In May of this year, Kansas and Oklahoma passed laws that allow foster care agencies to refuse to place children in foster or adoptive homes “when the proposed placement of such child would violate such agency’s sincerely held religious beliefs” or “when the proposed placement would violate the agency’s written religious or moral convictions or policies.” In July, South Carolina enacted a similar provision through its state budget. This permission to discriminate against LGBTQ2 people and others seeking to become foster parents or to adopt is part of a concerning nationwide trend.

These discriminatory laws must be challenged. Supporters of the bills claim that religious adoption agencies may move into their states if they have the legal ability to refuse LGBTQ2 couples. However, having more agencies does not mean the state has more placement families, which is the crucial question to serve children in need. The bills are clearly designed to permit discrimination against LGBTQ2 couples, and may also be used to discriminate against unmarried couples and single parents, which threatens the ability for children in need to find a welcoming home.

In discussing this issue, it is important to separate the ideas of fostering and adoption in order to protect the parental rights of another group that has historically faced discrimination: the poor parents of color who are statistically more likely to be dragged through child abuse or neglect proceedings, and are therefore at greater risk of having their children placed in foster care. Foster parenting operates with

continued on page 12
Dear ABA Friends and Colleagues,

The opportunity to serve as Chair of the ABA Commission on Sexual Orientation & Gender Identity (SOGI) is a humbling undertaking which I accepted from President Bob Carlson with much pride and commitment to doing the best job possible.

As we embark together as a Commission, we are cognizant that the lives of countless individuals and families are affected by our collective work within the context of the overall ABA and our legal profession across the nation and the globe. We at SOGI depend on the collective support of the entire ABA. We cannot and do not operate in a vacuum, but rather we actively collaborate with numerous entities both within the ABA organization as well within the fabric of the national and international legal community. One of our primary mandates is to uphold the Rule of Law for our LGBTQ2 constituents. If you are reading this, that makes you a partner as we strive to work within the colorful fabric of what brings us together at the ABA in our pursuit of liberty and justice for all under our U.S. Constitution and through the application of due process and equal protections.

Whether we are advocating for the protections of past precedents or pursuing the creation of fair and equal precedent setting laws, under the 14th Amendment, the 20th Amendment, the 1st Amendment or the 2nd Amendment, or any other part of the constitution, we are doing so collectively to create a more just and inclusive society.

Our LGBTQ2 community not unlike other sectors of our society have been under attack recently under the current political climate. Attacking any one group or any part of a group which has traditionally been vulnerable and/or disenfranchised is an affront not only to that class of people, but it to that which we hold so dear, the Rule of Law. We cannot and must not become numb. We cannot find it acceptable that our civil and/or human rights may be denigrated, and certainly not based on who we are or because of the person we love happens to be of the same sex, gender, sexual orientation or because they may be of a different racial or ethnic background, or because we may have a disability. An attack on one of us is an attack on all of us.

As we look back, just a few decades ago, interracial marriage was outlawed in the U.S. and South Africa as miscegenation. It was not until 1967, under the U.S. Supreme Court landmark civil rights decision in the case of Loving v. Virginia that interracial marriage became legal based on the ruling that race-based restrictions on marriages violated the Equal Protection Clause of our constitution. The precedent setting case struck down all state laws banning interracial marriage. Prior to Loving, there were 16 states that had still not repealed anti-miscegenation laws that forbade interracial marriages. However, it was not until 2000, that Alabama became the last state in the country to overturn its ban on interracial marriage despite more than three decades having passed since Loving. Not far behind was South Carolina which was the second-to-last to get rid of its interracial marriage ban in 1998, 31 one years after the U.S. Supreme court deemed it illegal.

On June 26, 2015, the U.S. Supreme Court handed down its precedent setting decision in Obergefell v. Hodges ruling that state bans on same-sex marriage and on recognizing same-sex marriages duly performed in other jurisdictions are unconstitutional under both the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution. In brief, Justice Kennedy asserted both that the right to marry is a fundamental right inherent in the liberty of the person and thereby protected by the due process clause, and, by virtue of the connection between liberty and equality, the right to marry is also guaranteed by the equal protection clause. As such, he concluded that “same-sex couples may exercise the fundamental right to marry”.

While there are other noteworthy civil rights and human rights struggles that have yielded significant precedent setting cases, I thought of briefly referring to Loving and Obergefell as a way to illustrate how our hard work and advocacy at the ABA and with our national sister organizations often intersect. Here, the fundamental protections for interracial marriage helped to form the basis for our success in obtaining protections for same sex marriage. In reading Obergefell, you will see how the seminal case of Loving and other key decisions played a crucial role in the court’s analysis in Obergefell. And, I also note that Sharp v. Perez, the first U.S. Supreme Court case which helped get us to get to Loving, is noteworthy of acknowledgement. And of course, it is important to see the rulings of Eisenstadt v. Baird, and, Griswold v. Connecticut, respectively, on the Due Process Clause extending to certain personal
From the Chair

choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. There are many more fights ahead of us as we strive to achieve a more just and inclusive society. We are undeterred in these fights. As we dive into the good fight of getting rid of Conversion Therapy laws, or advocating for the rights of Trans persons to be able to serve our country, we at SOGI will continue in earnest to advocate the rights of the LGBTQ2 community as a whole, and at the same time be ready to help where we can to advance the rights of others by working in partnership with you our supporters, including but not limited to our partner organizations that form the ABA Diversity Center.

Towards this end, I am proud to announce that SOGI will be launching its Public Interest Law LGBTQ2 Scholarship Program in 2019. More to follow on this amazing project. We are also formalizing SOGI’s Amicus Brief Project, and, the Banning of Conversion Therapy Initiative whose work will be highlighted during the Las Vegas Mid-year Meeting. And we will revamp and relaunch our Ally Toolkit to help our friends help us. And, much more to come.

In closing, I wish to congratulate our 2019 Stonewall Awards Honorees, Sharon McGowan, Mary Eaton, and Mark Agrast. You are all amazing advocates and we cannot thank you enough for your incredible work to protect the rights of others and for advancing the Rule of Law. We are proud of you. Cheers!

Thank you for your partnership and support.

Warmly,

VICTOR MANUEL MARQUEZ
Chair, ABA Commission on Sexual Orientation and Gender Identity

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.

To order, call the ABA Service Center at (800) 285-2221 or visit our website at www.ShopABA.org/outandabout

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Howard is Of Counsel with the firm Stoel Rives LLP in the firm’s Seattle office, where he assists business, governmental and church clients with their employee benefits legal needs. Howard is serving his third and final year as an ABA SOGI Commissioner.

Howard, what led to your involvement in LGBTQ2 advocacy?
HBT: I first became involved in the movement to allow for same sex marriage and domestic partnerships from the time we first moved to Washington 11 years ago. That involvement included raising money for ballot propositions for marriage equality.

I have always had an interest in marriage equality because of the impact it has on health plans and the availability of health benefits for same sex couples. For me, that’s personal and professional. My personal interest is as a gay man and for the benefit of my family and friends.

What led you to SOGI and becoming a Commissioner?
HBT: I have been active in the Health Law Section for many years and served as the liaison to SOGI from the Health Law Section. I was then appointed to the SOGI Commission. I have also served on the editorial board of the ABA Health Lawyer publication for 12 years.

What accomplishments from your work on the Commission are most important to you and give you a sense of pride?
HBT: My work as Chair of the Education Committee, including the CLEs we have put on at the ABA Annual and Mid-Year meetings. I’m also proud of the anti-bullying work of the Commission. The work of the Commission as a whole is important, including the Stonewall Awards and the recognition they give for the important work of the awardees.

What advice would you give to future Commissioners?
HBT: One thing I did not fully understand when I was appointed to the Commission is the constraints put on the work of the Commission by the existing policies of the ABA. Working within the rules of the ABA can be challenging at times. Any new Commissioner should take time to understand how the ABA works and the resolution process. I did not come in with experience with the House of Delegates and the resolution process, so that was a learning experience for me. Knowing how the ABA works is helpful.

What do you enjoy most about your employee benefits practice?
HBT: I enjoy utilizing my expertise in how to provide employee benefits for employees and their same sex partners. I am proud of that work. I co-authored a book on employee benefits for domestic partners prior to the recognition of marriage equality by the U.S. Supreme Court. Most of my clients wanted to provide benefits for same sex partners of employees, and I have enjoyed working with them to provide that. It has been a joy to work in a part of the country where that expertise is valued by my clients.

Howard, I see your undergraduate degree is in piano performance. Tell me about that.
HBT: I grew up in Scarville, a tiny farming community in Iowa, with a population of 90, and started piano lessons in the 4th grade. I have now been a church musician for almost 50 years. I have really enjoyed that as an avocation in addition to being a lawyer. There are a lot of similarities. Music involves recognizing patterns and involves logic and problem-solving skills. Lawyering involves much of the same problem-solving as music.

Music can be a creative outlet apart from the practice of law, and it can be a lot of fun.

Tell me about your family.
HBT: My husband John is a priest in the American National Catholic Church and is a psychotherapist. We have been together for 14 years and got married in Manhattan in 2011 when marriage became legal in New York. John and I each have two adult children from previous relationships. We have a pug named continued on page 6
Few attorneys have done more to promote and institutionalize the ideals of our profession or the human rights of LGBTQ people than this year’s Stonewall Award winner, Mark Agrast. Throughout his career, Mark has fought to ensure that the principles of equality, dignity, and the rule of law are not just abstract concepts, but lived realities enshrined in governmental and legal institutions and norms. Time and again, Mark has been at the forefront of efforts to advance the place of LGBT people in the legal profession and the rule of law both nationally and globally. He is one of the true legal heroes of our time, and the ABA SOGI Commission is deeply honored to present him with this award.

Mark’s devotion to public service is legendary. After studying as a Rhodes Scholar at the University of Oxford and receiving a J.D. from Yale Law School, Mark practiced international law with the Washington office of Jones Day before embarking on more than two decades of public service. He worked first as a top aide to Massachusetts Congressman Gerry E. Studds and then as Counsel and Legislative Director to Congressman William D. Delahunt of Massachusetts.

In those roles, Mark earned a reputation for integrity and a rare ability to translate ideals into effective strategies for real-world change. He was influential in shaping legislative responses to discrimination in employment, housing, and public accommodations, military service, marriage, adoption, child custody, and HIV and AIDS. And as an openly gay man, Mark broke boundaries and built support for LGBT people at a time when being out required considerable personal courage. For some Congresspersons, Mark was the first openly gay person they had ever met, and interacting with him helped dispel negative stereotypes and build support for LGBT equality.

After leaving Capitol Hill, Mark continued his public service in a variety of roles. From 2003 to 2009, he was a senior vice president and senior fellow at the Center for American Progress, one of our nation’s most important and influential progressive think tanks. From 2009 to 2014, after the election of President Obama, Mark served as Deputy Assistant Attorney General in the Office of Legislative Affairs in the Department of Justice. In 2014, he became executive director and executive vice president of the American Society of International Law, a nonprofit, nonpartisan, educational organization whose members include scholars, practicing lawyers, judges, and diplomats in over 100 countries.

One of the hallmarks of Mark’s career has been an acute sensitivity to the importance of building and strengthening progressive institutions. He is a longtime member of the ABA House of Delegates and served on the Board of Governors and its Executive Committee. He served as Chair of the Program and Planning Committee of the Board, where he designed and chaired the ABA’s Enterprise Fund, an initiative to fund innovative collaborative projects within the Association. He is a former chair of the Commission on Disability Rights, the Commission on Immigration, and the Section of Individual Rights and Responsibilities. He is also a member of the Board of Governors of the Washington Foreign Law Society and a leader in the World Justice Project, where he has played a key role in designing and implementing its Rule of Law Index, which measures the extent to which countries adhere to the rule of law.

These accomplishments have left a lasting mark, both on the legal profession in the United States and on the growing acceptance of human rights as a universal standard of accountability throughout the world. Within the ABA in particular, Mark has been a tireless champion of promoting the highest ideals of service, inclusion, equity, and professional responsibility. He was Chair of President Greco’s Commission on the Renaissance of Idealism in the Legal Profession and served on President Hubbard’s Commission on the Future of Legal Services. He was a member of the Center for Racial and Ethnic Diversity and currently serves on the Council of the Section of International Law.
Last but not least, it is no exaggeration to say that without Mark’s leadership, many of the most important institutions that support the inclusion and equality of LGBT people in politics and law would not exist. Mark co-founded the Lesbian and Gay Congressional Staff Association and the LGBT Bar Association of DC, and was an early leader of the National LGBT Bar. Within the ABA, he was instrumental in creating the Commission on Sexual Orientation and Gender Identity, for which he served as Special Advisor. These accomplishments are extraordinary and reflect a keen awareness that the best way to secure lasting change for LGBT people is to build organizations and institutions that can sustain future generations and provide them with a foundation for continued advocacy and change.

It is fitting that the SOGI Commission now honors Mark for his foresight and vision with its Stonewall Award. Like the brave individuals who fought back at the Stonewall Inn in New York City in 1968, Mark has fought hard to give LGBT lawyers and community members not only a history, but a future. In bestowing Mark with this award, we intend not only to thank him for his years of service, but to renew our own commitment to the legacy of courage and commitment he embodies and to the ideals he so faithfully serves.

BY SHANNON MINTER
Shannon Minter is the Legal Director of the National Center for Lesbian Rights (NCLR), one of the nation’s leading advocacy organizations for lesbian, gay, bisexual, and transgender people. Please note, The Equalizer’s editors may have changed the varying sexual orientation and gender identity acronyms to “LGBTQ2” for consistency.

**Title Howard Bye-Torre**

continued from page 4

Trekkie Monster, after the character in Avenue Q.

**What else should people know about you? What are your interests beyond music and the practice of law?**

**HBT:** Well, I am a big Disney fan. I blame it on being born in 1955, the year Disneyland opened. For the third month of my sabbatical last year, my sister and I rented a house in Orlando for the month to get Disney out of our systems. Our plan was to do it all, and as much as we wanted.

**Did it work?**

**HBT:** No, I still have not gotten Disney out of my system and I’m going back to Orlando next week. Like they say – it’s the happiest place in the world.

BY JEFF BRODIN

Thanks to Jeff Brodin for conducting this interview for The Equalizer. Please note, The Equalizer’s editors may have changed the varying sexual orientation and gender identity acronyms to “LGBTQ2” for consistency.

**Conversion Therapy: The Current State of Law, Policy, Advocacy, and Awareness in the United States and Beyond**

SOGI Conversion Therapy Update at ABA Midyear 2019

**The Miseducation of Cameron Post**
An Interview with
SOGI Stonewall Awardee Mary Eaton:
On Pro Bono and LGBTQ2 Rights

Mary Eaton is a partner at Willkie Farr & Gallagher and Chair of the firm’s Business and Corporate Litigation Practice Group. That’s impressive enough, but she also maintains an enormous pro bono case load. The Legal Aid Society has recognized Eaton for her pro bono service with its Pro Bono Publico Award six times. She was selected by the New York Law Journal as a 2015 honoree for its “Lawyers Who Lead by Example” award in the pro bono category, received the Thurgood Marshall Award from the Federal Bar Council, was named Outstanding Pro Bono Volunteer by the New York State Bar Association and was given the Attorneys and Advocates Award by the Sylvia Rivera Law Project.

Now, Ms. Eaton is one of SOGI’s 2018 Stonewall Award recipients, recognized for her extensive pro bono work on behalf of LGBTQ2 clients. Recently, I had the opportunity to sit down with Eaton and talk about her commitment to pro bono and her other passions:

Have you done pro bono work since you first became a lawyer?
Pro bono has always been an important part of my identity as a lawyer, and I have been doing it since I was in law school! My first work was on a correctional law project dealing with prisoners’ rights.

Tell us about some of the pro bono work you have done for the LGBTQ2 community.
In the case of Cruz v. Zucker, my firm partnered with The Legal Aid Society and the Sylvia Rivera Law Project to sue the NYS Department of Health on behalf of a class of transgender Medicaid recipients, seeking to overturn a NYS regulation that barred Medicaid coverage for transgender-related healthcare. The decision in Cruz led to a repeal of the ban and an amended regulation, which required Medicaid coverage for all medically necessary health care for individuals diagnosed with gender dysphoria. I put in almost 900 hours of pro bono on the case and supervised 26 Willkie associates, together with my partner, Wes Powell. In 2017, I was part of a team of Willkie lawyers who filed an amicus brief before the Supreme Court in the case of Gloucester County School Board vs. GG, which challenged a Virginia public school district’s policy prohibiting transgender students from using the restroom conforming to their gender identity. We also partnered with Lambda Legal and successfully sued Sizzler’s Restaurant for discrimination against an LGBTQ2 customer in the first test case of the bias crime law (which holds individuals accountable for anti-LGBTQ2 violence). In that case, I represented a lesbian in an action alleging violations of city and state civil and human rights laws after she was violently attacked and discriminated against in a Sizzler. I was also part of the Willkie team that drafted an amicus brief on behalf of 92 plaintiffs in the Obergefell case.

What was your most meaningful pro bono experience and why?
All of my pro bono experiences are meaningful to me. I’ve been really lucky to work on some great cases for some extraordinary people. We owe everything to our clients. These are people who have already been denied basic civil rights or suffered extreme abuse and yet are brave enough to take a stand, even if doing so puts them at even greater risk. They are the real trailblazers; I’m just there to help.

You put in a phenomenal number of hours of pro bono time. How do you manage that with your day job?
Many people in this country work two jobs just to put a roof over their heads and food on the table. My mom had two jobs. Anytime I feel tired, I just remind myself of that. Plus, it’s a privilege to practice law. Frankly, I think that anyone with the time and resources should be doing something to give back to the community, especially with everything that’s going on today. Now is an important time for us to pull together as a community and fight back.

What other activities are you involved with in the LGBTQ2 space?
I serve on the board of the Hetrick-Martin Institute, the nation’s oldest...
An Interview with SOGI Stonewall Awardee Sharon M. McGowan: A Look at LGBTQ2 Battlefronts through the Lens of Sharon’s Career

Sharon and Emily married in 2010, and have two children, Sadie, 6, and Shaia, 2. The family is active in their synagogue, Temple Shalom in Chevy Chase.

We asked Sharon to share some thoughts regarding her life and career in the movement.

When did you first consider a career as a lawyer?
From a young age, I loved public speaking. I participated in storytelling contests in elementary school, and then joined the forensics team in high school. My interest in becoming a lawyer was driven in significant part by my desire to fight for justice. But looking back on my chatterbox teenage self, I was likely also drawn to a career in the law because it involves talking with other people.

Were you always interested in advocacy for LGBTQ2 rights? When did you begin focusing your professional efforts on these issues?
As has been the case for many Boston-area law students who came before me and since, volunteering with GLAD (now GLBTQ Advocates & Defenders) – first as a help desk volunteer and then as a research assistant to the amazing attorneys at GLAD – offered my most defining and formative experiences in law school. I was also very lucky that Nan Hunter came to Harvard Law School as a visiting professor during my 1L year, whom I immediately sought out as a mentor, and who remains a friend and trusted advisor to this day. In many ways, my identity as a gay person is integrally intertwined with my identity as a lawyer.

Your work at the ACLU led to a huge early victory in trans rights in Diane Schroer’s case against the Library of Congress. The decision was perhaps the first to fully embrace the coverage of anti-trans discrimination by Title VII and is still among the most influential in the trans-rights area. Tell us about how you built Diane’s case into this landmark decision.
I went to the ACLU eager to focus on transgender rights, but I could never have predicted that I would have had the opportunity to represent someone as incredible as Diane Schroer in her case against the Library of Congress. Diane’s
personal story, including her decades of selfless military service, was tremendously inspiring to me. As was her willingness to speak out against the injustice that she had experienced in such a public way. I felt a huge responsibility toward Diane, and carried a heavy emotional burden of trying to make sure that the sacrifices that she was making to be a plaintiff in such a public-facing case were worth it to her. At that point, we knew that the law had started to develop in a way that recognized discrimination against transgender people as a form of sex stereotyping. But in some of those earlier cases, the formulation of the sex stereotyping argument was one that did not necessarily affirm their core identity. I spoke candidly with Diane about the risks involved in trying to formulate her case in a way that did not categorize her as simply “a gender non-conforming man,” but rather validated her as a woman who simply did not fit her prospective employer’s view of who women are, or could be. Her willingness to take that risk ensured that any victory in her case would not benefit only her, but would move the needle in a broader way, which has turned out to be the case.

How did your work change when you came to government service? What challenges greeted you, particularly in the field of LGBTQ2 rights?
I applied to the Justice Department after Diane’s case against the Library of Congress had essentially run its course, and so while I was a little sad at the thought of leaving my days of LGBTQ2 advocacy behind, I felt a tremendous sense of accomplishment, and looked forward to the opportunities to grow professionally and advance civil rights on a broad array of issues as a DOJ attorney. With that said, it was quite the shock to be in the Justice Department and have us filing briefs defending Don’t Ask, Don’t Tell, and the Defense of Marriage Act, as was the case in 2010. When Judge Young issued his decision striking down DOMA in July 2010, I was well placed to offer a civil rights perspective on how the government might choose to proceed in that moment, and was lucky that there were career officials and political appointees who were prepared to push the argument that the government should stop defending this discriminatory law. I had the chance to view from this inside what it looks like to “turn the ship,” so to speak. Countless memos were drafted, scores of meetings were convened, requiring more memos to be written. But in the end, it was incredibly gratifying to be part of the group of people who helped Attorney General Holder, and ultimately President Obama, reach the conclusion that DOMA was not a law that could or should be defended. I experienced similar initial frustration over the Department’s approach to sex discrimination, and obviously felt as though everyone should just fall into line with the Schroer decision that I had helped secured prior to joining DOJ. But again, months of deliberation, careful legal analysis and consultation across the federal government produced another incredibly important step forward when, in December 2014, Attorney General Holder announced that, going forward, DOJ would recognize that the prohibition on sex discrimination in federal employment [Title VII] also proscribed discrimination against a person for being transgender.

You went to OPM, and served at a Senior Level there, before returning to DOJ. Were you able to continue your LGBTQ2 work at OPM?
Among my proudest moments as an attorney was when the Office of Personnel Management, two days after the Supreme Court announced its decision in United States v. Windsor, announced that married federal employees and retirees would be able to access the same health and retirement benefits for their same sex spouses as heterosexual employees and retirees. Significantly, we made clear that it did not matter whether the state in which you lived recognized the marriage as valid – it would take two more years before we achieved nationwide marriage equality. But on that day in June 2013, I could hear audible gasps of joy and relief from Chief Human Capital Officers across the federal government when they learned that whether their employee lived in Massachusetts or Virginia, they would all be treated equally for purposes of federal benefits administered by OPM. I am very grateful that (now Judge) Elaine Kaplan brought me over to OPM to help the agency be ready for that day. It’s rare that you can be part of something that has such a direct and life-altering impact on people in such a positive way.

Tell us a little about your return to Justice, and your decision last year to leave government?
When I returned to DOJ in 2014, I envisioned myself there for many more years. The election obviously came as quite a shock, but for me, the decision to leave the Justice Department was as much about the appointment of Jeff Sessions as Attorney General as it was about who was in the White House. I knew that many of the gains that we had made during the previous eight years – on LGBTQ2 issues
but in other areas of civil rights as well – would be under attack unlike anything that we had seen in our lifetimes. And so while I considered myself to still be on “Team Civil Rights,” I knew that, in order to keep moving the ball down the field in the direction of social justice, I would have to change uniforms. To this day, I am grateful that the stars aligned in a way that allowed me to continue this crucial work as part of the team of lawyers and advocates at Lambda Legal.

What is the proudest moment in your career, and where do you go from here?
I have been so lucky to have had so many moments in my career that will always fill me with pride. I will always remember being the most junior associate on Jenner & Block’s Lawrence v. Texas team, along with Lambda greats, Ruth Harlow, Pat Logue and Susan Sommer, and how we all wept as we listened to Justice Kennedy deliver an opinion telling us that it was no longer a crime to be gay. I also remember wondering whether that might be as good as it would ever get as a civil rights lawyer, and perhaps I should just hang up my hat right then and there. But of course, there were many other great days after that, where the law actually lived up to its promise. With all of that said, the litigator in me will perhaps always take the most pride in having helped Diane Schroer get her day in court. I will never forget that feeling of chills running down my spine as I stood at the podium and offered our opening statement, knowing that, whatever happened, Diane’s story would be told, and her voice would be heard.

BY MEG MILROY
Thanks to Meg Milroy for conducting this interview for The Equalizer. Milroy is a Managing Associate General Counsel at Verizon, where she also serves on the Executive Advisory Board for the company’s LGBTQ Employee Resource Group. Milroy is serving her 3rd year as a SOGI Commissioner. Please note, The Equalizer’s editors may have changed the varying sexual orientation and gender identity acronyms to “LGBTQ2” for consistency.

Title Mary Eaton
continued from page 7

and largest provider of direct services to at-risk LGBTQ2 youth and home of the Harvey Milk High School, a New York City public high school for at-risk students, many of whom are LGBTQ2. HMI is a fabulous organization! They are doing work that nobody else does.

What are your other passions?
I am a proud feminist, so women’s rights are very important to me. I am also very concerned about the erosion of voting rights and what’s going on in this country right now with respect to immigration. I also strongly believe in mentoring the next generation, which is why I involve associates in my pro bono work. It’s an incredible learning experience for them.

What went through your mind when you heard you were to receive the Stonewall Award?
It is such an honor to be receiving this award, but honestly, I was absolutely floored. There are all these people doing such wonderful work for the advancement of LGBTQ2 rights; people who have devoted their lives to the cause. I didn’t expect to receive this. When I got the call, I thought they were calling the wrong person.

BY DIANA FLYNN
Diana Flynn is the Litigation Director at Lambda Legal and a currently serving as a SOGI Commissioner. She is a veteran of the U.S. Department of Justice’s Civil Rights Division, and is herself a prior recipient of the Stonewall Award. Please note, The Equalizer’s editors may have changed the varying sexual orientation and gender identity acronyms to “LGBTQ2” for consistency.
A Federal Attack on LGBTQ2 Rights by Targeting Incarcerated Transgender Women

On May 11, 2018, the Trump Administration announced a new federal Bureau of Prisons (“BOP”) policy that rolls back hard-fought protections won by incarcerated transgender people under the Obama administration.\(^{13}\)

The BOP operates under the Department of Justice and incarcerates roughly 184,000 people for violations of federal law, the largest share of which are incarcerated for violations of federal drug laws, and the majority of whom are people of color.\(^{14}\)

Prisons are some of the most gender segregated spaces in the United States. The new BOP policy targets particularly vulnerable, trans women, putting them at higher risk of rape and assault, by presuming that these women should be housed in a men’s facility, with men.\(^{15}\) Trans women now may only rarely, if ever, be considered for housing in a women’s facility—even if it is the safest placement for them and for those around them.\(^{16}\)

The BOP changed the housing assignment rules first by removing the following language from the Transgender Offender Manual: “The [Transgender Executive Council] will recommend housing by gender identity when appropriate.” The BOP then added in a number of factors for housing placement of transgender people, starting with the rule that “biological sex” will be used “as the initial determination for designation.” BOP also added a factor considering whether placement into a particular facility would “threaten the management and security of the institution, and/or pose a risk to other inmates in the institution (e.g., considering inmates with histories of trauma, privacy concerns, etc.).”

At first blush, the rule change may seem reasonable. However, consider the following: This rule was put into place as the result of a lawsuit filed by a handful of cisgender BOP inmates who objected to the idea of being housed with transgender women. One of the original Plaintiffs stated that transgender women are men, and that she filed suit in order to get all the “male inmates...removed from women’s prison,” because “it only takes one man to violate my bodily privacy and religious freedom.”\(^{17}\) This policy change then seems to be about prejudice rather than safety: the belief that transgender people do not exist, but rather are only pretending to be the gender with which they identify. But trans women are not safe in men’s facilities given the culture of brutality and toxic hypermasculinity prevalent in most U.S. men’s prisons.\(^{18}\) The data show that trans women in men’s prisons are raped at a rate 10 to 12 times that of cisgender men.\(^{19}\) In essence, the federal government is forcing trans women to live in cages with men who rape and otherwise assault and abuse them. This is particularly problematic given that trans persons are 6 times more likely to be incarcerated—due to societal stigma, over-criminalization, and lack of opportunity—than the general U.S. population.\(^{20}\)

I, and many other LGBTQ2 advocates, believe that such a policy violates the Eighth Amendment prohibition on cruel and unusual punishment.\(^{21}\) Prisons operate by taking away an individual’s freedom, including their ability to protect themselves. Therefore, it is incumbent upon the prison, acting as an arm of the state, to protect those it incarcerates. As Justice Souter said regarding the Eighth Amendment: “Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.”\(^{22}\) Deliberately placing trans women into facilities where they are more likely than not to be sexually assaulted seems the very paradigm of cruel and unusual punishment.

Further, treating trans people as their sex assigned at birth, rather than their gender identity, is disrespectful and harmful to trans persons by denying their right to self-identify, even their right to exist.\(^{23}\)

While BOP policy only directly affects the 184,000 inmates in BOP custody, federal policy is often used as a rationale by states when those states set their own policies. The BOP was the first jurisdiction in 2016 to implement a rule that allowed inmates’ gender identity to “be given serious consideration” in housing decisions under the Obama Administration. Advocates were hopeful that other jurisdictions, including state prisons and county jails, would follow suit, protecting and respecting our transgender community members.

The Trump Administration’s punitive change in BOP policy is not based on science or data on inmate safety. Instead, it is predicated on
the same stereotypes and myths as the anti-trans bathroom bills: that trans people, especially trans feminine persons, are sexual predators. Not only are trans people not more likely than anyone else to prey on vulnerable persons, they are far more likely to be preyed upon than the general population.

This is yet another example of how the current administration is working to harm LGBTQ2 people. For a deeper dive on this subject, I recommend reading The Dire Realities of Being a Trans Woman in a Men’s Prison, a blog post by Katelyn Burns, available at https://www.them.us/story/the-dire-realities-of-being-a-trans-woman-in-a-mens-prison.

Endnotes
1. This is separate from the administration’s proposed government-wide policy to define gender based exclusively and permanently on genitalia at birth, reported in October, 2018, which erase transgender identities for all governmental purposes including identification and healthcare, and eliminate legal protections for transgender persons. See Elizabeth Reis, The Trump Administration Wants to Define a Person’s Sex at Birth. It’s Just Not That Simple, TIME (October 23, 2018), http://time.com/5432006/trump-administration-transgender-definition-intersex-gender-sex/.
3. Trans men are almost always housed with women and may face anti-trans violence as well.
7. Valerie Jenness et al., Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault, CTR. FOR EVIDENCE-BASED CORR. 1, 55 (Apr. 27, 2007), available at http://ucicorrections.ueweb.uci.edu/files/2013/06/BulletinVol2Issue2.pdf. See also Andrew Harmon, New Rules Target Sexual Assault Epidemic Facing LGBT Inmates, JUST DETENTION INTERNATIONAL (quoting a Bureau of Justice Statistics survey showing that gay and bisexual men are 10 times more likely to be sexually assaulted in prison than heterosexual men, and lesbian women are twice as likely to be sexually assaulted by staff in prison as female heterosexual women), available at https://justdetention.org/new-rules-target-sexual-assault-epidemic-facing-lgbt-inmates/#search.
9. Many advocates have been working with state and local prisons and jails for years in an effort to get trans persons access to safer, more appropriate housing. This issue may be ripe for litigation in jurisdictions with favorable case law.
11. See Reis, note 1.
13. See, e.g., National Center for Transgender Equality, noting that “More than one in four trans people has faced a bias-driven assault, and rates were higher for trans women and trans people of color.” Available at https://transequality.org/issues/anti-violence.

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The Religious Excuse

continued from page 1

the intent that the child return to their original family, that the foster parent care for the child for as long as necessary until that time, and that the foster parent be available to adopt if and only if the child cannot return to their original family. This should not be conflated with adoption, where the intent is for the child to gain a new family.

The laws in Kansas, Oklahoma, South Carolina, and potentially at the federal level attack gay couples’ rights to serve as both—as foster parents or as adoptive parents. The foster parent component must be challenged because it is discriminatory and may prevent qualified individuals who would otherwise be able to care for children in need from being able to fulfill that role. The adoptive parent aspect must be challenged in order to achieve the equal opportunity to become a parent, and could be challenged with the additional arguments that LGBTQ2 people are being prevented from gaining the rights and privileges of parenthood.

Historically, there are three ways to be legally recognized as a parent: marriage, biology, and adoption. There is work to be done in each to achieve equal rights for LGBTQ2 parents.

Marriage

Any baby born into a marriage is presumptively the child of those two people, even if the child is not biologically related to one of the people. This was implemented in order to protect inheritance. When the Supreme Court legalized gay marriage in Obergefell v. Hodges, it stated in dicta that the ruling should provide gay couples with the right to marry “on the same terms and conditions as opposite-sex couples” and should include “the constellation of benefits that the States have linked to marriage.” This must include the marriage presumption for parenthood, that any child born into a marriage is the child of both, even if the child is not biologically related to the second partner. The Supreme Court further clarified this issue in Pavan v. Smith, where the Court held that Arkansas’ law requiring that the biological mother’s husband be listed on a baby’s birth certificate and denying the biological mother’s wife the right to be listed on the baby’s birth certificate was unconstitutional.

While the right to be a legally-recognized parent through marriage is likely to play out through contested cases over the next few years, the law is clear and the resulting LGBTQ2 parental rights should be as well. However, in the meantime, experts still recommend that every parent who is not the biological parent adopt or obtain a court judgment of parentage to ensure recognition across state lines.

Biology

A woman is presumptively the mother of a child she bears. For men, it is slightly more complicated; unmarried men who are the biological father of a child have automatic responsibilities but may only obtain constitutionally protected rights if they assert paternity and take advantage of the opportunity to develop an attachment with their children after birth, or are petitioned for child support.

This avenue to be recognized under the law as a parent is not equally available to LGBTQ2 folks. In a previous article, I discussed the need to design laws to give LGBTQ2 parents an avenue to become parents that was equal to the biological avenue that heterosexual partners have to become parents.

Adoption

The third way to be legally recognized as a parent is through adoption. There is still a long fight to gain the equal ability to become a parent through adoption.

Mississippi bars adoption by LGBTQ2 couples. Alabama may also have some restrictions on adoption by LGBTQ2 couples. Kansas, Kentucky, Nebraska, North Carolina, Ohio, Utah, and Wisconsin bar adoption by all unmarried couples, whether they identify as heterosexual or LGBTQ2. Only fifteen states and the District of Columbia affirmatively permit, via state statute or appellate court decision, adoption by both partners.

As discussed, additional states permit adoption agencies—even ones who receive public funding—to refuse to serve or place children with families that where it would...
“conflict with the agency’s sincerely held religious beliefs.” Virginia, North Dakota, South Dakota, Michigan, Virginia, Alabama, Mississippi, Texas, Kansas, Oklahoma, and South Carolina currently have such laws. Additional states are considering similar legislation.8

At the federal level, the House Appropriations Committee adopted an amendment to the 2019 federal Departments of Labor, Health and Human Services, and Education funding package, which provides that federal funding will be withheld from state or local governments that “discriminate or take an adverse action against” a child welfare agency who refuses to provide services that conflict with the agency’s sincerely held religious beliefs.9,10 This is in addition to the First Amendment Defense Act and the Child Welfare Provider Inclusion Act, which are both proposed legislation that purport to protect religious choice and will permit discrimination against LGBTQ2 people and their families. While there are many barriers to this version of the Labor, Health and Human Services funding bill being enacted into law—the full House would have to pass it and gain approval of a conference committee with the Senate, or somehow include it in a compromise version, rather than pass the Senate’s version that does not include this language—this proposed legislation bears watching. Litigation challenging the comparable laws at the state level should be used to build the challenge against this proposed federal legislation, and perhaps seek a Supreme Court ruling that could bar this type of discrimination nationally.

Clearly, each of these laws may limit LGBTQ2 couples’ ability to adopt, even where adoption by LGBTQ2 couples is not explicitly banned. The broader permissions to permit discrimination in foster placements not only may decrease safe placements for LGBTQ2 kids and decrease possible placements overall for children in need, they also “send a signal that the state governments enacting them accept and even embrace the dangerous and harmful notion that discrimination against LGBTQ2 people is a legitimate demand of both conscience and religion” and “threaten[] the broader principle that people should not be refused goods and services solely because of who they are.”11

These laws must be challenged and long-term, strategic litigation will be necessary on each front. In the meantime, I want to echo the National Center for Lesbian Rights and Gay & Lesbian Advocates and Defenders (GLAD)’s plea that LG-BTQ2 couples whose relationship is dissolving choose to respect each other’s parental rights and avoid litigation that may make it harder for future LGBTQ2 parents to be recognized.12 For example, it could be extremely harmful to LGBTQ2 parents’ adoption rights generally for a biological parent to challenge their ex-partner’s parental rights obtained through adoption of their joint child. Families are complicated, personal, and a crucial part of our human rights. Let us not give further fodder to discriminatory actors, and instead unite toward a brighter future for LGBTQ2 parents and their children.

BY SAMANTHA BEI-WEN LEE
Samantha Bei-wen Lee is a Staff Attorney at Brooklyn Defender Services Family Defense Practice. This article and its opinions are solely attributed to the author and do not reflect any statements or opinions on behalf of the Brooklyn Defender Services. Please note, The Equalizer’s editors may have changed the varying sexual orientation and gender identity acronyms to “LGBTQ2” for consistency.

ENDNOTES
Terry Franklin was born on the south side of Chicago to parents who were not college graduates but believed strongly in the importance of education. Franklin went to Whitney M. Young Magnet High School where he had a French class with a young Michelle Robinson, who later became Michelle Obama. Franklin says they were friendly both in French class as well as at Mayfair Academy where they both took dance (he took tap while she took ballet). Their friendship continued later in life when they were both at Harvard Law School at the same time.

As a child, Franklin's parents suggested that he consider a professional career. However, the only professions which he knew existed at that young age were medicine, law and being a teacher. Also at the time, he was very interested in the arts and acting but Franklin felt that if he pursued acting, it would not sit well with his perceived obligation to his family, church and community to pursue a profession and felt it was "too risky" to get into the arts because he was concerned about "coming out" to everyone if he pursued acting. He did not feel his denial of his true identity was bad because he honestly believed he could live the "straight life" even though he knew that being gay is not a choice. Understanding that there are significant personal and societal pressures on all of us, he was able to convince himself that he could live "another way". So, "coming out" as gay and involved in the arts were both put on hold. Because he was not great at math, he concluded that becoming a lawyer, rather than a doctor, teacher or actor, made the most sense to him. So, from an early age, law was something that he thought he might like.

While at Harvard, he met his future wife. They were married and lived together for 24 years. Their two daughters are now actresses, a career he denied to himself for 24 years. Their two daughters are now actresses, a career he denied to himself.

Some of his early career highlights included working pro bono on one of the most important housing discrimination cases in LA County. At the time, he was a pro bono staff attorney on the Independent Commission investigating the LA Police Department. There, Franklin worked on a case which went to the California Supreme Court and made new law on the issue of the fiduciary exception to the attorney-client privilege.

By about 2010, Franklin realized he had enough of self-denial. Realizing he was now 46 years old and living his life to please other people's expectations rather than his own, he knew he had to begin living his life as a gay man which included divorcing his wife. To this day, he and his "ex" remain close. Not long after his divorce, he met his partner, Jeffrey-Moline.

At the same time, another very interesting part of Franklin's life was developing. Franklin's "will story", which he calls the most meaningful search in his life, began at a family reunion in 2001. One of his relatives prepared an excerpt from a Will of his fourth-great grandmother, Lucy Sutton, which purports to not only emancipate her from John Sutton, a white farmer living in Jacksonville, Florida but also emancipates her eight children and six grandchildren. Until 2001, when he first saw the excerpt at the family reunion, no one in his family had mentioned the story before and the story came as a total shock to Franklin. He could not understand why a white slave owner farmer who owned Lucy and her children and grandchildren would do such a thing and/or what their relationship really was beyond being slaveholder and slave.

Thereafter, Franklin did nothing with the Will excerpt for many years. However, in 2014, his interest in the story renewed when his family was preparing for his Great Aunt Viola's 100th birthday. Franklin decided to contact the Clerk's office where the Will was filed (in Duval County, Florida). He requested the Clerk provide him with images of the entire Will, including the signature page, which showed it was signed by John with an "X" (John died in 1846) but otherwise in proper order. The Will stated that Lucy and her family, including her children, shall be set free...
but also sent to a place where “they and their children could live free forever”, all with the proceeds of selling John’s possessions. The Will further provided that John’s trustee, William Adams, whom Franklin believes was John’s half-brother, was directed to sell all of John’s possessions, including all livestock, furniture, etc. to fund Lucy’s travel to freedom. But still lingering to Franklin was why John was doing all of this for Lucy and her kids, including: did John have a white wife or white children; and, if so, why were there no mention of them in the Will provided to Franklin.

Franklin is certainly aware of the nature of slavery and the then societal “norms” which existed during slavery. Nonetheless, Franklin wanted to believe that what existed between Lucy and John was, in reality, a relationship.

During a business trip in March 2015, Franklin took a long detour to Duval County to see the actual Will and seek answers to his lingering questions. The Clerk gave him the entire folder which included the Will and other handwritten pages, which turned out to be a trial transcript. Franklin discovered that one of John’s brothers, Shadrack, had filed a contest to overturn John’s Will. Contrary to John’s wishes, Shadrack was attempting to have John’s Will declared null and void so Shadrack could inherit Lucy and her family as his slaves. The transcript also provided clues to Franklin about Lucy and John’s relationship. Franklin learned that John, Lucy and the kids had lived in Georgia. Before writing his Will, John moved his household to Florida, believing Florida was a state which would allow Lucy’s emancipation during John’s lifetime. Unfortunately, John learned he was wrong. Franklin also learned that when the lawyer who assisted John about the Will came to John’s house for its execution, that John invited the attorney to eat a meal with John and his “family” and that John specifically described the others in the house (meaning Lucy and her children) as “his (John’s) family”, and not his slaves. Franklin knew that it is one thing for John to have children with a slave but quite another for John to have established a household where Lucy and her children lived. Based on all his read, Franklin concluded John’s actions demonstrated that John was in a relationship with Lucy and her children. Apparently, Shadrack’s attempts to have the Will declared null and void failed. With the Will deemed valid, John’s estate was then sold and the proceeds used to allow Lucy and her children to travel from Florida to Illinois, emancipated, to Lucy and her children’s land of freedom. Lucy’s descendent, Franklin, was born and grew up in this land of freedom.

Franklin believes that his ancestor’s story also mirrors his own. Franklin fell in love and got married while in his 20s. They lived together for many years and had two daughters. When he realized he was living a lifestyle other than what he wanted, he “came out” and got divorced. It was then he realized that he had forced himself to not live the life he wanted but rather to live the life that everyone else expected of him and when that realization hit, he did something about it. He believes that John and Lucy are the same. They were not living the lifestyle they wanted either because the expectations and strictures imposed by society would not allow a relationship between a slave and John. So Franklin believes that John and Lucy did the best they could under the circumstances of the society norms during slavery, and after John’s passing John made sure that Lucy and her children would live in freedom, similar to Franklin living in his freedom, after his “comingout”.

Franklin states that while he ended up in a far different place in the practice of law than when he started his legal career (now a trusts and estates litigator), he has no regrets about his path to the present since he believes that what he has done throughout his career has ultimately led him to a place where his law practice, his artistic interests, and his connection to his ancestors have all come together. So, for Franklin, had it not been for his legal career and his practice area being trusts and estates litigation, his connection to his ancestors may not have occurred or at that time in that he does not believe that he would have totally appreciated the legal subtleties that he learned while discovering his ancestor’s history if he had learned them earlier in his career, i.e. before he had the benefit of his lifetime experiences as a trust and estates litigator.

This amazing experience also shifted much of Franklin’s understanding of what history means to him and the importance of being involved in diversity activities. From his experiences, he realizes that he may have descendants who may look back at Franklin and wonder what he did to deal with oppression or to make the world a better place. As Franklin states, he has long been an activist. As a law student, he was involved in a “sit in” at the Dean’s office at Harvard protesting the lack of women of color as professors. His pro bono work also pointed in the same direction. As he states, “Through the ABA, I was always involved with Diversity, and later the Diversity and Inclusion Committee, which led to my being asked to consider applying for a Commissioner position on SOGI”, which he did. Currently, he is in his third year on the Commission. Franklin has also served in many capacities in the RPTE Section of the ABA and been a member of its Council. He is also currently Chair of the Diversity and Inclusion Committee of the American College of Trust and Estate Counsel.

As for his time on SOGI, Franklin
says he did not have any goals when first becoming a Commissioner except to make a positive difference and bring both his skills and efforts to SOGI. His future plans with SOGI and other parts of the ABA include helping to coordinate the screening of the anti-conversion therapy film, “The Miseducation of Cameron Post” at the 2019 mid-year meeting in Las Vegas and hopefully be a Showcase presenter at the ABA annual meeting in San Francisco in August 2019.

Lastly, Franklin is a very lucky man for many reasons but for one in particular—he was fortunate to have found love twice in his life. As mentioned earlier, he has had a partner now for many years. Well, on February 14, 2018, he came home and was unnerved by the events at Parkland High School that day. He was wracking his brain on how to combat the hate and violence in the world . . . as he continued to think, he heard a voice in his brain say “We [meaning he and his partner of eight years, Jeffery Moline] should get married.” Apparently, it was not said just in his brain but aloud. Jeffery stopped and asked Franklin to confirm what he thought he had heard, which Franklin did. Jeffery asked him to confirm it again before they went to sleep that night, which Franklin did yet another time. In October, Franklin and Jeffery were in Washington, D.C. for a meeting of the American College of Trust and Estate Counsel. While there, on October 25, they went from their hotel to the United States Court of Appeals to Judge Robert Wilkins’ chambers, a member of that Court and a former housemate of Franklin. Then and there, with Judge Wilkins’ secretary and four law clerks including the first African-American woman to be president of the Harvard Law Review as their witnesses, Judge Wilkins officiated and the proud couple are now united as one.

As Franklin later put it, he realized that in addition to the sheer joy and excitement about getting married, he says that he had a sense of comfort and relief in being able to relax and exhale after the nuptials. As he states, he had been married to a wonderful woman for many great years and has two incredible children. He went on that he “had not expected to feel such a sense of relief [in believing] that my new marriage was a[s] valid in the eyes of the law as my last marriage. And I had not expected to feel a sense that I knew that I could rest easy—that the person I loved to whom I was bound to now was also bound to me, forever, and that we would always have one another”.

As my summation, all I can say is it has been my true honor and pleasure to bring this wonderful man to you. I hope you enjoy reading it as much as I had writing it.

JAMES L. SCHWARTZ
Jim is the founder of James L. Schwartz & Associates P.C. in Chicago and concentrates on securities, commodities, and real estate law. He is the SOGI Liaison from the Solo, Small Firm and General Practice Division and the Senior Lawyers Division.

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.

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SOGI Updates

Native Student Pipeline Event
SOGI Commissioner, Kori Cordero, recently participated in a pipeline event co-sponsored by the Wishtoyo Chumash Foundation, National Native American Bar Association, the California Indian Law Association, and Pitzer college. The full-day event consisted of a moot court, where Native high-school students learned about the Doctrine of Discovery, civil and criminal legal systems, and tribal jurisdiction. Students were also tasked with presenting a moot court case related to Chumash land rights and aboriginal title. The day also included a riff of the ABA YLD “What Do Lawyer’s Do?” panel, essentially a career and college prep panel for the 28 college-bound Native students.

Kori served as a panelist, moot court judge, and moot court coach. Special thanks to the Wishtoyo Chumash foundation for hosting and participating in this legal pipeline event and to Geneva EB Thompson (NNABA YLD Delegate) for creating the moot court materials and leading the event.

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Writers and Contributors
Samantha Bei-Wen Lee
Jeffrey C. Brodin
Kori Cordero
Diana K Flynn
Tasha Hill
Victor Marquez
Meg Milroy
Shannon Price Minter
Ghenete Wright Muir

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Paul W. Lee
Meg Milroy
Shannon Price Minter
Mario A. Sullivan
Ghenete Wright Muir, Esq.
Howard Duane Bye-Torre

ABA Staff
Skip Harsch, Director
Skip.Harsch@americanbar.org
Tina Guedea, Program Associate
tina.guedea@americanbar.org
Kelly Book, Art Director
kelly.book@americanbar.org

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