Message from Committee Chair Gerald L. Shoemaker Jr.

It’s the eve of one of the most important arguments addressing LGBTQ rights to be heard by the U.S. Supreme Court. This argument and resulting decision will be up there with Lawrence, Windsor, and Obergefell in terms of importance.

On Oct. 8, 2019, the Supreme Court will hear three cases impacting LGBTQ discrimination:

- **Zarda v. Altitude Express** will address the appropriateness of firing a skydiving diving instructor for being gay.
- **Bostock v. Clayton County** will address the claims of a municipal worker who was subjected to anti-gay discrimination while working in city government. These two cases were consolidated into a single case addressing whether Title VII’s prohibitions around sex-based discrimination cover sexual orientation-based discrimination.
- **Harris Funeral Homes v. EEOC** deals with a funeral home worker who was terminated for being trans and will decide whether gender identity-based discrimination is a form of sex-based discrimination.

If you are barred before the U.S. Supreme Court and are attending the argument, I recommend getting in line the night before, as attorneys in line for Windsor made it only into the attorneys’ lounge to hear that argument. I have tentative plans to attend the argument and am aware that there are other members of our committee who will be in attendance. Feel free to reach out to me if you want me to put you in touch with the other members who I am aware will be attending.

**Committee/Section Day** is Nov. 14, 2019 at the Red Lion Hotel in Harrisburg. The GLBT Rights Committee meeting will take place at 1:30 p.m. Please plan to make it in person. We will be discussing important issues, including the continuation of the our transgender name change project work, as well as the progress of the PBA Quarterly issue dedicated strictly to LGBTQ issues. Of course, if you can't make it person, we will have call-in capability.

Please remember we are always looking for authors for Open Court. Our co-editors, Mattricia O’Donnell McLaughlin and María Zulick Nucci do such a wonderful job with our committee publication and appreciate any help they can get. Please see their contact information on page 16.
The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.

In Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 290 (1976), the U.S. Supreme Court held that deliberate indifference to a prisoner's serious medical need constituted the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. Questions of deliberate indifference regarding transgender prisoners' medical needs arose in three recent federal cases, in three different jurisdictions. The results differed, suggesting that this aspect of the amendment, as applied to such prisoners, might come before the U.S. Supreme Court. This article will review these cases and note Pennsylvania's recent actions.

In Keohane v. Jones, 328 F.Supp.3d 1288 (N.D.Fla. 2018), https://docs.justia.com/cases/federal/district-courts/florida/flndce/4:2016cv00511/87631/171, Reiyn Keohane was a 19-year-old transgender woman on hormone treatment who had dressed and groomed as a woman since she was 14. After her arrest, the local jail refused to continue the hormone treatment and did not let her dress and groom as a woman. When she was transferred to prison, she was again denied treatment and the ability to present as a woman, based on a “freeze-frame” policy applied to transgender inmates: they could not have treatment that was not in place upon their arrival. Keohane's multiple grievances to prison authorities during the first two years of her incarceration were denied. She attempted self-castration and suicide, with no relief until she filed suit against the Secretary of the Florida Department of Corrections: within months, she was provided hormone therapy, and the policy prohibiting new treatment for transgender inmates was amended. Id. at 1292-93.

Chief District Judge Mark E. Walker began his opinion with the quote from Trop v. Dulles set forth above. He defined the “essential issues” as: (1) whether the denial of hormone therapy for two years constituted deliberate indifference to Keohane's gender dysphoria, which the defendant agreed was a serious medical need; (2) whether the court should order hormone treatment, or did the defendant's provision of hormone treatment and the policy amendment regarding no new treatment for inmates with gender dysphoria, both of which occurred only after Keohane filed her complaint, sufficiently remedy her injuries; and (3) was “parallel treatment” – social transitioning allowing her to use female inmates’ dress and grooming standards – necessary, such that its refusal constituted deliberate indifference. Id. at 1293-96.

Chief Judge Walker reviewed the Standards of the World Professional Association for Transgender Health (WPATH standards), https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf, recognized by several professional organizations, and found them authoritative. WPATH standards recognize social transitioning, and the defendant's expert stated that letting a transgender woman inmate express as female was a “compassionate accommodation.” Id. at 1294-95.

Judge Walker noted Keohane's treatment record and the secretary's “shifting explanations” for having denied treatment.

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treatment and dismissed the argument that the denial of women’s clothing and grooming supplies was based on security concerns. He also rejected the secretary’s reliance on the “freeze-frame” policy, hypothesizing that an inmate who developed any other health issue after incarceration would not be denied treatment per the policy. Id. at 1301-02.

Judge Walker underscored that the defendant’s chief medical officer had “qualms” with the WPATH standards and had acknowledged he was “sure” his religion entered into his views of transgender people. The judge highlighted the prison witnesses’ lack of experience with transgender inmates and their personal views, stating “[a] lot can explain the denial of care in this case, starting at the top with ignorance and bigotry. But medicine does not yield to ignorance or bigotry. And while differences in medical judgment often serve as a valid defense to a claim of deliberate indifference, ignorance and bigotry is no defense ...” Id. at 1305-06.

After reviewing Keohane’s medical history, her treatment, then the lack thereof, her grievance filings and the trial testimony, Judge Walker found deliberate indifference in the blanket denial of social transitioning and the lack of competence in treating gender dysphoria or otherwise meeting medical community standards. He noted that she was not seeking extraordinary, special treatment: “She’s simply asking defendant to see her and treat her as she is; namely, a woman stuck in a male body that’s stuck in a cage for the foreseeable future.” Id. at 1317. He permanently enjoined the “freeze-frame” policy and required the defendant to provide Keohane with hormone therapy and social transitioning. “Ultimately, this case is about whether the law, and this court by extension, recognizes Ms. Keohane’s humanity as a transgender woman. The answer is simple. It does, and I do.” Id. at 1293.

The defense appealed, at No. 18-14096-HH (11th Cir., 2019); argument was heard Aug. 22, 2019, [link]. With respect to Florida’s “freeze-frame” policy, it is noteworthy that, in 2015, during the Obama Administration, the U.S. Department of Justice (DOJ) filed a statement of interest in Diamond v. Owens, Case No. 5:15-cv-50-MTT-CHW (M.D. Georgia), a case involving Georgia’s freeze-frame policy. DOJ stated that the policy was facially unconstitutional under the Eighth Amendment as allowing failures to provide adequate medical treatment to prisoners. [link]. In 2018, in the current Trump administration, DOJ, regarding the Federal Bureau of Prisons, issued a change notice for Transgender Offender Manual of the Federal Bureau of Prisons, focusing on housing issues. The notice states, in part, “Hormone or other necessary medical treatment may be provided after an individualized assessment of the requested inmate ...” [link]. It is of interest that the notice uses the permissive word “may,” rather than a mandatory “shall” or “must,” with respect to “necessary” treatment, arguably contrary to the Eighth Amendment; however, it does refer to “individualized assessment.” Recognition of a transgender inmate’s humanity does not extend to a right to evaluation for sex reassignment surgery, according to the Fifth Circuit in a case out of Texas. In Gib-
son v. Collier, 920 F.3d 212 (5th Cir., filed March 29, 2019), http://www.ca5.uscourts.gov/opinions/pub/16/16-51148-CV0.pdf, Scott Lynn, aka Vanessa Lynn, Gibson sought evaluation for sex reassignement surgery [SRS, sometimes termed gender correction or confirmation surgery (GCS)]. The court found the state’s denial not cruel and unusual where the only federal court to date to decide a claim for surgery itself had so held en banc. Id. at 215-16, citing Kosilek v. Spencer, 774 F.3d 63 (1st Cir. 2014), https://law.justia.com/cases/federal/appellate-courts/ca1/12-2194/12-2194-2014-01-17.html.

Gibson was diagnosed with gender dysphoria and had lived as a female since the age of 15. She suffered depression and attempted self-castration and other self-harm. Under Texas prison policy, transgender prisoners were to be evaluated on a case-by-case basis under “current, accepted standards of care.” However, that policy did not designate SRS as part of protocol. Id. at 217-18.

Gibson was pro se in the district court, stating Eighth Amendment claims and seeking an injunction for SRS evaluation. The defendants moved for summary judgment on the bases of qualified and sovereign immunity. Gibson responded on the merits, providing the WPATH standards, which cite SRS as necessary for some patients. The district court rejected the immunity defenses but granted summary judgment on the Eighth Amendment claims; the Court of Appeals appointed counsel. Id. at 218.

The parties did not dispute Gibson’s serious medical need; the dispute was whether denying SRS was deliberate indifference – keeping in mind that her request was for evaluation, not actual surgery. The majority on the Fifth Circuit panel stated that she had failed to present a genuine dispute of material fact, where she offered neither witness testimony nor professional evidence. It noted “[t]he sparse record”: the WPATH standards – which found SRS necessary and effective in some cases. Relying on Kosilek, supra, the court stated that the WPATH standards did not reflect consensus but “merely one side in a sharply contested medical debate.” Id. at 219-221.

At the heart of the court’s ruling was the significance of the WPATH standards and the availability of qualified expert testimony as to an individual inmate’s assessed medical requirements. The court in Gibson repeatedly stated that the WPATH standards were hotly debated and contested, finding that, on any remand, Gibson could not establish SRS as “universally accepted.” It criticized the dissent, in part for suggesting that Kosilek allowed denial of SRS only upon an individual assessment and analogized this to a prisoner wanting a treatment not approved by the U.S. Food and Drug Administration, asking whether this could be challenged as a categorical prohibition, like the Texas policy not including SRS. Id. at 224-226.

The majority then gave an acknowledged originalist, textualist analysis of “cruel and unusual”: conduct must be both cruel and unusual to violate the Eighth Amendment. Prison policy cannot be “unusual” if it is widely practiced. Where only California, through settlement of a lawsuit, provided SRS, its denial could not be unusual. Id. at 226-228, citing Quine v. Beard, 2017 WL 1540758 (N.D.Cal. 2017), see https://law.justia.com/cases/federal/district-courts/california/candce/3:2014cv02726/278295/116/; https://casetext.com/case/quine-v-beard-2.

Gibson was a 2-1 vote, with the opinion by James C. Ho, who was nominated by President Donald Trump and has been criticized for his approach in various cases. See “Legal Opinions or Political Commentary? A New Judge Exemplifies the Trump Era,” NPR, July 26, 2018; https://

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Dissenting, Judge Rhesa Hawkins Barksdale, nominated by President George H.W. Bush, criticized the affirmance of summary judgment on a ground not urged by the defense. He also noted that, contrary to the majority’s repeated misrepresentations of her request, Gibson did not seek SRS, but only evaluation for it by a gender dysphoria specialist. She was not given time for proper discovery. More importantly, the majority placed the burden on her to show an issue for trial, contrary to F.R.Civ.P. 56. He also criticized the majority’s reliance on Kosilek, decided four years previously, on an extensive record including evaluation of the inmate by several medical professionals and a trial, not a summary judgment motion on a limited record and unusual procedural history. There was also no inquiry in Gibson into gender dysphoria treatment developments since 2014. Id. at 228-233.

Judge Barksdale reviewed the district court opinion in Edmo v. Corizon Inc., Case 1:17-cv-00151-BLW (D.Idaho, filed Dec. 13, 2018), https://law.justia.com/cases/federal/district-courts/idaho/idcde/1:2017cv00151/38928/66/, where the plaintiff proved a serious medical need but the defendants ignored the WPATH standards. The court found that it was and ordered surgery within six months, finding the defense witnesses lacked experience, could not explain deviations from medical guidelines and gave illogical and inconsistent testimony. Id. at 9-10.

The appellate court reviewed the record of the district court hearing, held over three days, with seven witnesses, thousands of pages of exhibits and expert witnesses’ qualifications. It noted Edmo’s history, IDOC’s provision of hormone therapy, its policy against GCS unless the treating physician deemed it necessary, and its policy revisions, shortly before the hearing – similar to the defendant’s changes of action and policy in Keohane after the complaint was filed – regarding GCS and providing women’s commissary items to transgender women inmates. Id. at 19-37.

Here, Edmo established deliberate indifference, given the record of self-harm and psychological distress. The court recognized that transgender care is “an area of increased social awareness” and that the medical community has advanced its knowledge in this area. It affirmed the injunction to provide GCS, adding that “the facts of this case call for expeditious effectuation of the injunction.” Id. at 84-85.


Adree Edmo was a transgender woman inmate with the Idaho Department of Corrections (IDOC), who made two attempts at self-castration. The parties agreed she suffered from gender dysphoria, a serious medical condition, and that the WPATH standards were “the appropriate benchmark.” The issue was whether gender confirmation surgery (GCS) was medically necessary. The district court, whose opinion Judge Barksdale discussed in his dissent in Gibson, found that it was and ordered surgery within six months, finding the defense witnesses lacked experience, could not explain deviations from medical guidelines and gave illogical and inconsistent testimony. Id. at 9-10.

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The court stated that providing some treatment did not defeat a deliberate indifference claim, which required a fact-specific analysis. It criticized Gibson extensively, where the record lacked witness testimony or professional evidence, involved a pro se inmate, “coopted” Kosilek, where that court found only that GCS was not necessary in that case, and where Gibson was a 2-1 vote. Id. at 64-72.

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Conclusion
These cases demonstrate the importance of developing an adequate record when representing a transgender inmate, including qualified professional evaluations, qualified expert witnesses and presentation of the WPATH standards as accepted in the medical community. They also demonstrate the need for counsel to assist the inmate through the prison grievance and then, if needed, the judicial process. Counsel’s advocacy should include readiness to present to prison officials and the courts the case law from around the country and over many years finding in favor of transgender inmates.

In Pennsylvania, the news is positive. In January, Department of Corrections (DOC) PREA Coordinator Dave Radziwicz spoke at the American Correctional Association’s Winter Conference and discussed Gov. Tom Wolf’s Commission on LGBTQ Affairs, which includes matters affecting transgender prisoners; DOC has had a transgender support group for more than two years. [PREA stands for the Prison Rape Elimination Act, 34 U.S.C. §§30301-30309.] This past May, DOC issued Policy No. 13.2.1, Access to Health Care, which includes transgender inmates: https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/13.02.01%20Access%20to%20Health%20Care.pdf.


Ignorance and bigotry are realities, Keohane, supra, regardless of legal principles. Differing litigation results at a time of increasing societal awareness and after a change in federal administrations, with the current administration taking conservative positions on LGBTQ issues, suggest that the issue of health care for transgender inmates could go to the U.S. Supreme Court, like other LGBTQ cases in recent court terms. At any level, however, ignorance, bigotry and negative publicity should not be allowed to defeat the Eighth Amendment’s basic concept of the dignity of man, even as the court in Keohane stated, men and women in cages.

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Lavender Law and All of Its Hues Shine Bright in Philadelphia

By Ellen S. Fischer

The annual Lavender Law Conference is the signature event of the National LGBT Bar Association, and this year’s 31st annual event was the biggest one yet, with almost 2,000 attendees from around the country, plus 200 corporations, organizations, government agencies and law firms participating in the career fair.

It might be hard to imagine that a legal conference could be a thrilling event, but the energy generated at Lavender Law by all of those smart people attending, learning, teaching and working to bring about equality and to change the world is electrifying. Really.

Day One began with a plenary session entitled, “Election 2020.” The speakers for this session were Brian Castro from the House Financial Services Committee, Leigh Chapman from the Leadership Conference on Civil and Human Rights and Sean Young from the ACLU of Georgia. The speakers addressed the significant role the election presents for attorneys, given the anticipated voting problems, especially those regarding gerrymandering and voter suppression. As lawyers, they noted, our job is to help educate voters as to their rights, to assist voters in getting to the polls and to ensure they have the unfettered right to vote. In addition, and more importantly, we must be prepared to file whatever emergency petitions might be necessary if a voter is denied the vote for no legitimate reason.

Day Two’s plenary session, entitled “2018-2019 SCOTUS Review: The Conservative Face of the Court,” was a troubling review of the Supreme Court’s 2018-2019 decisions and a reminder that the court will hear argument in sexual orientation and gender identity discrimination cases under Title VII in the coming October term: Bostock v. Clayton County, Georgia, No. 17-1618; Altitude Express Inc. v. Zarda, No. 17-1623; and R.G. and G.R Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, No. 18-107. With Justices Kavanaugh and Gorsuch on the bench, we may soon see setbacks, particularly regarding certain federal Courts of Appeal decisions, some of which are mentioned above. According to this panel, the court’s conservative majority will have broad implications for the future of LGBT law.

Panelists included Jon W. Davidson from Freedom for All Americans; Chinyere Ezie, staff attorney from the Center for Constitutional Rights; Chai R. Feldblum from Morgan Lewis and Commissioner with the EEOC from 2010-2019; Greg Nevins, senior counsel and employment fairness project director in the Southern Regional Office of Lambda Legal; and Chase Strangio from the ACLU’s LGBT & HIV Project.

Following each plenary session was a day filled with breakout sessions, stimulating conversation and much learning about all of the ways that we, as attorneys, can be advocates for the rights of all of those facing discrimination. The number of breakout sessions can best be described as daunting in terms of choices. On each day, there was a choice of over two dozen sessions; I wished that I could have attended more than the three per day that time allowed.

I attended Lavender Law to improve my own legal knowledge for my family law practice, so I mostly attended family-law-related sessions, including “Intersex and Non-binary Considerations in Law & Policy;” “But I am on the Birth Certificate!” “Understanding the Interplay of Birth Records, Marital Presumption of Parentage, Adoption Proceedings and Contested Parentage Cases in a Post-Paven Era;” “Transgender Parents and Children in Custody Proceedings;” and “Estate Planning: Everything You Need to Know but Didn’t Think to Ask.”

I also took the opportunity to attend an emotionally charged breakout session entitled, “Redefining Intimate Partner Violence (IPV) for Trans, Queer & HIV+ Communities.”

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- Violence against the LGBT community is on the rise and is higher than in the general population, possibly because bystanders are less likely to intervene or because police have not received proper sensitivity training. Other reasons are that too many people are simply homophobic or that there is fear of “outing” oneself;
- LGBT people face barriers to getting help because they have a unique sexual orientation and gender identity; and
- LGBT people rely on informal, personal networks for help in their IPV and sexual abuse situations, because law enforcement is not helpful.

The 1.5-hour IPV session began with a role-playing exercise intended to help attendees understand what it feels like to be an IPV victim looking for help and support. Eight of us raised our hands to accept one of the eight available roles. In addition to the victim and the aggressor, there was a police officer, an HIV counselor, a therapist, a friend, a parent and, finally, a judge. Each of the volunteers was given a 5x7 card. The front of the card faced the victim and identified who the person was; on the back of the card, facing the actor, was the typed “script.” In a matter of moments, we all became sadly aware of the sense of being alone and without any viable recourse which a transgender, queer or HIV+ victim too often faces.

In each instance, the request for help was met with scorn and victim blame. The last person chosen by the victim was the police officer. As noted below, transgender individuals frequently find the police very unhelpful and without any appreciation of what they are going through. With head hanging, the victim returns home, to be victimized again. And, if the victim is a transgender woman diagnosed with HIV, her aggressor keeps her traumatized with threats of being outed.

For the victim, it is sometimes a question of not only learning skills to stay in the relationship but also developing particular self-help skills, like minimizing trade-offs with the aggressor. There are also many times when children are involved and the victim needs to stay in place. Moving is often financially prohibitive, and moving without one’s children is not a choice anyone wants to make.

One of the speakers recommended reading “The Revolution Starts at Home,” edited by Ching-In Chen, Jai Dulani and Leah Lakshmi Piepzna-Samarasinha, to learn about alternative safety plans in order to advise clients in an IPV situation, particularly those living in rural areas.


Day Three was a different kind of day. For many, it was career fair day, where students, young lawyers and laterals were mentored on interviewing skills before walking into what could be a number of job interviews and job offers.

There were 200 potential employers interviewing. As one African-American, middle-aged, transgender woman joked...
to me during lunch, “Here, everyone wants to meet me and shake my hand!”

For others, Day Three was devoted to being with and learning only with those in our particular institute. Some of the bar’s institutes, such as the Family Law Institute, are by invitation only, and attendance requires a promise that all conversation is confidential, while others, such as the Intellectual Property Law Institute, can be joined by any LGBTQ lawyer or ally.

This year, for the first time, recognizing the impact of transgender name change policies on so many areas of the law, the Family Law Institute, the Transgender Institute and the Trust and Estates Institute hosted a joint CLE program called “Transgender Name Change and Gender Marker 2.0.” I had the distinct honor of moderating the program with an amazing panel, including Arli Christian, state policy director at the National Center for Transgender Equality; Josh Langdon Hooser, a private practitioner in Cincinnati, Ohio and Charleston, South Carolina; and James Knapp, chair of the board of directors of Trans Ohio.

The issues are the same throughout the country: (1) how to convince a court to waive publication of a name change petition for our transgender and nonbinary clients; and (2) once a petition is granted, how to move forward to change the birth certificate gender marker and finalize other identifying documents. Many states still prohibit gender marker change. There was also lively conversation about each of us possibly soon having the right to use “X” as our preferred gender. See Zzyym v. Pompeo, 341 F.Supp.3d 1248 (D.Colo. 2018), on appeal to the Tenth Circuit (No. 18-1453) and to be scheduled for argument; https://www.courtlistener.com/docket/8229516/zzyym-v-pompeo/; https://www.lambdalegal.org/in-court/cases/co_zzyym-v-pompeo.

One of the most important takeaways for me was the impact a name change can have on estate documents. For example, to prevent a will contest between siblings where daughter, Susan, who was left 50% of her father’s estate, has transitioned to son, Sam, the other sibling may attempt to prevent Sam from inheriting, on the claimed basis that Sam is not the daughter to whom her father left 50% of his estate.

There were many written materials produced for this joint session, including materials provided by Joan Burda, a private attorney in Ohio, whose practice is limited to estate planning and small business law. She is also the author of the award-winning book, Estate Planning for Same-Sex Couples, Third Edition (ABA 2015). The following is new recommended language for wills, included in Burda’s materials:

The titles given to the paragraphs of this will are inserted for reference purposes only and are not to be considered as forming a part of this will in interpreting its provisions. All words used in this will in any gender shall extend to include all genders, and any singular words shall include the plural expressions, and vice versa, specifically including “child” and “children” when the context and facts so require, and any pronoun shall be taken to refer to the person or persons intended regardless of gender or number.

Burd’s written materials also addressed the need to consider the impact of assisted reproductive technology on potential heirs. Is a child who has no genetic material from either of her parents still a rightful child for inheritance purposes? What if a surrogate carries a child for infertile parents so that the genetic material does not belong to the parents and the child was not born of the adopted mother?

“Child” includes those conceived by a genetic parent through assisted reproductive technology techniques. The parents of that child must have been married or in a similar legal relationship recognized by the U.S. government or their state of residence. The other parent must have executed a written document acknowledging his or her intent to become a parent. That document shall not have been revoked before the pregnancy began and implantation of the embryo occurred.

“Child shall also include those conceived by my child, grandchild or similar heir or descendant where there is no genetic connection between the child and the parents. This includes children conceived using assisted reproductive technology techniques that use donated genetic material and a gestational surrogate.”

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The Lavender Law Conference is a place not just for learning about new legal issues. It is also a place for open and honest conversation where personal questions get asked and answered without embarrassment or judgment. For instance, I am representing several nonbinary clients who are seeking to change their names. I inadvertently offended one of my clients – who is no longer my client – when I asked the client to help me appreciate what it feels like to be nonbinary or gender non-conforming. When I asked the same question of panel members during the session, “Intersex & Nonbinary Considerations in Law & Policy,” the question generated so much conversation that the panel did not get to complete its presentation. I learned, by the way, that there is no one answer, that sometimes a person may feel more male than female, or vice-versa, or may feel not quite like either.

I am excited and looking forward to next year’s conference in Washington, D.C., Aug. 12-14, 2020. Imagine a conference with 2,000 LGBTQ folks and allies, plus representatives from 200 of the country’s top employers converging in the nation’s capital just three months before the election! Please consider joining the National LGBT Bar Association and joining me for next year’s conference. I hope to see you there!

Ellen S. Fischer is a partner at Fenningham, Dempster & Coval LLP. A certified collaborative divorce attorney and an experienced mediator, Ellen is proud of her success with no-court alternatives. She has been an advocate for the LGBTQ+ community since the start of her career. She handled one of Pennsylvania’s earliest transgender custody cases in 1993 and has remained an active legal ally ever since. She is one of only six Pennsylvania lawyers invited to join the LGBT Family Law Institute® of the National LGBT Bar Association, a select group of international attorneys dedicated to pursuing the rights of LGBTQ+ individuals and families.

Hear Ye! Hear Ye!

This feature provides up-to-date, brief bulletins addressing LGBTQ issues that might be relevant to readers’ lives or practices. Contributions from committee members and allies are welcome. Send the editors an item or an alert to the item.

Student Gay-Straight Alliance Granted Intervention in Reynolds v. Talberg


In the fall of 2018, the Williamston Community School District adopted policies to better protect LGBT students from harassment and discrimination and to ensure that they have use of common facilities and education programs. The policies specifically include sexual orientation and gender identity and allow students to be referred to by their chosen gender.

In response, parents, assisted by the Great Lakes Justice Center, sued under 42 U.S.C. §1983, alleging that the policies interfere with their religious beliefs and/or practices. The complaint is available at https://www.aclu.org/legal-document/reynolds-v-talberg-complaint. The center’s stated “goal ... is to Defend Truth and Protect Liberty.” https://greatlakesjc.org/about-us/. The ACLU subsequently petitioned to intervene in order to ensure that the student voice was heard in the action.

In March 2018, the defendants moved to dismiss, alleging that the complaint failed to allege facts raising a plausible inference that their constitutional or statutory rights have been violated. A decision is awaited on that motion.

In addition to the lawsuit, the policies sparked a recall election against the school board president and board members. President Greg Talberg alone was recalled.

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Update: Grimm v. Gloucester County School Board

On Aug. 9, 2019, the U.S. District Court for the Eastern District of Virginia granted Gavin Grimm's motion for summary judgment, ruling that, based on the 14th Amendment and Title IX, the school violated his rights by maintaining restroom rules that segregated transgender students. Case 4:15-cv-00054-AWA-RJK, Document 229. The court affirmed his constitutional rights, stating:

In sum, there is no question that the board’s policy discriminates against transgender students on the basis of their gender nonconformity ... Under the policy, all students, except for transgender students, may use restrooms corresponding with their gender identity. Transgender students are singled out, subjected to discriminatory treatment and excluded from spaces where similarly situated students are permitted to go.

Order, slip op., page 17; District Judge Arenda Wright Allen’s Order is available at https://www.aclu.org/sites/default/files/field_document/grimm_decision.pdf. (This case was discussed more fully in this column, Open Court, Spring 2019.)

Commission on Unalienable Rights

On May 30, 2019, Secretary of State Mike Pompeo announced the creation of the Commission on Unalienable Rights by publication in the Federal Register. https://www.govinfo.gov/content/pkg/FR-2019-05-30/html/2019-11300.htm. Its stated purpose is to provide “fresh thinking about human rights discourse where such discourse has departed from our nation’s founding principles of natural law and natural rights.”

The commission’s creation, name and stated purpose are of interest, where the administration removed the United States from the United Nations Human Rights Council, severed relations with human rights monitors and, domestically, sanctioned or proposed actions curtailing the rights of women, minorities, the LGBTQ community, especially through the use of non-legislated executive orders.

Policy analysts and advocates highlight concern that references to “natural rights” and “natural law” signal profound change on the issue of human rights. https://www.washingtonpost.com/politics/2019/06/06/this-is-why-trumps-new-commission-unalienable-rights-is-likely-upset-human-rights-community/. This language deviates from “universal human rights,” the predominate prism through which to consider human rights since the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) in 1948, https://www.un.org/en/udhr-book/pdf/udhr_booklet_en_web.pdf, and arguably suggests the administration’s affinity with the religious right, which itself has used such phrases to challenge rights. Secretary Pompeo’s rationale is that the current understanding of human rights acts to “blur the distinction between unalienable rights and ad hoc rights granted by governments” and “are often aimed more at rewarding interest groups and dividing humanity into subgroups;” the commission will “ground our discussion of human rights in America’s founding principles.”

Conservatives dominate the commission’s 10 members. Its chair, Harvard law professor and former U.S. ambassador to the Vatican Mary Ann Glendon, has spoken out against same-sex marriage and been active in the pro-life movement. However, she is known to be a strong supporter of the UDHR, which is relevant in analyzing the commission.

The commission’s significance might depend on the 2020 presidential and senatorial elections. However, it might trigger discussions, laws and policies that revamp our understanding of human rights as they have evolved in law, policy and constitutional doctrine since the founding days of the nation.

Prosecutorial Discretion Used to Leave Same-Sex Partners Unprotected

Prosecutor Craig Northcott, district attorney general of Coffee County, Tennessee, has used his interpretation of biblical law as a basis to deny victims of domestic violence who are partners or spouses in a same-sex relationship protection from domestic violence. Rejecting the validity of marriage between same-sex partners, granted by what he called “the social engineers” of the Supreme Court, Northcott stated: “There is no marriage to protect with homosexual relationships, so I don’t prosecute them as domestic.” http://www.abajournal.com/news/article/ethics-probe-launched-after-daa-calls-islam-an-evil-belief-system.

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Law Enforcement and LGBTQ


The Department of Justice at the Supreme Court

The three cases (consolidated) that could define what discrimination against LGBTQ people is lawful in the United States are set for argument before the U.S. Supreme Court on Oct. 8, 2019: Bostock v. Clayton County, Georgia, No. 17-1618; R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, No. 18-107; and Altitude Express Inc. v. Zarda, No. 17-1623.

In its amicus curiae brief, filed Aug. 23, 2019, the U.S. Department of Justice argued in Bostock that the word “sex” in federal law refers to a person’s biological sex and does not include sexual orientation. https://www.supremecourt.gov/DocketPDF/17/17-1618/113417/2019082314530_17-1618bsacUnited-States.pdf, pp. 9, 13. DOJ contends in its filing that Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which bans sex stereotyping under Title VII, did not address transgender discrimination.

Federal Contractors and Free Exercise

The U.S. Department of Labor proposed a rule, published in the Federal Register on Aug. 15, 2019, https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-17472.pdf?utm_medium=email&utm_campaign=pi+subscription+mailing+list&utm_source=federalregister.gov, to “provide clarity” to contractors seeking to work with the federal government as to the legal limits of discrimination when employment actions are “conscience-based.” The department provided information about the proposed rule in a press release: https://www.dol.gov/newsroom/releases/ofccp/ofccp20190814. Comments were due by Sept. 16, 2019. The proposed amendment would revise Title 41, Public Contracts and Property Management, Part 60-1.5(e), Exemptions, to provide:


As Bloomberg Law reported, the proposed rule “would cement current exemptions that ‘religion-exercising organizations’ can use to shield themselves from bias claims for hiring decisions and other actions motivated by religious belief.” The new definition of “religious organization” is expansive, giving wide reach to the principles of Burwell v. Hobby Lobby Corp., 134 S.Ct. 2751 (2014). It includes religious entities, as well as “closely held” companies acting in accordance with an owner’s religious belief. https://news.bloomberglaw.com/daily-labor-report/contractor-rule-could-pit-religious-liberties-against-lgbt-rights-corrected/

The proposal could affect many Americans beyond the LGBTQ community. Potentially, employed single mothers, religious minorities, specific members of racial groups who have married, people with a criminal history and others could fall under the proposed rule, depending on the employer’s “religious conscience” regarding such persons.
Film

“For They Know Not What They Do,” from director Daniel G. Karslake, is a look inside evangelical communities, providing a face to voices of hate as well as tolerance and examining the difference between religious freedom and religious bias. The film is an example of the power of the documentary film. There is not hate within its message, just the intent to showcase what currently exists, to no longer let hate live behind a religious and political backdrop, instead bringing the stories of individuals forward and showing the work that still needs to be done. [https://www.filminquiry.com/tribeca-film-festival-2019-doc-1/](https://www.filminquiry.com/tribeca-film-festival-2019-doc-1/)

“Vita and Virginia” from director Chanya Button, depicts the love affair, friendship, professional relationship and writings between socialite and author Vita Sackville-West and Virginia Woolf, a leading literary force in the early 20th century. The film, based on a 1992 stage play written by Eileen Atkins, utilizes the letters and diary writings of both Sackville-West and Woolf. The film stars Gemma Artht in as Sackville-West and Elizabeth Debicki as Woolf.

Books

“Mama’s Boy: A Story from Our Americas” by Dustin Lance Black
This memoir, from the LGBT activist and Oscar-winning screenwriter of the film MILK, reflects the lifelong impact a good parent has on children even as they grow to face trauma, turmoil and change. The book examines the author’s upbringing in a Mormon family, his mother’s disability, their struggles with each other and the outside world, and his challenge in coming out. In his reflection on the Mormon Church, Black examines the shame and disapproval he experienced from the community, but also the protection and support the Mormon church provided. The book also delves into wider social and political issues of LGBTQ concerns.

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“On Earth We’re Briefly Gorgeous” by Ocean Vuong:
This fiction debut from poet Ocean Vuong examines many forms of “otherness”: immigrant, queer, literate, mentally ill and more. Written in signature poetic language, the book examines family, violence, illness, race, gender and feeling through the conceit of a letter written by a son to his illiterate mother. An emotionally wrenching read, the novel has been highly praised for the beauty of the language and the penetrating nature of its observations. https://www.npr.org/2019/06/05/729691730/on-earth-is-gorgeous-all-the-way-through

Children’s Books

“Julian is a Mermaid” by Jessica Love
“Parents need to know that ‘Julián Is a Mermaid’ by Jessica Love is a story about a boy who wants to be a mermaid that will resonate with all kids who have secret dreams. Julián shares his dream and identity with his abuela, but when he first tries dressing as a mermaid, he does it when he’s alone ... But when she (Abuela) brings him to a parade where everyone’s dressed in similar costumes, there’s relief that Julián has found his tribe. Author-illustrator Love depicts a vibrant community where everyone’s brown-skinned ... Parents might also be interested to know that the Mermaid Parade is a real event: an annual, spirited spectacle that ushers in summer at New York City’s Coney Island.” Review by Jan Carr, Common Sense Media, https://www.commonsensemedia.org/book-reviews/julian-is-a-mermaid

“Rainbow: A First Book of Pride” by Michael Genhart, PhD, illustrated by Anne Passchier
A primer for the young on pride events throughout the year. The book is illustrated with beautiful colors of the rainbow and celebrates “the life, healing, light, nature, harmony and spirit” of family and LGBTQ pride. Rainbow will be of special interest to children in same-sex parent families www.apa.org/pubs/magination/441B269. See also, Love is Love by Michael Genhart (Author), Ken Min (Illustrator).

“Jacob’s Room to Choose” by Sarah and Ian Hoffman, illustrated by Chris Case
The authors continue to tell the story of Jacob, seen first in “Jacob’s New Dress.” This time, the concerns of gender nonconforming children play gently on the “bathroom cases.” Jacob is expelled from the boy’s bathroom because of how he is dressed, and a similar event happens in the girl’s bathroom. The teacher seizes the incidents as a true “teaching moment” for all of her students to resolve the problem, demonstrating the importance of allies for the two children and the importance of acceptance for everyone.

Exhibits

The American History Museum of the Smithsonian has increased its collection of items on exhibit which makes visible LGBTQ history. On Aug. 19, 2019, “Will & Grace” creators added scripts and show memorabilia to the museum’s collections. Other artifacts, including the first transgender pride flag, athlete Renée Richards’ tennis racket and items from the DC Cowboys Dance Company were also entered into the collection. These items on display in Washington make visible the history of the LGBT community, which is absent from many similar museums, and hopefully demarginalize individuals who can see themselves and their history treated with respect and importance.
Read more: https://www.smithsonianmag.com/smithsonian-institution/will-grace-affirms-role-american-history-180952400/#byDoqoTL3QFWkuhr.99
Getting to Know One of Our Members: Ben Jerner

Just for the record, as they say, what is your full name?
Benjamin Leigh Jerner

Please tell our readers about your background, education and employment as an attorney.
I was born in Creve Coeur, Missouri. I spent my elementary school years in Plano, Texas. At the age of 10, with an unmistakable Texas accent, my family moved to southern New Hampshire. I survived long enough to lose the “y’all” and stayed in New England through my college years. In 1992, I moved to Philadelphia to attend law school at Temple University.

After graduation I worked for a couple of small firms before opening my own practice in 2001. In 2003, Tiffany Palmer and I founded Jerner & Palmer PC. Over the last 16 years, we have practiced in the areas of estate planning and administration, adoption and assisted reproduction law, and family law, with a particular focus on the needs of LGBT clients.

Where do you live and work?
I live in Elkins Park, Pa., and I work in Northwest Philadelphia. Although I sometimes miss city life, I am very happy at this point in my life to be living in the ‘burbs and practicing in our relatively quiet Germantown neighborhood.

Why did you join the PBA GLBT Rights Committee? Does it dovetail with other professional or volunteer efforts or ventures?
I joined the committee in order to work on the Transgender Name Change Task Force. The task force was a natural fit for me as, over the past four or five years, a significant portion of my practice has been doing name changes for transgender children and adults.

What’s your favorite vacation spot?
My favorite vacation spot, in theory, would be a cabin by a lake in the middle of nowhere. As I am married to an Israeli and have two children, our vacations are usually to beach locations that are fully cable- and WiFi-equipped.

Do you have a favorite book?
I love the Chief Inspector Gamache Series by Louise Penny because I love reading mysteries and because, if there was such a village as Three Pines in Quebec, that is where I would like to live.

Do you have a favorite TV show?
My favorite TV show at the moment is “The Deuce.” My brilliant friend, Will, is a writer on the show – but the real reason I’m hooked is that I’ll watch anything with Maggie Gyllenhaal ...

What about a favorite movie?
Hmm. I’m not sure I have one favorite movie. Some favorites include “Casablanca,” “It’s a Wonderful Life” and all the Harry Potter movies.

Do you have a favorite band or type of music?
I love many kinds of music, from Joni Mitchell to the Hamilton soundtrack to Taylor Swift (in my defense I have a 10-year old daughter, and some of that Taylor Swift music is pretty catchy).

Is there anything special you do after a particularly challenging day?
My favorite thing to do after a particularly challenging day is to read to my kids at bedtime. It’s the one thing I try to never miss, and it is known at our house as “Dad’s favorite time of the day.”

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Getting to Know A Member: Ben Jerner
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Is there any special photo or artwork on your office wall or in your office?
Photos of New York taken by my dear friend, Lisa, (which remind me that there are amazing people in the world), pictures of my family (which remind me why I work so hard) and a few thank-you notes from clients (which remind me that what I do does, sometimes, make a real difference).

Would you like to tell us about any interesting object you keep on your desk?
I’m sure there is something very interesting on my desk — somewhere underneath all the piles of paper ...

What’s one thing that we don’t know about you?
I have never gotten a speeding ticket.

Do you have any pet peeves?
People who are unable to say the words “I don’t know.”

Do you have any pets?
We have a Tibetan Spaniel named Rosie.

If you were not a lawyer, you would be a _____.
Cabinet maker or a farmer.

Open Court Co-editors

Martricia O’Donnell McLaughlin has practiced law in Northampton and surrounding counties since 1979 in the general practice firm of McLaughlin and Glazer. Currently, Martricia concentrates her legal practice in criminal law and appellate advocacy. She is also a certified mediator concentrating in family and elder issues.
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Mária Zulick Nucci is a contract attorney with Allerton Bell PC in Wyoming and is experienced in appellate litigation and aviation law, with an interest in animal law. Her private and public sector experience has covered a range of civil law areas. She graduated from Temple University School of Law.
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Committee History:
The committee was formed in 2005. The committee’s mission is to study matters pertaining to the recognition and protection of the legal rights of the gay, lesbian, bisexual and transgender (GLBT) community. The committee monitors and makes recommendations on issues and developments in the law impacting GLBT people in the public and the legal profession.

Committee Membership:
The committee is open to GLBT lawyers and allies. The committee welcomes all members who are interested in promoting equal rights for the GLBT lawyers and the GLBT community at large.