDENT AND EXECUTIVE DIRECTOR OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW
Mark Agrast has worked tirelessly to advance the rights of LGBT persons. Among other achievements, Agrast helped start the American Bar Association’s Committee on the Rights of Gay People in 1983, establish the ABA SOGI Commission in 2007, and lead the effort to pass a resolution supporting same-sex marriage in the House of Delegates in 2014. Mark has also co-founded the LGBT Bar Association of Washington, D.C. and as a key leader in the World Justice Project, Agrast assisted in the development and implementation of its Rule of Law Index. From 2009-14, he was Deputy Assistant Attorney General in the Office of Legislative Affairs at the U.S. Department of Justice. Agrast graduated from Case Western Reserve University, pursued post-graduate studies as a Rhodes Scholar at the University of Oxford, and received his J.D. from Yale Law School.

MARY EATON
PARTNER AT WILLKIE, FARR & GALLAGHER LLP IN NEW YORK
Mary Eaton has combined her litigation practice with pro bono on behalf of LGBT clients. Eaton led a team of lawyers who sued the New York State Department of Health on behalf of a class of transgender Medicaid recipients and in 2016 successfully forced the Department to change a regulation that barred Medicaid coverage for transgender-related health care. Also, Eaton drafted an Amicus brief on behalf of 92 plaintiffs represented by Willkie attorneys in the U.S. Supreme Court Obergefell v. Hodges case. In 2017, Eaton and her team filed an Amicus brief before the Supreme Court on behalf of national education groups in Gloucester County School Board v. G.G., challenging a Virginia Public School District policy prohibiting transgender students from using the restroom conforming to their gender identity. A graduate of Columbia Law School, she began her career at Cravath, Swaine & Moore until joining Willkie in 2002.

SHARON M. MCGOWAN
CHIEF STRATEGY OFFICER AND LEGAL DIRECTOR AT LAMBDA LEGAL
Sharon McGowan is the oldest and largest LGBT legal group in the country. McGowan leads a team of nearly three dozen lawyers. Before that, she served as Deputy Director of appellate litigation at the U.S. Department of Justice Civil Rights Division. Here she developed the arguments that led the United States to stop defending the Defense of Marriage Act, as well as the arguments put forth on the merits in the Windsor and Obergefell cases. In addition, she served as Counsel for the United States as amicus in G.G. v. Gloucester Co., where the Fourth Circuit upheld the finding that requiring a transgender student to use a restroom that corresponds with their biological sex violates Title IX. McGowan has a B.A. from the University of Virginia and received her J.D. from Harvard Law School.

The Stonewall Award recognizes lawyers, members of the judiciary and legal academia who have effected real change to remove barriers on the basis of sexual orientation and gender identity in the legal profession, the world, state, state/or locale and championed diversity for the LGBT community.
The Commission on Sexual Orientation and Gender Identity would like to congratulate former Commissioner, Shane Vannatta Shane who was sworn in as the newest Fourth Judicial District Judge of Montana on Friday, February 22nd.

He will be the first to hold the newly-created seat on the District Judge bench. He will be the state’s 49th active judge, the highest number in Montana history. And most importantly he’s also the first openly gay judge to serve in the state! Thank you, Shane, for you years of service to the SOGI Commission, the ABA, and the legal profession. We are lucky to have individuals like you serving on the bench.