INSIDE: SCHOOL VOUCHERS, RACIAL PROFILING AND MORE

DELAWARE LAWYER

A PUBLICATION OF THE DELAWARE BAR FOUNDATION

Volume 20 Number 3 $3.00 Fall 2002

REC D
T 1 6 2002
GIFT PLA

CIVIL RIGHTS IN DELAWARE:

Where We Are Now

Nonprofit Organization
U.S. Postage
PAID
Wilmington, Delaware
PERMIT NO. 697

WHEN WORDS ARE NOT ENOUGH

Carl DOUBÉT Jr.
JEWELERS

Your Official Rolex Jeweler

Greenville • (302) 888-2991

CONTENTS

FALL 2002

EDITOR'S NOTE

2

CONTRIBUTORS

3

FEATURES

6

ZELMAN V. SIMMONS-HARRIS AND THE POLITICIZATION OF RELIGION

Lawrence A. Hamermesh

12

THE PACE OF PROGRESS IN DELAWARE: THE JURY IS STILL OUT

Antoine J. Allen

14

REDLINING LEARNERS: DELAWARE'S NEIGHBORHOOD SCHOOL ACT

Leland Ware

20

THE CASE FOR DRUG TREATMENT: COMMON SENSE VERSUS INERTIA

Thomas P. Eichler

26

PREVENTING RACIAL PROFILING AND ENSURING PROFESSIONAL TRAFFIC STOPS

Mark W. Seifert

28

RLUIPA: PROTECTING HOUSES OF WORSHIP AND RELIGIOUS LIBERTY

Timothy J. Houseal

OPINION

35

A CIVIL LIBERTIES PARADOX

William E. Wiggin

As the Executive Director of the American Civil Liberties Union of Delaware, it is my job to think and worry about our civil liberties all day long — and I confess to lying awake at night as well. Unfortunately, I have more worries than I could include in this issue. In selecting the pieces that follow, I have tried to focus on issues that affect us at a state and local level and matters that the ACLU of Delaware has taken an active interest in.

Other issues also deserve our attention. The tragedy of September 11 has been followed by an unprecedented assault on our civil liberties. Congress passed the USA Patriot Act in a matter of days without meaningful public input. Among its many troubling provisions, the Patriot Act reinstates domestic intelligence operations banned since the 1970s and reduces judicial oversight of federal investigations to a bare minimum.

The Justice Department recently rolled out Operation TIPS — the Terrorism Information and Prevention System to encourage citizens to report one another for suspicious activity. Attorney General Ashcroft singled out delivery people, letter carriers, utility readers and cable repairmen as "ideally suited" for the plan. Of course they are: they have access to our homes, something the Justice Department can only get with a warrant. The US Postal Service, to its credit, refused to participate. In the latest absurdity surrounding Operation TIPS, *Slate*, the online magazine, reported that calls to Operation TIPS are being taken by FOX Television's "America's Most Wanted".

There are more problems out there than I could cover in a year's worth of issues of *Delaware Lawyer*. Here are just a few:

- A recent U.S. Supreme Court opinion called into question the validity of Delaware's death penalty statute and, at the urging of the Delaware Attorney General, the General Assembly voted in a new death penalty statute in the last hours of its session without any opportunity for public comment.
- The Delaware Department of Correction has a multi-million-dollar facility where inmates are subjected to twenty-three-hour-a-day isolation at the same time that Gander Hill is so overcrowded that prisoners must sleep in the gym and dozens of men share a single bathroom.
- Delaware's Freedom of Information Act, already one of the most limited in the country, was gutted by the General Assembly.
- The Delaware Senate refused to vote on House Bill 99, a comprehensive gay and lesbian civil rights act.

And that's just a few.

Don't lie awake at night worrying about the state of civil liberties in our nation. Do something. Contact a legislator. Represent a prisoner in a prison conditions case. Write a letter to the editor. You could even join the ACLU.

Drewry N. Fennell

KNIPES-COHEN COURT REPORTING
An Affiliate of Spherion

400 Market Street, 11th Floor
Philadelphia, PA 19106
800-544-9800 215-928-9300
Fax: 215-627-0555

- Attorney's Lounge
- Audiotape Transcription Services
- Certified Shorthand Reporters (NJ & DE)
- Complete Litigation Support Services
- Condensed Transcript Formats
- Copy Services
- Court Filing
- Day-In-Life Videos
- Deposition Conference Rooms
- Deposition Keyword Indexing
- Document Imaging
- Document Management
- Document Scanning
- Expedited and Daily Transcript Services
- Full Service Agency
- Imaging
- Meeting Facilities
- Product Demos
- Real-time Reporting
- Registered Professional Reporters
- Subpoena Service
- Video Conferencing
- Videotape Depositions
- Video Duplication & Editing

CONTRIBUTORS

ANTOINE J. "TONY" ALLEN

is President of the Metropolitan Wilmington Urban League, whose mission is to enable people of color to secure economic self-reliance, parity, power and civil rights. He was previously Special Assistant to U.S. Senator Joseph Biden, Jr. Mr. Allen was recently appointed to the Governor's Judicial Nominating Commission. Winner of the 2002 American Civil Liberties Foundation Gerald Kandler Memorial Award, Mr. Allen holds a Ph.D. in Urban Affairs and Public Policy from the University of Delaware.

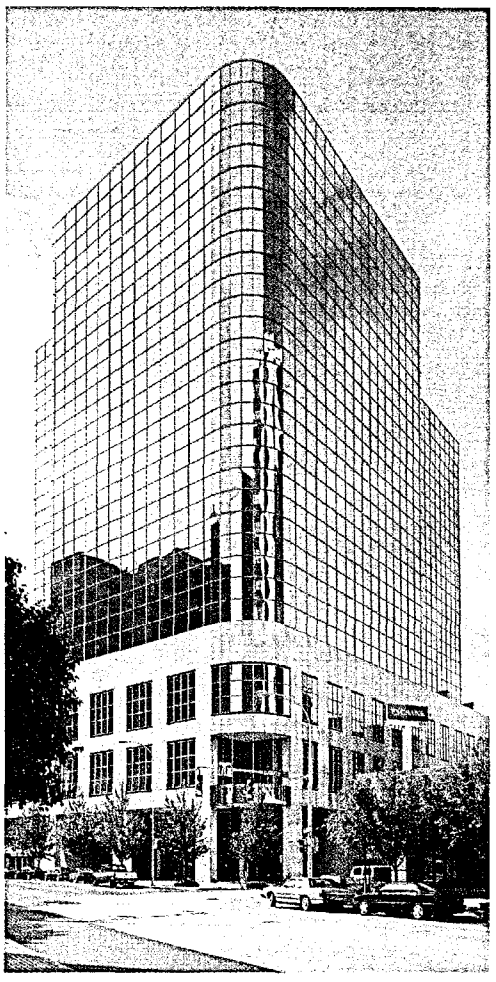
LAWRENCE A. HAMERMESH

(B.A., 1973, Haverford College; J.D., 1976, Yale Law School) is President of ACLU Delaware and Associate Professor of Law at Widener University School of Law. A partner with Morris, Nichols, Arsht & Tunnell until 1994, Professor Hamermesh teaches and writes in the area of corporate law and finance. He is Chair of the Council of the Corporation Law Section of the Delaware State Bar Association, and is a member of the Corporate Laws Committee of the ABA Business Section.

THOMAS P. EICHLER

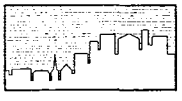
is Executive Coordinator for Stand Up for What's Right and Just (SURJ), whose mission is to reform the State's criminal justice system. Prior to joining SURJ, he served three Delaware Governors as Director of Environmental Control, Secretary of Health and Social Services, and of Services for Children, Youth and Their Families. Mr. Eichler has received the National Governors Association Distinguished Service Award and the National Academy of Public Administration and American Society of Public Administration National Public Service Award. Mr. Eichler is a Distinguished Alumnus of the Rockefeller College of Public Affairs and Policy, State University of New York, and is a Distinguished Policy Fellow with the University of Delaware.

(Continued on page 5)



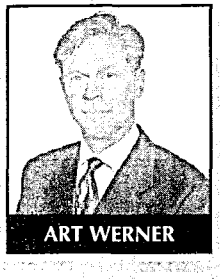
We Enhance The Value Of Your Property

Customized Service • Responsive Experts
Extensive Resources • Decades of Experience



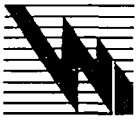
ASSET MANAGEMENT ALLIANCE
A Bellevue Holding / EDiS Joint Venture
Commercial Property Management
222 Delaware Avenue • P.O. Box 710 • Wilmington, DE 19899
Paul L. Voss, Jr. • 302-655-2100 • FAX 302-655-3531
www.assetmanagementalliance.com

LAWYERS' PROFESSIONAL LIABILITY



Phone: 302.656.8359
Fax: 302.656.0749
Hercules Plaza, Wilmington

WERNER INSURANCE



• LIABILITY (AUTOMOBILE ACCIDENTS, SLIP & FALLS) •

S&H INVESTIGATIVE SERVICES

State of the Art Equipment
Uncompromising Professionalism

Brief Adjustments

John E. Slagowski
Director

offices located in:

DELAWARE
MARYLAND
PENNSYLVANIA

office (800) 446-9911
fax (302) 992-9899

Don't forget to visit our website!

www.SnH.net

• ASSET INVESTIGATIONS • TRIAL PREPARATION • COURT TESTIMONY • WORKER'S COMP. •

• MISSING PERSONS • BACKGROUND INVESTIGATIONS • PROCESS SERVICE • DATABASE RESEARCHES •

• STATEMENTS • SURVEILLANCE • EDUCATIONAL •

PHILIP BERGER

Weichert, Realtors®

Providing Experienced, Professional Real Estate Service to all of New Castle County Since 1969.

Weichert "President's Club"

3302 Concord Pike, Wilmington, DE 19803
Off: 302-478-3800 Res: 302-764-8384

DELAWARE LAWYER
A publication of Delaware Bar Foundation
Volume 20, Number 3

BOARD OF EDITORS
Karen L. Pascale, Chair
Richard A. Levine, Managing Editor
Hon. Thomas L. Ambro
Teresa Cheek
Lawrence S. Drexler
Joel Friedlander
Peter E. Hess
Hon. Jack B. Jacobs
David C. McBride
Susan F. Paikin
Vernon R. Proctor
Jeffrey M. Schlerf
Robert W. Whetzel
William E. Wiggin

DELAWARE BAR FOUNDATION BOARD OF DIRECTORS
Harvey Bernard Rubenstein, President
Mary E. Copper
Anne Churchill Foster
Hon. Randy J. Holland
Vivian Medinilla
Elizabeth Yatco Olsen
Donald F. Parsons, Jr.
Michael J. Rich
Carl Schnee
Calvin L. Scott, Jr.
Barbara H. Stratton
Donald J. Wolfe, Jr.

Executive Director
Susan W. Cobin

DELAWARE LAWYER
Attention: Chair, Board of Editors
c/o Media Two, Inc.
22 W. Pennsylvania Ave., Ste. 305
Towson, MD 21204

Subscription orders and address changes should be directed to:
Lora Nikolaeva (302) 656-1809 x247

Requests for information about advertising should be directed to:
Vera Malkowski (410) 879-9606
vera.malkowski@mediatwo.com

DELAWARE LAWYER is published by Delaware Bar Foundation as part of its commitment to publish and distribute addresses, reports, treatises, and other literary works on legal subjects of general interest to Delaware judges, lawyers, and the community at large. As it is one of the objectives of DELAWARE LAWYER to be a forum for the free expression and interchange of ideas, the opinions and positions stated in signed material are those of the authors and not, by the fact of publication, necessarily those of Delaware Bar Foundation or DELAWARE LAWYER. All manuscripts are carefully considered by the Board of Editors. Material accepted for publication becomes the property of Delaware Bar Foundation. Contributing authors are requested and expected to disclose any financial, economic, or professional interests or affiliations that may have influenced positions taken or advocated in the articles. That they have done so is an implied representation by each author.

Copyright 2002
Delaware Bar Foundation
All rights reserved, ISSN 0735-6595

TIMOTHY JAY HOUSEAL

is a Partner at Young Conaway Stargatt & Taylor, LLP where he practices in the areas of environmental law, insurance coverage litigation and other complex litigation. In June 2002, he was elected to the National Board of Directors of the Christian Legal Society.

MARK W. SEIFERT

serves as the Technology Officer for the Delaware State Police. He started his career with the DSP in 1987. Major Seifert is a graduate of the University of Delaware and has an M.P.A. from Wilmington College. He also holds graduate certificates from the Southern Police Institute at the University of Louisville and the Senior Management Institute for Police Programs at the John F. Kennedy School of Government, Harvard University.

LELAND WARE

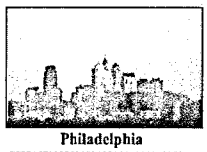
is the first holder of the Louis L. Redding Chair for the Study of Law and Public Policy at the University of Delaware. He was previously a Professor at St. Louis University School of Law and, from 1984 to 1987, University Counsel at Howard University. Prior to joining Howard, he was a Trial Attorney with the U.S. Department of Justice, Civil Division in Washington, D.C. Professor Ware serves on the editorial board of the *Fair Housing Fair Lending Reporter* and is a Vice President of the National Board of Directors of the American Civil Liberties Union. Professor Ware is a graduate of Fisk University and Boston College Law School. ◆

ESQUIRE™

DEPOSITION SERVICES

1201 N. Orange Street, Suite 760, Wilmington, DE 19801
302.426.9857, Fax 302.884.6742
Additional local offices in Doylestown, Kennet Square, Media, Norristown and Philadelphia, PA; Florham Park, Westmont and Woodbridge, NJ

Wilmington



Philadelphia

New York

Washington D.C.

Houston

San Francisco

San Diego

Denver

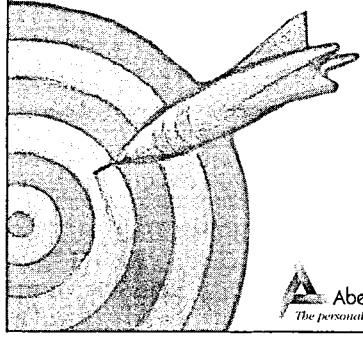
Chicago

Esquire Deposition Services™ is the leader in delivering quality-assured court reporting services to every ZIP code in the U.S., ESPECIALLY WILMINGTON.

Call Esquire Deposition Services for interactive realtime reporting, video services, process service, interpreting/translating and other litigation support services. Discover local court reporting that delivers service anywhere, whether you're at home in Wilmington or on the road.

We're Your Local Court Reporting Company, Everywhere.

Is this how you choose your search firm?



At Abelson Legal Search we put ourselves in the place of our candidates and clients to best meet their goals and preferences. Our personalized approach has enabled us to complete more than a thousand permanent; long-term attorney placements. To learn more, call us at 215-561-3010.

Abelson Legal Search
The personal approach to legal search
1700 Market Street • Suite 2130 • Philadelphia, PA 19103
www.abelsonlegalsearch.com

Lawrence A. Hamermesh

ZELMAN V. SIMMONS-HARRIS AND THE POLITICIZATION OF RELIGION

On June 27, 2002, the last day of its October 2001 Term, the United States Supreme Court ruled in *Zelman v. Simmons-Harris*[1] that a "school vouchers" program did not offend the First Amendment's establishment clause, despite the fact that public funding for the program did ultimately pay for tuition at religious schools. This article is not a motion for reargument; for better or worse, the 5-4 majority opinion in *Zelman* is now controlling authority on the interpretation of the First Amendment of the United States Constitution. Instead, this article points out some of the concerns expressed by the *Zelman* dissenters, and invites consideration of some of the policy and legal debates that will inevitably follow in *Zelman's* wake.

A Short History of School Vouchers: The Idea, and the Cleveland Plan

A short reminder of the nature and history of "school vouchers" will assist in appreciating the significance and likely impact of the *Zelman* decision. School vouchers — essentially government checks issued to a student's family to be applied toward tuition at any eligible school — were originally conceived as a private market antidote to perceived evils of a public education monopoly.[2]

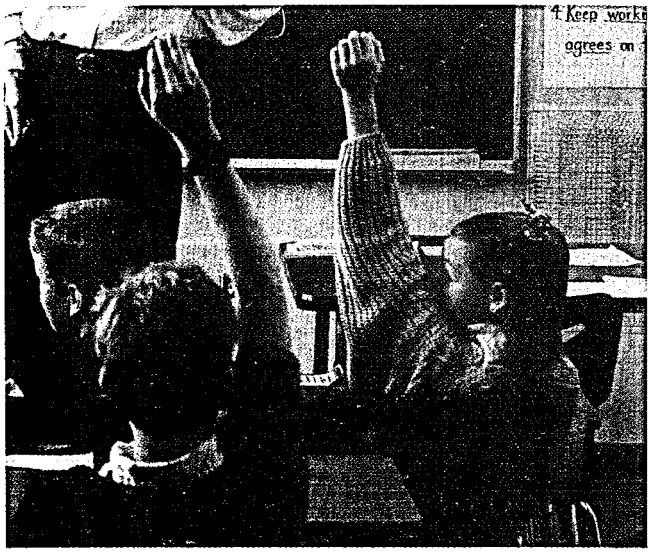
The idea was that instead of limiting public funding to "public schools," a government committed to supporting quality education should provide a base level of funding for each student's family, for whose support and dollars the schools — public and private, religious and nonsectarian — would compete. The resulting competition, it was thought, would winnow out the inferior schools from the better, and in

any event force all schools to be better and more competitive in both cost and quality.

This kind of "free market" voucher program — one in which all schools are essentially privatized — has never been implemented. What has been implemented instead are a number of programs — notably in Milwaukee and Cleveland — in which public funds are distributed only to low income families, in school districts in which it is perceived that the public schools are educationally inadequate.

In the Cleveland program at issue in *Zelman*, families with incomes below 200% of the poverty line had priority for receipt of school vouchers, and the program was limited to residents of school districts that were or had been under federal court supervision (as Cleveland's has been since 1995).

The Cleveland program also afforded families far less than the universal choice contemplated in the original, idealized version of a school vouchers program. Vouchers could only be used at eligible



"participating" schools. Those schools had to be located within the boundaries of the federally supervised districts, or in immediately adjacent districts. The schools had to meet "statewide educational standards." And to be eligible to enroll voucher students, schools had to agree "not to discriminate on the basis of race, religion, or ethnic background, or to advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin or religion."[3]

In reality, the school choice afforded under the Cleveland voucher plan was even more limited than the formal rules might have allowed. First, the amount of the voucher — no more than $2,250 per year — evidently limited the number of schools that chose to participate in the program, and the numbers of students they accepted. Not one school in the adjacent districts chose to accept voucher students. In the 1999-2000 school year, 56 in-district schools did participate, but all but ten were religiously affiliated.

Even more striking evidence of the lack of choice was the fact that 96.6% of the participating students that year were enrolled in religious schools: secular private schools enrolled only 129 out of the 3,700 voucher students. Interestingly, almost two-thirds of the voucher students who were enrolled in religious schools were from a different religious background than the schools in which they were enrolled. Not surprisingly, according to a parent survey, the parents of these students were motivated by academic reasons, not by religious choice.[4]

The conclusion is inevitable: at least a majority of the students participating in the Cleveland voucher program were receiving religious instruction at sectarian schools that their parents accepted solely or primarily as a condition to access to a facility they believed would improve their children's non-religious education. It was this vouchers program that the Supreme Court found not to constitute an establishment of religion.

The *Zelman* Decision

The reasoning of the majority in *Zelman* was simple, if not simplistic: starting from the hotly debated premise that the voucher parents' selection of a school was a "true private choice," the majority concluded that any "incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."[5] Accordingly, the Court ruled, the Cleveland program "does not offend the Establishment Clause" of the First Amendment.

The four dissenters obviously had a very different view of the Cleveland voucher program. In essence, they maintained that in reality — judging by the program's actual participation statistics as opposed to a formalistic, theoretical notion of parental choice — the Cleveland program amounted to the financial support of religious schools and concomitant religious instruction, in the amount of over $8 million annually. The dissenters' arguments regarding the application of the Establishment Clause to the Cleveland vouchers program are of course not, strictly speaking, authoritative on the interpretation of the First Amendment. The dissenting opinions, however, particularly those of Justices Souter and Breyer, point up important questions that policy makers now will have to confront, as legislatures across the country gear up to address the inevitable calls for the adoption of school voucher programs.

The Inevitable Policy Issues in the Wake of *Zelman*

In dissent, Justice Souter made the unassailable observation that school vouchers policy is now largely remitted to the "action of the political branches at the state and national levels."[6] The participants in those branches — and those who might seek to influence them — must carefully evaluate the special issues presented by vouchers programs that include funding of schools that promote religious instruction. The remainder of this article highlights some of those problems.

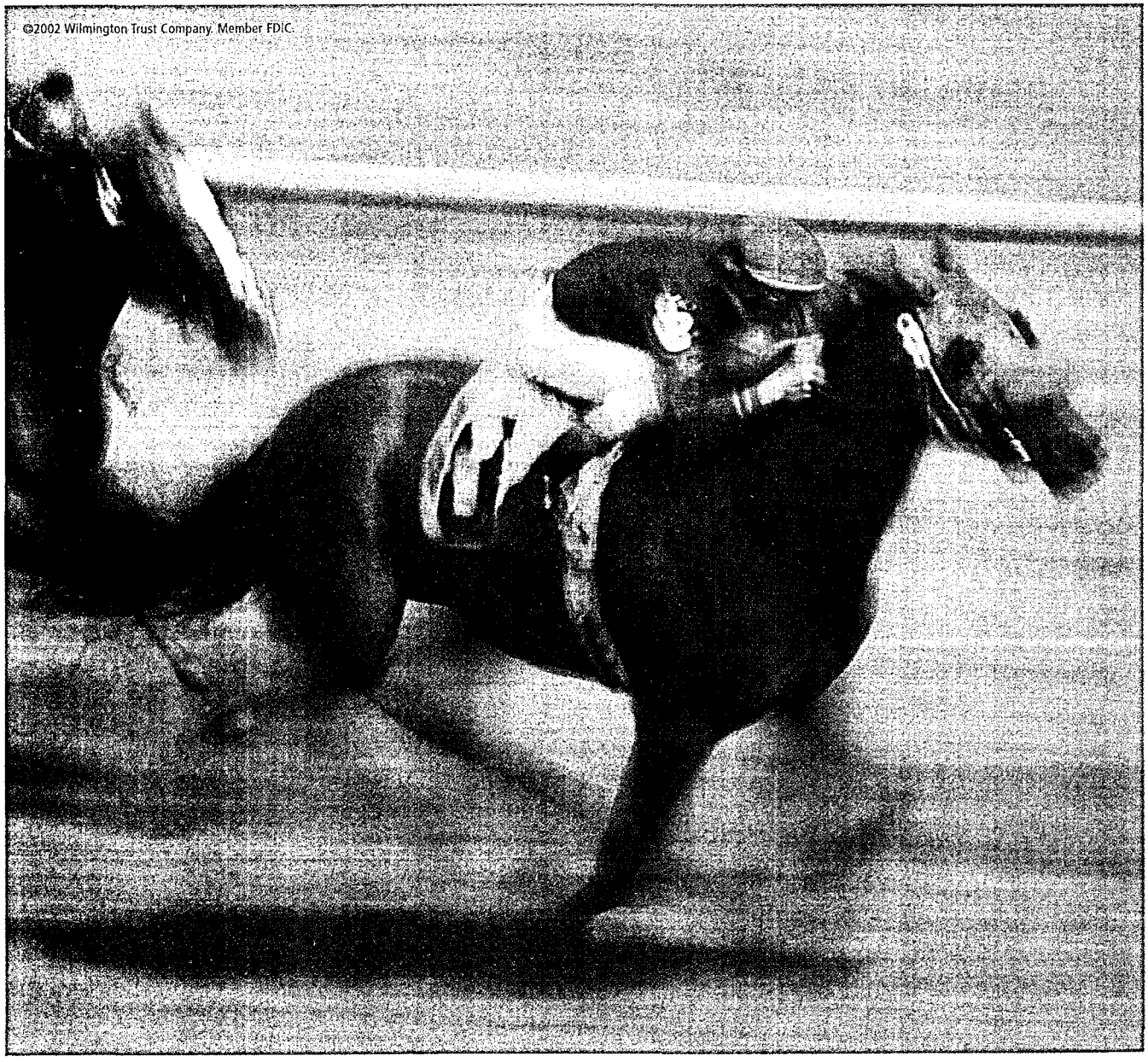
Student Admission Issues

One of the notable features of Cleveland's voucher program was its requirement that participating schools not discriminate on the basis of race, ethnicity or religion in admitting students.[7] In other words, participating sectarian schools were not permitted to prefer members of their own faith. In a voucher system with such a rule, for example, if 500 "voucher students" sought admission to a religious school and only 50 equally qualified students of that school's religious affiliation applied, only one in ten of the resulting student population would apparently be a member of that school's faith. Such a result may dramatically affect the desirability of a vouchers program to religious schools that wish to preserve a coherent faith community.

Of course, voucher legislation could theoretically (and putting aside issues under Title VI addressed by Professor Ware elsewhere in this issue) skirt this

WILMINGTON TRUST
Recognizing worth.

Advice
Investments
Banking
Lending
On-Line
Business Services



We've been selected "best financial services company" in Delaware.*
What Can We Do For You Today?

*In a recent study conducted by the Response Center, Wilmington Trust was rated highest overall among major full-service institutions in Delaware. We were voted #1 for "best financial services company," "best customer value" and "a good choice for managing wealth" - more than twice as often as the next highest ranked competitor in our class. Similarly, Delaware consumers overwhelmingly selected Wilmington Trust as best in class for most "trustworthy," "responsive" and "reliable."

EQUAL HOUSING LENDER

wilmingtontrust.com

800-814-8386

problem by permitting active and overt discrimination on the basis of sexual orientation, national origin, religion or perhaps even race. Elimination of at least some of these criteria from anti-discrimination strictures, however, could (justifiably) make such legislation politically controversial, if not downright unpalatable.

Thus, the dilemma is established. On one hand, will religious schools wish to see adopted a scheme in which a student's religious affiliation is not a permissible consideration for admission and in which the religious composition of their student bodies could shift dramatically in ways beyond their control? Conversely, will the taxpaying public tolerate a vouchers program in which participating religious schools can discriminate among applicants on grounds that federal and Delaware law generally reject? Or will religious schools, as a condition of receiving public funds, be required to dilute or compromise their religious mission by accepting state-imposed anti-discrimination criteria?

Will the taxpaying public tolerate a vouchers program in which religious schools can discriminate among applicants?

Employment Issues

Voucher programs with an anti-discrimination requirement like Cleveland's present similar issues involving participating schools' employment practices. Just as those schools may not discriminate on the basis of religion in accepting students, participating schools in the Cleveland program are presumably prohibited from discriminating in the hiring of teachers, administrators and other staff.

The same dilemma arises: will religious schools wish to be subjected to such limitations as a condition to participation in a voucher program? And if not, will legislators and the taxpaying public allow the use of significant public funds by institutions that do not observe such anti-discrimination constraints?

Another aspect of school employment practices will present difficult issues in the implementation of any voucher plan permitting use at religious schools. At present, State teacher certification requirements are limited to those who teach at public schools. And to be sure, nothing in a voucher program that includes religious schools would necessarily change that.

But consider the problem of the regulatory nose under the tent: if considerable public funds are ultimately directed to religious school instruction, how long will the taxpayers who support such funding, and the governmental institutions that administer the program, be content to leave teacher qualifications at participating private schools unregulated? If public regulation of teacher qualifications follows public funds into private schools, what will happen to the cost structure of those schools? Will those schools welcome application of teacher certification requirements? Or will public, political demands come into conflict with private (particularly religious) school preferences and practices?

Instructional Content Issues

Recall that the Cleveland voucher program required participating schools to agree not to "teach hatred of any person or group on the basis of race, ethnicity, national origin or religion."[8] It is hard to see how any publicly-funded vouchers program would or should tolerate such teaching by the schools it supported. But accepting this curricular limitation raises a variety of complex problems.

First, as Justice Breyer cautioned, there are central elements of the religious tenets of major faiths that could easily be interpreted to foster hatred of other religions.[9] Consider, for example, a public official or tribunal charged with enforcing the "no teaching of hatred" requirement who encounters espousal of Zionism (through celebration of Israeli Independence Day, say) at a Jewish school participating in a vouchers program. What if that official or tribunal

TRADEMARK
& COPYRIGHT SEARCHES

TRADEMARK-Supply word and/or design plus goods or services.

SEARCH FEES:
COMBINED SEARCH - $315
(U.S., State, Expanded Common Law and Internet)
TRADEMARK OFFICE - $135
STATE TRADEMARK - $140
EXPANDED COMMON LAW - $165
DESIGNS - $210 per International class
COPYRIGHT - $180
PATENT SEARCH - $450 (minimum)

INTERNATIONAL SEARCHING

DOCUMENT PREPARATION
(for attorneys only - applications, Section 8 & 15, Assignments, renewals.)

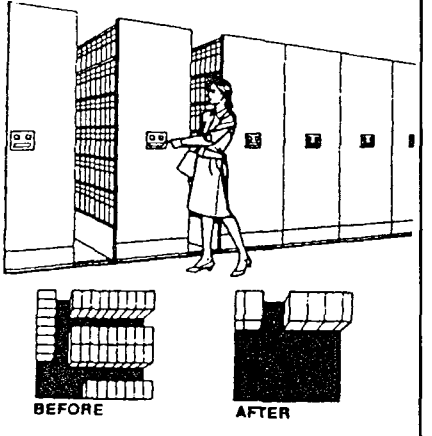
RESEARCH- (SEC - 10K's, ICC, FCC, COURT RECORDS, CONGRESS.)

APPROVED- Our services meet standards set for us by a D.C. Court of Appeals Committee.

Over 100 years total staff experience - not connected with the Federal Government.

GOVERNMENT LIAISON SERVICES, INC.
200 North Glebe Rd., Suite 321
Arlington, VA 22203
Phone: (703) 524-8200
FAX: (703) 525-8451
Major credit cards accepted.
TOLL FREE: 1-800-642-6564
WWW.TRADEMARKINFO.COM
SINCE 1957

Mobile Storage Systems



You can mobilize your cabinets and shelving for greater space savings. Adding wheels and tracks creates high-density filing by eliminating useless aisles. Store your records, supplies, data media, reference materials...anything worth keeping in an orderly fashion. TAB offers a wide choice of styles including Electric, Mechanical and Manual.

Call for a free brochure or survey.

EFFICIENT OFFICE SOLUTIONS, INC.
formerly **TAB of Delaware**
117 J&M Drive, New Castle, DE 19720
(302) 326-0660 Phone
(302) 326-0902 Fax
info@eos-tab.com

were to conclude that such espousal constitutes the teaching of hatred of persons of Palestinian origin?

More generally, would participating religious schools be required to disavow teachings in religious texts such as "Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness?"[10] Will it be unacceptable for religious schools that receive public funds to teach their students the superiority of their faith over others?

The mere existence of this kind of issue inevitably presents a second, even more uncomfortable one: who would decide, on behalf of the public authority supervising the voucher program, whether a particular religious school's teachings complied with the prohibition against fostering "hatred of any person or group on the basis of . . . religion"?

If the prohibition were not meaningfully monitored, it would be a sham; if it were monitored and enforced, on the other hand, who would make compliance judgments? The Secretary of Education? A court? Some other elected or appointed official? Would religious school curricula — including religious instruction itself — be subject to periodic state administrative review for compliance with the anti-hatred stricture?

Whoever might administer such a stricture, he, she or it would be in the unenviable position of monitoring and negotiating with religious schools over the content of their religious instruction, or even more uncomfortable, making a judgment that certain schools' religious teaching made them ineligible for continued support with the voucher program's funds. Religious schools would have to consider this prospect as well, in determining whether to participate in a voucher program, unless the program simply allowed participating schools to use public funds to promote even the most virulently anti-Christian, anti-Semitic or anti-Muslim teachings.

A similar curricular problem arises even in the absence of a voucher program, but is certainly suggested by Cleveland's requirement that participating schools satisfy "state educational standards." We continue to see bitter controversy over the curricular treatment of the subject of evolution, and the Supreme Court has even intervened to prohibit states from legislating to require the teaching of creationism where evolution is taught.[11] If participating schools in a voucher program must satisfy "state educational standards," will there not be greater regulatory pressure to dictate the content of religious school curricula, on the subject of evolution or otherwise?

Again, will greater public funding carry with it greater public demand for a role in determining the content of instruction at participating schools? Should religious schools consider this possibility before aggressively seeking the bait of state funding through a voucher program?

"Public money devoted to payment of religious costs . . . brings the quest for more."

Religious Competition Issues

If a Delaware program were to allow state-funded vouchers to be applied to religious school tuition, it is almost inevitable that religious schools and communities will weigh into the political arena in order to maximize the benefit to them of any voucher program. Perhaps they all will get along. As Justice Breyer warned, however, "Why will [the religious schools] not become concerned about, and seek to influence, the criteria used to channel this money to religious schools?"[12]

If the First Amendment, as interpreted in *Zelman*, does not itself spare us from such entanglement of church and state, at the very least our political bodies, not to mention our religious communities, ought to have such concerns clearly in mind in deliberating about the virtues of a voucher system.

Remaining Constitutional Issues

Although *Zelman* may have disposed of any absolute federal constitutional prohibition against indirect public funding of religious schools through a voucher program, there are plenty of issues under state constitutional provisions that must yet be resolved.[13] While Delaware was not one of the States that adopted constitutional provisions (so-called "Blaine amendments") aimed particularly at prohibiting public funding for sectarian (particularly Roman Catholic) schools,[14] Article I, Section 1 of Delaware's Constitution does contain a provision — dating back to the Declaration of Rights and Fundamental Rules of the Delaware State enacted September 11, 1776, and for which the First Amendment of the United States Constitution has no counterpart — that "no man shall or ought to be compelled . . . to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent. . . ."[15]

In light of the narrow majority that decided *Zelman*, one can be confident that a challenge to a voucher program in Delaware would focus significantly on that provision, Delaware's own constitutional separation of church and state.

Conclusion

In his dissent in *Zelman*, Justice Breyer quoted a predecessor, Justice Rutledge, in warning about the dangers of public funding of private religious education:

> Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one [religious sect] by numbers [of adherents] alone will benefit most, there another. This is precisely the history of societies which have had an established religion and dissident groups.[16]

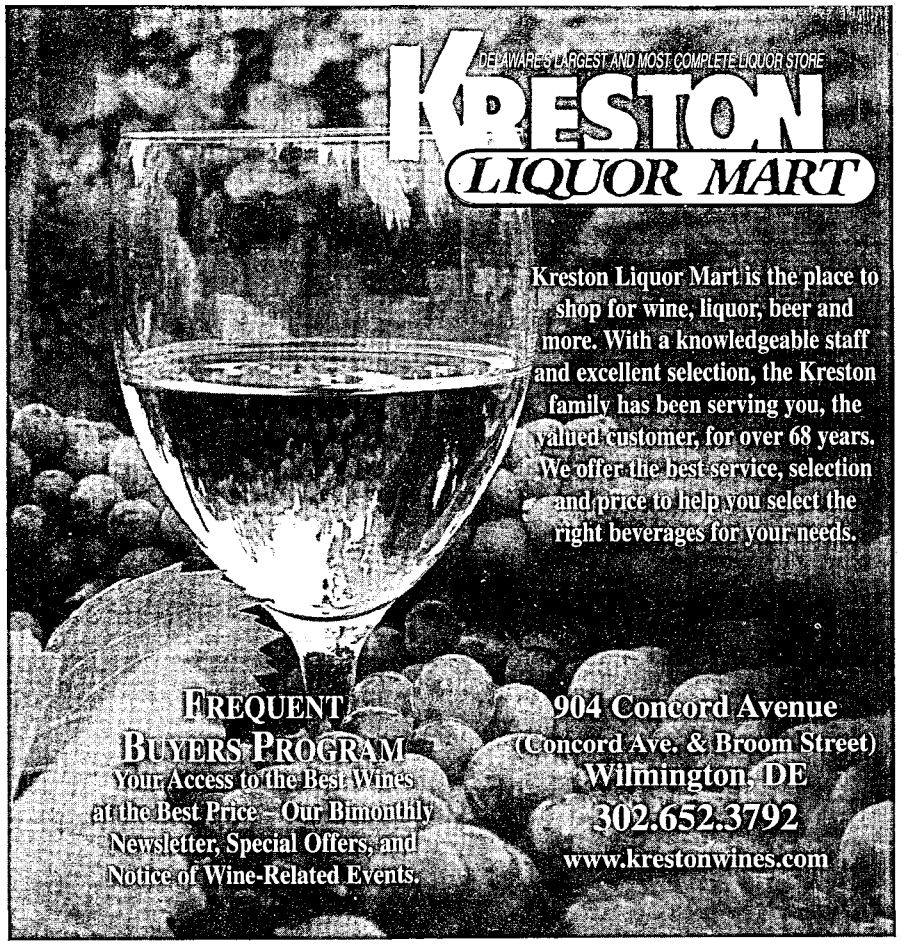
Before we embark in Delaware upon a program for providing such funding, let all of us pause and evaluate the risks against which Justice Rutledge warned, and the real complexities we will face, before we too readily accept any such program. ◆

Footnotes

1. 2002 U.S. LEXIS 4885, 70 U.S.L.W. 4683 (June 27, 2002) (hereafter "*Zelman*").
2. Many readers will recall the 1992 debate in this publication on the subject of school vouchers between former Governor Pierre S. duPont IV and David A. Drexler. *Delaware Lawyer* vol. 10, no. 3, at 27-36. At that time Governor duPont had recently proposed a voucher system in which parents not electing a public school would get a $2,150 voucher for tuition at an "accredited" private school. In a thoughtful nod

to the First Amendment, Governor duPont would have limited the voucher to $1,935 if applied at a religious school, "to avoid the constitutional problems of paying for the religious part of the curriculum of sectarian schools with tax dollars." Drexler, on the other hand, predicted that a voucher program would merely "provide private schooling opportunities to a comparatively few additional students, while diverting significant public resources from the public schools." For a more recent discussion of similar concerns, see Chipman L. Flowers, Jr., discussion "The Reformation of Public Education – Are School Vouchers the Answer?," *In Re:*, vol. 25, no. 9 (April 2002).

3. *Zelman*, 2002 U.S. LEXIS 4885 at *9-10.
4. *Id.* at *109-109 (Souter, J., dissenting).
5. *Id.* at *22.
6. *Id.* at *130.
7. *Id.* at *9-10.
8. *Id.*
9. *Id.* at *123, n.24 (See, e.g., Christian New Testament (2 Corinthians 6:14) (King James Version) ("Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?"); The Book of Mormon (2 Nephi 9:24) ("And if they will not repent and believe in his name, and be baptized in his name, and endure to the end, they must be damned; for the Lord God, the Holy One of Israel, has spoken it"); Pentateuch (Deut. 29:18) (The New Jewish Publication Society Translation) (for one who converts to another faith, "the LORD will never forgive him; rather will the LORD's anger and passion rage against that man, till every sanction recorded in this book comes down upon him, and the LORD blots out his name from under heaven"); The Koran 334 (The Cow Ch. 2:1) (N. Dawood transl. 4th rev. ed. 1974) ("As for the unbelievers, whether you forewarn them or not, they will not have faith. Allah has set a seal upon their hearts and ears; their sight is dimmed and a grievous punishment awaits them").
10. 2 Corinthians 6:14 (King James Version).
11. *Edwards v. Aguillard*, 482 U.S. 578 (1987).
12. *Zelman*, 2002 U.S. LEXIS 4885 at *141.
13. The Delaware Constitution of 1897 may extend protections of individual rights beyond the protection afforded under the Bill of Rights of the United States Constitution. See *Harris v. State*, __ A.2d __ , 2002 Del. LEXIS 395 at *10 (June 13, 2002), citing *Jones v. State*, 745 A.2d 856, 863 (Del. 1999).
14. See Laurie Goodstein, "In States, Hurdles Loom," *New York Times*, sec. 4, p.3 (June 30, 2002).
15. The full text of Article I, Section 1 is:
§1. Freedom of religion.
Section 1. Although it is the duty of all men frequently to assemble together for the public worship of Almighty God; and piety and morality, on which the prosperity of communities depends, are thereby promoted; yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent; and no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship, nor a preference given by law to any religious societies, denominations, or modes of worship.
See also THE DELAWARE CONSTITUTION OF 1897: THE FIRST HUNDRED YEARS (Delaware State Bar Association 1997) at 173, 285.
16. *Zelman*, 2002 U.S. LEXIS 4885 at *139-140, citing *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 53-54 (1947) (dissenting opinion).



SERVING DELAWARE TRIAL LAWYERS FOR OVER TEN YEARS!

DEMONSTRATIVE METROCOLOR EXHIBITS

High Volume Document Reproduction – Full Color or Black & White

Large Format Trial Exhibits – Custom Designed / High Quality

Engineering / Blueprint Copying-

Available 24 Hours a Day/7 Days a Week

FREE PICK-UP AND DELIVERY - WE'RE ONLY JUST A CALL AWAY!

302-888-1718

METROCOLOR HELPS YOU MAKE EVIDENCE EVIDENT!

Antoine J. Allen

THE PACE OF PROGRESS IN DELAWARE: THE JURY IS STILL OUT

In June 2002, the Metropolitan Wilmington Urban League (MWUL) was pleased to release *The Pace of Progress*, the first comprehensive report concerning the state of people of color in Delaware. The report was completed by legal scholar Professor Leland Ware, the Louis L. Redding Chair for the Study of Law & Public Policy at the University of Delaware; Professor Ware's assistant and doctoral candidate David Rudder; and Associate Professor in the Political Science Department Dr. Ted Davis. Two years ago, it was the goal of the MWUL to complete this work so that the entire community would have a baseline analysis of how far people of color have come toward the Delaware mainstream, and perhaps more importantly, how much real work is left to do. In the authors' own words, "While there have been considerable gains made by Delaware African-Americans and Hispanics in the decades following the enactment of the federal civil rights laws of the 1960s, vestiges of *de jure* segregation still impose substantial barriers to equity" (pp. 131, 132). Indeed, the jury is still out on racial balance and equality of opportunity in Delaware and in our country.

The Elements of Examination

This report examines the economic, educational, and social status of Delaware's African-American and Hispanic residents. Part I contains an examination of Delaware's history of racial discrimination in housing, education, and employment. It begins with an analysis of the post-Reconstruction era, when the system of racial segregation was established and concludes with a discussion of the 1960s, when federal Civil Rights legislation outlawed state-sponsored racial subordination.

The next part compares African-Americans and Hispanics to Delaware's white population in selected categories. These include average household incomes, levels of educational attainment, employment, and rates of homeownership. The report also examines the extent to which minority-owned business enterprises participate in the state's economy and compares the involvement of whites and minorities in the criminal justice system, focusing on arrest records for various criminal offenses.

The commentary also includes a historical analysis of Delaware's Hispanic population, the fastest-growing group in the state. The report concludes with a regional analysis, which compares Delaware to other states in the mid-Atlantic region, using the same units of measure that were employed in the intrastate comparisons. Our analysis shows that during the decades following the enactment of the Civil Rights legislation of the 1960s, African-Americans and other minorities have made considerable progress towards achieving racial equality.

Despite the advances, however, much remains to be done before the disparities, which can be attributed to Delaware's history and legacy of racial subordination, will be eliminated.

Selected Findings

During the era of state-sponsored segregation, African-Americans and Hispanics were excluded from all but the lowest paying and least desirable occupations. They were forced to attend separate and unequal schools. Their residential options were limited to segregated neighborhoods in which the principal features were dilapidated, substandard, and overcrowded housing. The Civil Rights legislation of the 1960s outlawed *de jure* segregation but these laws did not eliminate the disparities caused by decades of discrimination and subordination.

Currently, Delaware's African-American and Hispanic residents earn, on average, 60 cents for each dollar earned by the average white family. Blacks and Hispanics are under-represented in professional and upper-level management positions and over-represented in the lowest paying and least desirable occupations. Despite significant advances over the last forty years, the average levels of educational attainment for minorities in Delaware lags far below the average for whites.

It is important to recall that Delaware was one of the five jurisdictions involved in the Supreme Court's 1954 decision in *Brown v. Board of Education*, which declared segregation in public schools unconstitutional. Like many other states, Delaware engaged in years of dilatory tactics and did not begin to make serious efforts to desegregate its public schools until the late 1970s. The school districts in New Castle County were not released from federal court supervision until 1995. This means, among other things, that every African-American in Delaware's workforce, who attended New Castle County schools, was educated in circumstances in which the vestiges of segregation and discrimination remained.

African-American and Hispanic students score well below the state average on the mandatory student achievement examinations that were introduced in 1998. Nearly 40 percent of the state's African-American and Hispanic students did not secure passing scores on examinations administered pursuant to the new testing program.

This will have a devastating affect on the academic careers of this group of students. Students who do not receive passing scores cannot be promoted to the next grade level. Those who persevere and manage to fulfill all other state and local requirements will only be eligible to receive a "Basic" high school diploma, the lowest of the three levels established under Delaware's high-stakes testing regime. African-American and Hispanic students are also disproportionately placed in programs for students with learning disabilities.

The rate of home ownership for African-Americans is twenty percent lower than the level of white ownership. Even when family incomes are essentially the same, the level of African-American home-ownership is significantly lower than that of similarly situated whites.

An emotional plea for what we know to be fair and equitable is simply no longer enough.

Over the last decade, many localities in the state have become more residentially integrated, yet there are many communities in Delaware that are becoming far more segregated, especially within the City of Wilmington. One of the most segregated neighborhoods sits in the shadow of the state capitol in Dover. "Hypersegregation" — extreme racial isolation in inner city areas — is one of the most significant barriers to progress toward racial equality.

Delaware's minority-owned business enterprises are under-represented in every classification except the service industry, and they are virtually absent from banking and financial services, the fastest-growing sectors in the state's economy. African-Americans and Hispanics are over-represented in the state's criminal justice system. Their rates of arrest and incarceration far exceed those of similarly situated whites.

African-Americans and Hispanics collectively represent one-fourth of Delaware's population. Twenty percent of the state's inhabitants are African-Americans; Hispanics constitute the remaining five percent. Forty years ago, blacks were a mere thirteen percent of the state's population, and Hispanics were not among the groups identified on census forms. Delaware's African-American population has grown substantially, but over the last decade, the rate at which the Hispanic population has increased exceeds that of any other group. This trend indicates that the African-American population will continue to grow and Hispanics are likely to constitute a much larger proportion of the state's population.

Conclusion

The Pace of Progress is one example of the work of the Metropolitan Wilmington Urban League. While we are rooted in the history of the civil rights movement in Delaware and throughout our country, we know too that in many aspects, the rules of engagement have changed. An emotional plea for what we know to be fair and equitable is no longer enough. In the face of cheers for the success of the civil rights movement, our report reveals that disparities still remain and in some cases — even with the rise of a significant black middle class — such disparities have widened.

In Gunnar Myrdal's *American Dilemma* (1944), he suggested that America's treatment of the Negro was inconsistent with the precepts it espoused in its most seminal documents including the Constitution and the Bill of Rights. The face of the Negro has expanded to include growing Hispanic and Asian populations and such treatment of all of these groups, while better, has not yet found the common ground that our collective declarations of democracy and freedom suggest. Indeed, that "[a]ll men [and women] are created equal and endowed by their creator with certain inalienable rights . . ."

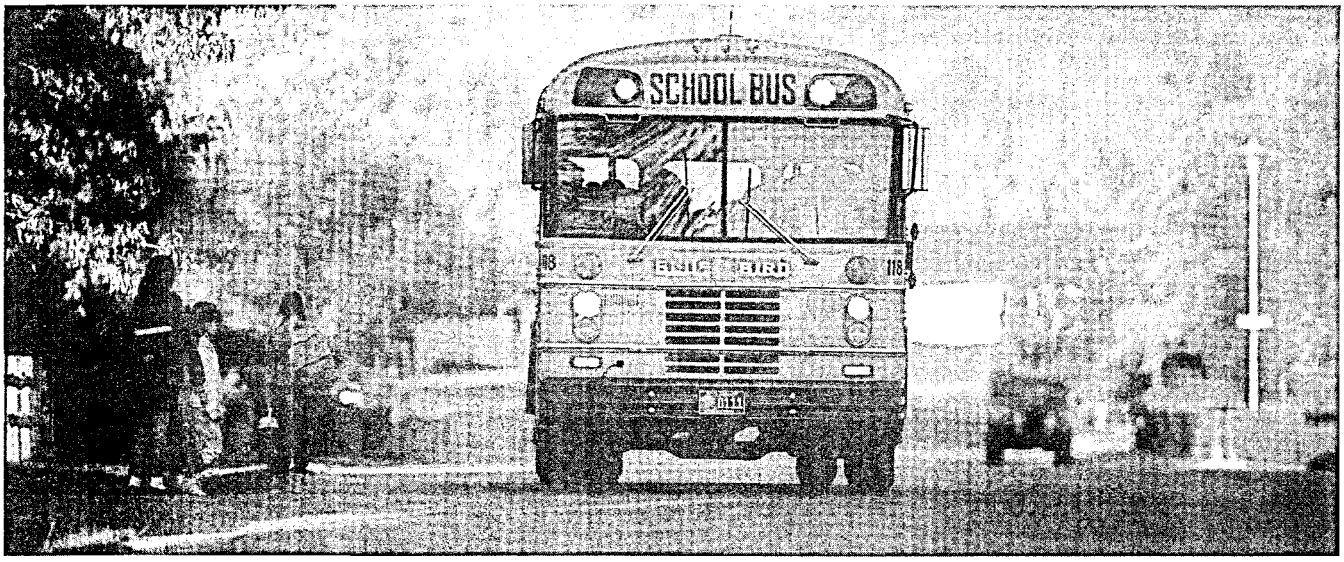
To find that common ground, we must work at it consistently and with each other. Purchase *The Pace of Progress* and join the Urban League movement. Together we can make more than a verbal difference. ◆

The Pace of Progress can be purchased through the MWUL for $22.00. Please call (302) 622-4300 to place your order. To join the Urban League movement, visit the MWUL website at www.mwul.org for more information.

FEATURE

Leland Ware

REDLINING LEARNERS: DELAWARE'S NEIGHBORHOOD SCHOOLS ACT



The year 2002 marks the 50th anniversary of a milestone in the efforts to desegregate public schools in Delaware. In 1952, civil rights lawyer Louis L. Redding prevailed in *Bulah v. Gebhart* and *Belton v. Gebhart*, the cases that compelled the desegregation of two school districts in New Castle County, Delaware.[1] Two years later, these proceedings were among the five consolidated cases that are collectively remembered as *Brown v. Board of Education*,[2] the decision that held that segregation in public education violated the Fourteenth Amendment. Because the court in *Brown* ordered that desegregation proceed with "all deliberate speed,"[3] it is likely that the civil rights lawyers expected that the process would take some time to complete. It is doubtful, however, that anyone anticipated in 1954 that the desegregation controversy would remain unresolved, nearly fifty years later.

After Brown was decided in 1954, the southern states embarked on a campaign of "massive resistance" in which they directly flouted the Supreme Court's mandate or engaged in endless foot dragging and other dilatory tactics.[4] Serious efforts to desegregate southern schools did not commence until the late 1960s, when the Supreme Court abandoned the "deliberate speed" approach and imposed on school districts an affirmative duty to eliminate all vestiges of segregation "root and branch."[5]

In Delaware the first large scale efforts to integrate New Castle County's schools began in the mid-1970s when a federal court in *Evans v. Buchanan* reconfigured the school districts and ordered busing to achieve racial balance within individual schools.[6] After years of court supervised desegregation efforts, in 1996 a federal trial court in Delaware held that the school districts in New Castle County had achieved "unitary status" and could be released from federal court supervision. This ruling was affirmed by a divided vote in the Court of Appeals for the Third Circuit.[7]

In 2000, the Delaware legislature enacted a neighborhood schools law,[8] which requires the assignment of students to schools closest to their homes without regard to how this might affect the racial composition of student populations. If the geographic restrictions imposed by this law are implemented literally, they will resegregate the schools in Wilmington. There are high levels of residential segregation in the city and 90 percent of the city's public school students are African-Americans and Latinos.

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from engaging in racially discriminatory activities. To establish a violation of the Civil Rights Act of 1964, Title VI, a plaintiff is required to prove that state officials acted with discriminatory intent.

However, U.S. Department of Education regulations implementing Title VI only require proof of a discriminatory effect.[9] Proof of discriminatory intent is not required.

As the discussion in the following sections of this article demonstrates, whatever the actual intent of the legislature may have been, the Neighborhood Schools Act violates federal law. The state neighborhood schools law will, at minimum, have a discriminatory effect on black and Latino students.

When the unitary status order was entered in *Coalition to Save Our Children v. State Bd. of Education*, the ruling was predicated on a court-ordered reconfiguration of the school districts in New Castle County that divided Wilmington among four separate districts and established racially balanced student populations in individual schools. The Neighborhood Schools Act redlines[10] educational opportunities: it will dismantle the desegregation that the court endorsed in *Coalition to Save Our Children* and impose an attendance scheme that will compel segregated schools in Wilmington.

It does not matter that the stated purpose of the Neighborhood Schools Act is race neutral. When the inevitable complaint is filed with the U.S. Department of Education, the result will be a finding that the Neighborhood Schools Act is unlawful. The disparate impact that the law will have on minority students is enough to establish impermissible discrimination under the regulations implementing Title VI.

The Efforts to Desegregate Delaware Schools: The New Castle County Litigation

The Neighborhood Schools Act was not written on a clean slate. It is important to consider the long and difficult history of school desegregation in Delaware. In 1952, Delaware Civil Rights lawyer Louis L. Redding filed two separate lawsuits seeking to desegregate schools in New Castle County, Delaware. In *Belton v. Gebhardt* and *Bulah v. Gebhardt*, the plaintiffs claimed that the schools maintained for black students in two separate districts were not equal to those reserved for whites.[11]

While the Delaware cases were pending, NAACP lawyers filed similar suits in Kansas, South Carolina, Virginia, and the District of Columbia. All of the cases were eventually consolidated and argued in the U.S. Supreme Court. In 1954, the Supreme Court held in *Brown v. Board of Education* that segregation is inherently discriminatory and a violation of the Equal Protection Clause of the Constitution.

When the inevitable complaint is filed with the U.S. Department of Education, the result will be a finding that the Neighborhood Schools Act is unlawful.

The southern states reacted to *Brown* with extreme hostility. They developed a strategy that became known as "massive resistance." For years, most of the affected jurisdictions directly flouted the Brown decision or engaged in tactics that delayed the desegregation process. Delaware was among those that engaged in dilatory tactics. In 1968, the Delaware state legislature enacted the Educational Advancement Act. The law prohibited any school district with a population of 12,000 or more students to consolidate with other school districts. This prevented the Wilmington school district, which by then had an increasingly black student population, from consolidating with other districts.

In 1970, a group of African-American parents reactivated litigation in the United States District Court in Delaware claiming, among other things, that the Educational Advancement Act violated Delaware's duty to disestablish racially-identifiable schools because it prevented Wilmington from merging with other districts. The three-judge panel ruled that the Educational Improvement Act played a significant role in maintaining segregation in Wilmington and suburban New Castle County schools. The U.S. Supreme Court ultimately affirmed this ruling.[12]

In 1975, the court in *Evans v. Buchanan* ordered that the 11 school districts in New Castle County be desegregated and reorganized into a single district.[13] In 1981, an order was issued permitting four separate districts to replace the single district that was previously established.[14] The City of Wilmington was divided among four districts that included areas in suburban New Castle County. Students were bused within the reconfigured districts to achieve racial balance in individual schools.

In the early 1990s there was a dramatic shift in the Supreme Court's approach to school desegregation litigation; one that signaled the beginning of the end of court-supervised desegregation efforts. In *Dowell v. School Board of Oklahoma City* and *Freeman v. Pitts*[15] the Supreme Court relaxed the standard for achieving "unitary status"; the circumstances under which federal court supervision of the desegregation process would not be required.

The court found in *Dowell* and *Freeman* that instead of an affirmative duty to eliminate all vestiges of segregation "root and branch," states only had an affirmative duty to eliminate the vestiges of segregation to the "extent practicable." If single race schools persisted as a result of "external factors" such as segregated housing patterns, such conditions would not prevent a unitary status finding.

In 1996, applying this relaxed standard, the United States Court of Appeals for the Third Circuit affirmed a trial court ruling that the school districts in New Castle County had achieved unitary status and were to be released from federal court supervision.[16] The racial balance within New Castle County's school districts and in individual schools was an essential predicate to the court's decision.

The Neighborhood Schools Act Violates Federal Regulations Implementing Title VI of the Civil Rights Act

In 2000, the Delaware legislature enacted the Neighborhood Schools Act, which requires every school district in the state to assign students to schools closest to their residences. If this legislation is implemented solely on the basis of geography, it is inevitable that the students residing in Wilmington will attend racially segregated schools. Ninety percent of the city's students are African-Americans or Latinos and high levels of residential segregation persist in Wilmington. Title VI of the Civil Rights Act of 1964 provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[17]

Although Title VI bars only intentional discrimination, the regulations promulgated pursuant to the statute expressly prohibit actions that have a disparate impact on groups protected by the law, even when those actions are not intentionally discriminatory. The Supreme Court has consistently affirmed the validity of these regulations.[18]

The Department of Education's Title VI regulations at 34 C.F.R. section 100.3(b)(2) state that:

> [a] recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the **effect** of subjecting individuals to discrimination because of their race, color, or national origin, or have the **effect** of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.[19]

To establish liability under the Department of Education's disparate impact regulations, a plaintiff must demonstrate that a facially neutral practice has a disproportionate impact on a group protected by Title VI. If the plaintiff demonstrates a disparate impact, the defendant must prove that the challenged practice is supported by a "substantial legitimate justification."[20]

Researchers have consistently found that students in many urban schools are subjected to substandard and deteriorating facilities, racial isolation and concentrated poverty.

A defendant attempting to meet the "substantial legitimate justification" burden must demonstrate, by a preponderance of evidence, the "educational necessity" of their practices, that is, to show that the challenged practices "bear a manifest demonstrable relationship to classroom education."[21] As one court explained, the defendant must prove that "the requirement which caused the disproportionate impact was required by educational necessity," i.e., that "any given requirement has a manifest relationship to the education in question."[22] If the defendant sustains this rebuttal burden, the plaintiff can still prevail if it can be shown that there is an equally effective alternative practice that would not cause an adverse impact.

The Neighborhood Schools Act will have an adverse impact on minority students who reside in the city of Wilmington. Ninety-one percent of the city's public schools students are African-Americans and Latinos. Seventy-five percent of them are eligible for free or reduced priced lunches.[23] If they are assigned to schools solely on the basis of geographic proximity, it is inevitable that these students will be concentrated in racially segregated, high poverty schools.

Researchers have consistently found that students in racially isolated, high-poverty urban schools are subjected to conditions that suburban children are not compelled to endure. These typically include substandard and deteriorating facilities, racial isolation, and concentrated poverty.[24]

Compared to other areas of the state, Wilmington has, on average, double the number of students from low-income families, three times the state average of students with limited English proficiency and double the percentage of students with special needs.[25] White students in suburban areas will not be segregated.

There is no "educational necessity" that would support the geographic restrictions imposed by the Neighborhood Schools Act. It has not been shown that decreasing the commuting distance to a particular school will enhance classroom instruction. Even if there were a legitimate educational justification, there are other ways in which the proximity goal could be addressed without inflicting the harm that Wilmington students will suffer under the Neighborhood Schools Act. The legislature could have, for example, allowed school districts to consider student body diversity in making student assignments.

The Impact of Residential Segregation on School Attendance Assignments

In the late 1970s, the three-judge panel in *Evans v. Buchanan* officially noted the history of racially discriminatory housing practices in New Castle County. In *Evans*, the court found, among other things, that "racial discrimination in the sale or rental of private housing in New Castle County was widespread, was tolerated or encouraged by the real estate industry, and was sanctioned by state officials." The court found that racially restrictive covenants continued to be recorded in deeds until 1973. It also held that the

CONESTOGA TITLE INSURANCE CO.

Founded,
Utilized,
Trusted
and Appreciated

by Attorneys

www.contitle.com 800-732-3555
© 2001 Conestoga Title Insurance Co.

ing

amples,
ics as
/ such
re,
nscription
ology

y in the courtroom

aware's "e-courtroom"
urtroom technology already

udents, legal assistants,
upport staff.

education credit for lawyers
by the Delaware Commission on Continuing Legal Education, as well as the Pennsylvania Continuing Legal Education Board.

October 22-November 5, Tuesdays and Thursdays, 6:00-8:30 p.m., at the University of Delaware Downtown Center, 8th and King Streets, Wilmington.

UNIVERSITY OF DELAWARE
Professional and Continuing Studies

For more information, contact Joyce D. Hunter at jdhunter@udel.edu or 302/571-5239.

segregated housing patterns are still prevalent in the City of Wilmington. The high levels of residential segregation are well documented and obvious to the most casual observer. In 2000, a study was conducted by the Center for Community Development and Family Policy at the University of Delaware.[27] The study measured segregation in New Castle County, Delaware, from 1970 to 1990.

The researcher utilized a methodology developed by social scientists known as a "dissimilarity index." Dissimilarity studies compare the spatial distribution of different groups, and are sometimes referred to as "measures of unevenness." The index uses census tracts as the units of measure. The index can range from 0 to 1. It compares the distribution, within a given area, of any two groups (in this case blacks and whites). To reflect complete integration, the distribution in a given census tract should reflect an even distribution of whites and blacks relative to their proportion within the entire area.

The index of dissimilarity indicates the level of unevenness in the distribution of groups in a given area, i.e., the percentage of members of a particular racial group that would have to move to another census tract to achieve an even distribution of each group in proportion to their representation in the general population. If the percentage of blacks and whites were the same in each census tract in an entire area, this would reflect complete integration, and the index would equal 0. On the other hand, if blacks and whites live in

TATNALL

Faces of the future.

They'll be ready.

OPEN HOUSES
9 a.m.-1 p.m.
Age 3-Kindergarten:
Tuesday, **October 22**
Grades 1-4:
Thursday, **October 24**
Grades 5-12:
Wednesday, **November 6**

Academics, Athletics, and the Arts
THE TATNALL SCHOOL
1501 Barley Mill Road • Wilmington, DE 19807
Admissions and Financial Aid: (302) 892-4285
www.tatnall.org
College preparatory education for age 3 to Grade 12

THE NEIGHBORHOOD SCHOOI ACT VIOLATES FEDERAL REGULATIONS IMPLEMENTINC TITLE VI OF THE CIVIL RIGHT

In 2000, the Delaware legi enacted the Neighborhood S Act, which requires every scho trict in the state to assign stud schools closest to their residen this legislation is implemented on the basis of geography, inevitable that the students resi Wilmington will attend racially gated schools. Ninety percent city's students are African-Am or Latinos and high levels of resi segregation persist in Wilmington. Title VI of the Civil Rights Act of 1964 provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[17]

Although Title VI bars only intentional discrimination, the regulations promulgated pursuant to the statute expressly prohibit actions that have a disparate impact on groups protected by the law, even when those actions are not intentionally discriminatory. The Supreme Court has consistently affirmed the validity of these regulations.[18]

The Department of Education's Title VI regulations at 34 C.F.R. section 100.3(b)(2) state that:

> [a] recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination

tently found that students in many urban schools are subjected to substandard and deteriorating facilities, racial isolation and concentrated poverty.

A defendant attempting to meet the "substantial legitimate justification" burden must demonstrate, by a preponderance of evidence, the "educational necessity" of their practices, that is, to show that the challenged practices "bear a manifest demonstrable relationship to classroom education."[21] As one court explained, the defendant must prove that "the requirement which caused the disproportionate impact was required by educational necessity," i.e., that "any given requirement has a manifest relationship to the education in question."[22] If the defendant sustains this rebuttal burden, the plaintiff can still prevail if it can be shown that there is an equally effective alternative practice that would not cause an adverse impact.

The Neighborhood Schools Act will have an adverse impact on minority students who reside in the city of Wilmington. Ninety-one percent of the city's public schools students are African-Americans and Latinos. Seventy-five percent of them are eligible for

ciency and double the per centage of students with special needs.[25] White students in suburban areas will not be segregated.

There is no "educational necessity" that would support the geographic restrictions imposed by the Neighborhood Schools Act. It has not been shown that decreasing the commuting distance to a particular school will enhance classroom instruction. Even if there were a legitimate educational justification, there are other ways in which the proximity goal could be addressed without inflicting the harm that Wilmington students will suffer under the Neighborhood Schools Act. The legislature could have, for example, allowed school districts to consider student body diversity in making student assignments.

THE IMPACT OF RESIDENTIAL SEGREGATION ON SCHOOL ATTENDANCE ASSIGNMENTS

In the late 1970s, the three-judge panel in *Evans v. Buchanan* officially noted the history of racially discriminatory housing practices in New Castle County. In *Evans*, the court found, among other things, that "racial discrimination in the sale or rental of private housing in New Castle County was widespread, was tolerated or encouraged by the real estate industry, and was sanctioned by state officials." The court found that racially restrictive covenants continued to be recorded in deeds until 1973. It also held that the

Consider Conestoga

Conestoga is committed to assisting its agents and Approved Attorneys in ways which will allow them to grow and prosper. We provide the personal attention you deserve from underwriting support to marketing and media development.

Find out what we can do for you...

"pervasiveness of housing discrimination in the New Castle County real estate industry is demonstrated by the Multi-List established by the Greater Wilmington Board of Realtors in April, 1965. The Multi-List designated as 'open' those listings where the owner was willing to sell to a minority buyer."[26]

The court noted further that discriminatory public housing policies contributed to the concentration of minority residents in Wilmington. The court's finding of "pervasive discrimination" in the New Castle County housing market was critical to the decision to impose a countywide, inter-district remedy in the school desegregation litigation.

While there has been progress toward equal housing opportunities, segregated housing patterns are still prevalent in the City of Wilmington. The high levels of residential segregation are well documented and obvious to the most casual observer. In 2000, a study was conducted by the Center for Community Development and Family Policy at the University of Delaware.[27] The study measured segregation in New Castle County, Delaware, from 1970 to 1990.

The researcher utilized a methodology developed by social scientists known as a "dissimilarity index." Dissimilarity studies compare the spatial distribution of different groups, and are sometimes referred to as "measures of unevenness." The index uses census tracts as the units of measure. The index can range from 0 to 1. It compares the distribution, within a given area, of any two groups (in this case blacks and whites). To reflect complete integration, the distribution in a given census tract should reflect an even distribution of whites and blacks relative to their proportion within the entire area.

The index of dissimilarity indicates the level of unevenness in the distribution of groups in a given area, i.e., the percentage of members of a particular racial group that would have to move to another census tract to achieve an even distribution of each group in proportion to their representation in the general population. If the percentage of blacks and whites were the same in each census tract in an entire area, this would reflect complete integration, and the index would equal 0. On the other hand, if blacks and whites live in

E-Courtroom Training

With discussion of specific legal cases as examples, the course will include such important topics as

- presentation of evidence using technology such as videoconferencing, presentation software, document cameras, Internet, real time transcription
- trial strategies in using courtroom technology
- impact on the jury
- legal and ethical issues of using technology in the courtroom

Plus, a session in the Superior Court of Delaware's "e-courtroom" provides hands-on experience with the courtroom technology already in use in this "courtroom of the future."

Designed for: judges, lawyers, law clerks, law students, legal assistants, legal secretaries, legal nurses, and other legal support staff.

This course has been approved for continuing education credit for lawyers by the Delaware Commission on Continuing Legal Education, as well as the Pennsylvania Continuing Legal Education Board.

October 22-November 5, Tuesdays and Thursdays, 6:00-8:30 p.m., at the University of Delaware Downtown Center, 8th and King Streets, Wilmington.

UNIVERSITY OF DELAWARE
Professional and Continuing Studies

For more information, contact Joyce D. Hunter at jdhunter@udel.edu or 302/571-5239.

TATNALL

Faces of the future.

They'll be ready.

OPEN HOUSES
9 a.m.-1 p.m.
Age 3-Kindergarten: Tuesday, **October 22**
Grades 1-4: Thursday, **October 24**
Grades 5-12: Wednesday, **November 6**

Academics, Athletics, and the Arts
THE TATNALL SCHOOL
1501 Barley Mill Road • Wilmington, DE 19807
Admissions and Financial Aid: (302) 892-4285
www.tatnall.org
College preparatory education for age 3 to Grade 12

entirely separate areas, this would be complete segregation and the disparity index would equal 1.00. Communities are considered integrated when the dissimilarity index is lower than .33, moderately segregated when the index is between .33 and .66, and highly segregated when the index is above .66.

In conducting the analysis of segregation in New Castle County, the researcher used census tracts as the relevant spatial unit. Each tract contains roughly 4,000 residents. The years 1970 through 1990 were selected as the period of analysis. A review of the dissimilarity indices from 1970, 1980, and 1990, reveals some improvement in black-white segregation in New Castle County but not within the City of Wilmington. The county is comprised of roughly 134 census tracts. The county's index of dissimilarity gradually improved from .7349 in 1970, to .5544 in 1990. This means that 55.44 percent of blacks in New Castle County would have to move to achieve an even distribution of blacks and whites among neighborhoods in the county. This reflects high levels of segregation within the county.

There were some noteworthy findings when the City of Wilmington was compared to the rest of New Castle County. The dissimilarity index between blacks and whites in the City of Wilmington decreased from .6016 in 1970 to .5349 in 1990. The dissimilarity index for suburban areas of New Castle County fell dramatically from 1970 to 1990, showing a decline from .6578 to .3888. As previously indicated, an area with a dissimilarity rating of .33 or below is considered integrated.

The *Wilmington News Journal* prepared a separate dissimilarity study in 2001.[28] Unlike the University of Delaware study, which relied on 1990 census data, the *News Journal* researchers relied on the 2000 census. The researchers concluded that the state, as a whole, is becoming more integrated. About 65 percent of the Delaware's residents now reside in neighborhoods that are considered integrated; whereas, in 1990 only about 35 percent of the population lived in such neighborhoods. However, many localities within the state remain almost entirely white or black.

According to the *News Journal*, more than a third of Delaware's population lives in highly segregated census tracts. The City of Wilmington is actually becoming more segregated; the African-American population grew from 37,446 in 1990 to 41,646 in 2000. The city's white population declined from 30,134 to 25,811 during the same period. Other New Castle County communities such as Pike Creek, Hockessin, and the Delaware Route 52 corridor are almost exclusively white.

Contrary to the assumptions of many,[29] residential segregation is not attributable to economic status or private choice. Yearly reports produced by HUD and other monitoring organizations reflect the same data year after year. At least one in four minorities seeking housing can expect to encounter some form of discrimination.[30] Discrimination, rather than economics, accounts for the persistence of residential segregation. African-Americans do not have an unfettered choice when it comes to housing; they regularly receive treatment that is different and less favorable than similarly-situated white home seekers. The racially segregated housing patterns that currently exist in Wilmington reflect a history and legacy of discrimination. The geographic restrictions imposed by the neighborhood schools law will re-establish a regime of segregated schools in Wilmington.

Discrimination, rather than economics, accounts for the persistence of residential segregation. African-Americans do not have an unfettered choice when it comes to housing.

To the extent that the Delaware legislature believed that the Neighborhood Schools Act was justified by the holding in *Freeman v. Pitts*,[31] its reliance was misplaced. *Freeman* addressed the standard for determining "unitary status"; i.e., when the vestiges of segregation have been eliminated to the point where federal court supervision of the desegregation process is no longer required. The Supreme Court held in *Freeman* that the existence of some single-race schools would not preclude a unitary status finding if the student populations in such schools were attributable to residential segregation rather than actions of school officials. This means that one or two single-race schools in an otherwise desegregated system will not prevent a finding that the vestiges of segregation have been eliminated to "the extent practicable."

The circumstances of Delaware's Neighborhood Schools Act are entirely different. When the unitary status order was entered in *Coalition to Save Our Children*, the Court's finding was expressly predicated on the reconfigured school districts in New Castle County which divided Wilmington among four separate districts and racially balanced student populations in individual schools. The court relied on extensive testimony and data reflecting racially balanced student assignments.[32] Student assignment is the primary factor in the *Green* analysis (the factors that courts use to determine unitary status). The court in *Coalition to Save Our Children* would not have found unitary status if the schools in Wilmington were more than 90 percent black and Latino.

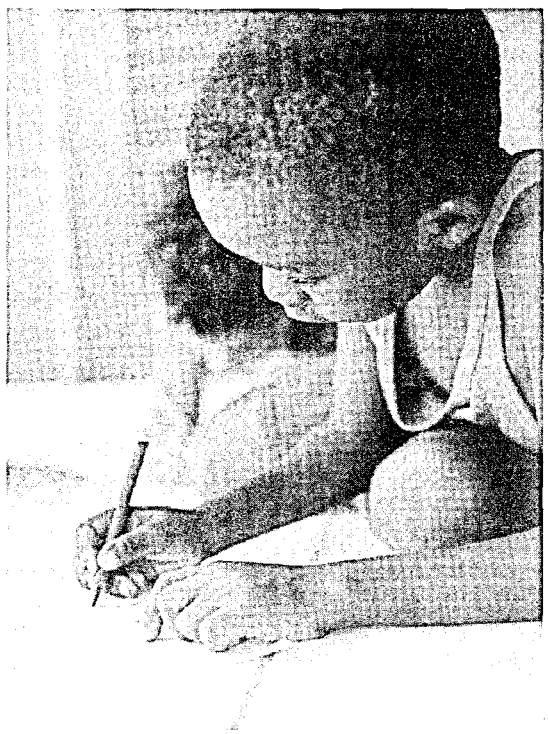
The Neighborhood Schools Act will dismantle the desegregation that the court approved in *Coalition to Save Our Children* and impose an attendance scheme that will compel segregated schools. It is one thing to tolerate the continued existence of one or two single-race schools attributable to residential segregation in reaching a unitary status determination. It is quite another thing for a legislature to enact a law that dismantles a desegregated school system and replaces it with a statutory regime which compels virtually all of the students in the state's largest city to attend segregated schools. This is not permissible under the Department of Education's regulations.

CONCLUSION

The Neighborhood Schools Act is an unlawful obstacle to the goal of equal educational opportunities. It will reinforce racial and economic isolation by disregarding the effects of residential segregation. Proponents of neighborhood schools did not consider the legacy of racial segregation that is reflected in current residential patterns. They erroneously assumed that families have exercised a choice in deciding where they reside and, therefore, a choice as to which schools their children will attend. This reasoning is flawed since African-Americans and Latinos, particularly those with lower incomes, do not have the range of residential choices that are available to similarly situated whites. Their choices have always been constrained by discriminatory practices.

Delaware's Neighborhood Schools Act will have an effect similar to the one that prompted the court to rule against the state nearly thirty years ago in *Evans v. Buchanan*. The court's ruling in *Evans* was premised on a state law that purported to be race neutral, but in reality, treated African-American students in Wilmington differently, and less favorably, than similarly situated whites residing in other localities. The Neighborhood Schools Act has a similar effect: the law's attendance limitations will treat Wilmington's minority students less favorably than students in other areas in the state.

Approximately 90 percent of the students who reside in the Wilmington are African-Americans and Latinos. Since these students will be restricted to schools solely on the basis of proximity to their homes, they will be obligated by a state law to attend single-race, high poverty schools. These burdens are not imposed on white students in other localities. When the inevitable complaint is filed with the U.S. Department of Education, it will result in a finding that the geographic restrictions imposed by the Neighborhood Schools Act are unlawful because they are "criteria . . . which have the effect of subjecting individuals to discrimination because of their race." 34 C.F.R. 11.3 [b][2].◆



FOOTNOTES

1. *Gebhart v. Belton*, 91 A. 2d 137 (Del. Ch. 1952)
2. *Brown v. Board of Education*, 347 U.S. 483 (1954).
3. *Brown v. Board of Education*, 349 U.S. 294 (1955) (Brown II).
4. Richard Kluger, *Simple Justice* (1975); Jack Greenberg, *Crusaders in the Courts* (1994); Waldo E. Martin, *Shades of Brown: Black Freedom, White Supremacy and the Law* (1998); Juan Williams, *Thurgood Marshall: American Revolutionary* (1998).
5. *Green v. School Bd. of New Kent County*, 391 U.S. 430 (1968); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 198 (1969).
6. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975); aff'd, 423 U. S. 963 (1975).
7. *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F. 3d 752 (3d Cir. 1996).
8. "[T]he school boards of Brandywine School District, Colonial School District, Christina School District and Red Clay Consolidated District shall develop a Neighborhood School Plan for their districts that assigns every student within the district to the grade-appropriate school closest to the student's residence, without regard to any consideration other than geographic distance and natural boundaries of neighborhoods." H.B. 300, 140th Gen. Assem. (Del. 2000).
9. 34 CFR Sec. 100.3(b)(2).
10. "Redlining" is a discriminatory practice that was institutionalized by a federal government agency, the Home Owners' Loan Corporation, in the 1930s and widely used in the real estate industry. It was used to evaluate the risks associated with loans made in specific neighborhoods. The Home Owners' Loan Corporation's underwriting guidelines established four categories of neighborhood quality. The lowest of these was color coded red and declared ineligible for government loans. Black neighborhoods were invariably rated in the fourth category. Douglas S. Massey and Nancy Denton, *American Apartheid* (1993).
11. *Gebhart v. Belton*, supra note 1.
12. The judgment of the district court was summarily affirmed. *Buchanan v. Evans*, 423 U.S. 963 (1975).
13. *Evans v. Buchanan*, supra note 6.
14. *Evans v. Buchanan*, 512 F. Supp 839 (1981).
15. *Board of Educ. of Oklahoma Public Schools v. Dowell*, 498 U.S. 237 (191); *Freeman v. Pitts*, 503 U.S. 457 (1992).
16. *Coalition to Save Our Children*, supra note 7.
17. 42 U.S.C. Sec. 2000d.
18. *Guardians Ass'n v. Civil Service Comm'n of New York City*, 463 U.S. 582, 584 (1983); *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985). In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Supreme Court held that there is no private right of action to enforce regulations promulgated pursuant to Title VI. However, the court assumed, for purposes of deciding *Sandoval*, that regulations promulgated under Title VI "may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under [Title VI]." This means that individuals asserting claims under Title VI regulations are obligated to pursue complaints with the U.S. Department of Education rather than filing civil actions in federal court.
19. 34 C.F.R. section 100.3(b)(2) (emphasis added).
20. *Georgia State Conference of Branches, NAACP v. Georgia*, 775 F. 2d 1403, 1417 (11th Cir. 1985). *Larry P. By Lucille P. v. Riles*, 793 F.2d 969 (9th Cir.1984).
21. *Georgia State Conference of Branches, NAACP*, supra note 19.
22. 793 F. 2d at 982 n. 9.
23. *They Matter Most: Report of the Wilmington Neighborhood School Committee* (January 2001).
24. Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* (2001).
25. Id.
26. *Evans v. Buchanan*, supra note 6.
27. Andrew Carswell, "Measuring Migration In New Castle County DE." (December 2000).
28. Mike Chalmers, and Aaron Pilhofer, "Racial Divide Narrows." *Wilmington News Journal*, May 6, 2001, at A1.
29. Richard Morin, "Misperceptions Cloud Whites' View of Blacks," *Washington Post*, July 10, 2001, at A1.
30. John Yinger, *Housing Discrimination Study, Incidence of Discrimination and Variations in Discriminatory Behavior* (1991); Gary Orfield and Susan Eaton, *Dismantling Desegregation* (1996).
31. *Freeman v. Pitts*, 503 U.S. 457 (1992).
32. *Coalition to Save Our Children v. State Board of Education*, supra note 7.

Thomas P. Eichler

THE CASE FOR DRUG TREATMENT: COMMON SENSE VERSUS INERTIA

With just less than five percent of the world's population, the United States has 23 percent of the world's inmates . . . These figures set the United States apart from the rest of the democratic world . . . Why should it be necessary in the "land of the free" to deprive so many citizens of their liberty?

—Andrew Coyle
Director of the International Centre for Prison Studies, University of London, United Kingdom

Author's note: While deep in thought pondering what could be worthy of the opportunity to contribute to *Delaware Lawyer*, the quiet was disturbed by something flying over the transom and crashing on the floor. It turned out to be a large envelope with a brief and supporting exhibits, leaving me only the task of editing it down to meet space limits. I understand that the answering brief is due 60 days from the publication date. I hope someone is preparing it. Maybe it will fly over your transom, so be alert.

—Tom Eichler
Executive Coordinator, Stand Up for What's Right and Just

Please, fill out this card, check the areas that interest you, and drop it in the mail.

Please send more information about Conestoga Title Insurance Co.'s...

☐ **Agency programs**
☐ **Attorney programs**

I am interested in learning more about...

☐ **Affiliated Business Arrangements/Joint Ventures**

Name: _____
Firm: _____
Address: _____
City, State, Zip: _____
Phone: _____

ıd domestic tran-

:ge enough at

ısion plans

Reallocation of resources should be made to preventive measures to avoid projected prison bed demand.

Brief for the **Pro Position;**

Filed on behalf of all citizens of Delaware.

Opening Statement

At the beginning of a new century, Delaware stands at a public policy crossroad. Today Delaware ranks 12th in the nation in the rate of imprisonment of its citizens (sentences over one year); while placing only 33rd in the well being of its children according to the annual *2002 Kids Count* report by the Annie E. Casey Foundation **(EXHIBIT A)**.

Unlike the 1990s, when it was possible for the State to finance both new prisons and new classrooms, the return to more normal economic times is imposing real choices for Delawareans on public policy strategies for public safety and the welfare of its citizens.

This year the Department of Correction will complete the latest addition to the Baylor Women's Correctional Institute with completion of a drug treatment unit. Thus will conclude the current wave of construction that began in the mid-1990s, adding some 2,500 beds to the Delaware prison system, for a new total capacity of 6,589 beds.

The Department, to its credit, has projected past growth rates to the year 2010 and has prepared capital construction master plans to expand male facilities (2,856 additional beds) and female facilities (440 additional beds) to meet the forecasted need. This would mean a 50 percent increase in capacity for a state that is already incarcerating prisoners at a rate higher than 38 other states.

This expansion cannot be made without sacrificing other important public goals directed at public safety and the public welfare generally. **Now** is the time to **draw the line – 6,589 beds are enough**. Public safety goals can be better served pursuing other priority investments in the well-being of our state.

The Case:

A. 6,589 Beds are Enough

Delaware is a "leader" in its commitment to incarceration:

- The United States has the world's highest incarceration rate;
- Within the United States, Delaware's prison rate (incarceration for more than one year) is the 12th highest of the 50 states;
- Delaware has the highest per capita state and local public expenditure for corrections of all the 50 states;
- Delaware presently has newly built cells for 400 inmates that it cannot afford to open, but maintains inmates in other overcrowded prisons.

Recently the United States became the nation with the highest incarceration rate in the world. For some time the Soviet Union, then Russia, was first but the release of political prisoners in Russia put the U.S. in first position. When comparing to nations with which we like to be compared the picture is even more stark. For example with an incar-

no postage necessary if mailed in the United States

Business Reply Mail
first class permit no. R1925 Lancaster, PA, USA
postage will be paid by addressee

CONESTOGA TITLE INSURANCE CO.
123 East King Street
Lancaster, PA 17602

Thomas P. Eichler

THE CASE FOR DRUG TREATMENT: COMMON SENSE VERSUS INERTIA

With just less than five percent of the world's population, the United States has 23 percent of the world's inmates . . . These figures set the United States apart from the rest of the democratic world . . . Why should it be necessary in the "land of the free" to deprive so many citizens of their liberty?

—Andrew Coyle
Director of the International Centre for Prison Studies, University of London, United Kingdom

Author's note: While deep in thought pondering what could be worthy of the opportunity to contribute to *Delaware Lawyer*, the quiet was disturbed by something flying over the transom and crashing on the floor. It turned out to be a large envelope with a brief and supporting exhibits, leaving me only the task of editing it down to meet space limits. I understand that the answering brief is due 60 days from the publication date. I hope someone is preparing it. Maybe it will fly over your transom, so be alert.

—Tom Eichler
Executive Coordinator, Stand Up for What's Right and Just

IN THE DELAWARE COURT OF PUBLIC OPINION

STAND UP FOR WHAT'S RIGHT & JUST ("SURJ"), and :
Like-minded groups and citizens, :
:
V. :
:
THE FORCES OF INERTIA :

In the matter of competition for limited public resources to achieve public safety, justice, and domestic tranquility:

RESOLVED: The Delaware Department of Correction Bureau of Prisons (DoC) is large enough at 6,589 beds with the completion of present expansion; and

Affirmative steps should be taken to avoid implementation of capital expansion plans that would add 3,296 beds between now and December 31, 2010; and

Reallocation of resources should be made to preventive measures to avoid projected prison bed demand.

Brief for the **Pro Position;**

Filed on behalf of all citizens of Delaware.

Opening Statement

At the beginning of a new century, Delaware stands at a public policy crossroad. Today Delaware ranks 12th in the nation in the rate of imprisonment of its citizens (sentences over one year); while placing only 33rd in the well being of its children according to the annual *2002 Kids Count* report by the Annie E. Casey Foundation **(EXHIBIT A)**.

Unlike the 1990s, when it was possible for the State to finance both new prisons and new classrooms, the return to more normal economic times is imposing real choices for Delawareans on public policy strategies for public safety and the welfare of its citizens.

This year the Department of Correction will complete the latest addition to the Baylor Women's Correctional Institute with completion of a drug treatment unit. Thus will conclude the current wave of construction that began in the mid-1990s, adding some 2,500 beds to the Delaware prison system, for a new total capacity of 6,589 beds.

The Department, to its credit, has projected past growth rates to the year 2010 and has prepared capital construction master plans to expand male facilities (2,856 additional beds) and female facilities (440 additional beds) to meet the forecasted need. This would mean a 50 percent increase in capacity for a state that is already incarcerating prisoners at a rate higher than 38 other states.

This expansion cannot be made without sacrificing other important public goals directed at public safety and the public welfare generally. **Now** is the time to **draw the line – 6,589 beds are enough**. Public safety goals can be better served pursuing other priority investments in the well-being of our state.

The Case:

A. 6,589 Beds are Enough

Delaware is a "leader" in its commitment to incarceration:

- The United States has the world's highest incarceration rate;
- Within the United States, Delaware's prison rate (incarceration for more than one year) is the 12th highest of the 50 states;
- Delaware has the highest per capita state and local public expenditure for corrections of all the 50 states;
- Delaware presently has newly built cells for 400 inmates that it cannot afford to open, but maintains inmates in other overcrowded prisons.

Recently the United States became the nation with the highest incarceration rate in the world. For some time the Soviet Union, then Russia, was first but the release of political prisoners in Russia put the U.S. in first position. When comparing to nations with which we like to be compared the picture is even more stark. For example with an incar-

ceration rate of 110 per 100,000 population in Canada compared with 699 in the U.S, for every one incarcerated Canadian, there are more than five incarcerated persons in the United States. (**EXHIBIT B**: The Sentencing Project, *New Prison Population Figures Show Slowing of Growth But Uncertain Trends*).

The Delaware Statistical Analysis Center (DelSAC), the state's agency tracking criminal justice data, reported a Delaware adult incarcerated population of 6,935 persons as of June 30, 1999 in its most recently published *Correction Incarceration Fact Book* (January 2002) (**EXHIBIT C**).

Delaware's Bureau of Prisons has experienced tremendous growth. The 1999 Delaware Bureau of Prison census, compared to the 1981 prison census, showed:

	1981	1999	
Detainees	236	1,204	(pretrial)
Jail	117	1,980	(sentenced to 365 days or less)
Prison	1,148	3,751	(sentenced to 365+ days)

That is a **444 percent total increase in Delaware's incarcerated population in 18 years**. A more frequent yardstick than total incarceration rate is the prison rate, prison being those sentenced to terms of more than one year (365 plus one day and longer). The Delaware Statistical Analysis Center put Delaware's prison incarceration rate at 494 per 100,000 giving Delaware a national ranking of 12th, making Delaware a high state in a nation that leads the world (**EXHIBIT D**, DelSAC June 28, 2001 memo report).

At 12th, Delaware's prison population rate (494) is 15 percent higher than the average of the 50 states (438) (**EXHIBIT E**, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2000*, March 2001). If Delaware were at the national average, it would have 524 fewer prison inmates. At an annual cost of $24,500 per inmate, Delaware is presently spending more than $12 million annually to maintain its lofty position on prison incarceration. Keep in mind that this only includes the prison population (more than one-year sentence).

In 1981 Delaware's incarceration rate for prison (offenders serving terms of one year and up) was 208 per 100,000. According to DelSAC data, in 1999 it reached 494, for a 237 percent increase in twenty years.

This increase is being accompanied by an impressive capital construction program by the DoC to chase its rising census. The present construction program that began in the mid-1990s is nearing completion with construction of a new drug treatment unit at the Baylor Women's Correctional Institution. When that is done later this year, some $180 million in capital expansion will have added 2,500 new beds for a design capacity of 6,589 beds system-wide. DoC has been prudent in recognizing its responsibilities and has prepared master plans designed to increase this new capacity by another 50 percent by 2010:

— 2,856 additional beds for males;
— 440 additional beds for females.

A dramatic increase in the Department of Correction annual operating budget is required to operate the new capacity. In the 15-year period from State Fiscal Years 1987 to 2002, the operating budget of the Department increased 367.9 percent:

— $ 49,119,800 FY1987;
— $180,693,500 FY2002.

Ironically, with the present state fiscal downturn, there are newly constructed cells sufficient to serve 400 inmates standing vacant for the want of payroll to hire the correction officers, while other units go overcrowded (**EXHIBIT F**: *Wilmington News Journal*, March 17, 2001, at B1, "Low Pay Leaves Prisons Short-Handed").

In spite of this, today Delaware's correction system is the most expensive among the 50 states on a per capita basis. The Bureau of Criminal Justice Statistics February 2002 annual report (**EXHIBIT G**) on expenditures shows combined per capita state and local expenditures at:

— Delaware $257.30;
— National average $162.40.

These numbers reflect not only the incarcerated population but also the cost of the probation and parole systems. In Delaware last year, there were another 20,149 persons on some level of DoC supervision in the community in addition to those incarcerated.

In 1989 the General Assembly passed SB 142 to curb drug trafficking by reducing the drug weights that trigger mandatory trafficking sentences. For example, the weight of cocaine necessary to trigger a three-year mandatory sentence was reduced from 15 grams to 5 grams. The Statistical Analysis Center published reports on the impact of SB 142 in March of 1991 and again in March 1992. While they documented significant increases in convictions under

the statute, they also found that the new law was not acting as a deterrent. Specifically, if the specter of a three-year sentence as the penalty for simple possession of five grams of cocaine really matters to criminals, the confiscated evidence reviewed by the Medical Examiner should show a shift to smaller amounts beneath the new, lower thresholds. The 1991 report's finding was that while there was a significant increase in cases (almost double), "(t)he count of illicit drugs in each of the weight strata, on average, is not different when a per-post analysis is calculated" (p.1).

To be clear about the dynamics, the Statistical Analysis Center's June 1993 report on mandatory sentences observes:

> **Whereas SB 142 was intended to reduce drug trafficking** in Delaware through reduced weight ranges coupled with existing harsh minimum mandatory terms of imprisonment, the report reflected **no reduction in drug trafficking**. Drug arrests for possession and trafficking increased That caused an accompanying increase in detained admissions for drugs, leading to a coincident increase in prosecutorial/defense/court caseloads. The ultimate effect was increased three-year mandatory sentencing drug trafficking offender demand for DOC beds. (**EXHIBIT H** at p.18) (emphasis supplied).

This finding is reflected on the national level in a report by the Federal Judicial Center (**EXHIBIT I**: *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, 1994) which suggests that conventional assumptions of deterrence theory may not apply to drug traffickers:

> To be deterred, offenders must stop to weigh the costs and benefits, be aware of the penalties, find those penalties intolerable, and have other more attractive options. Even if some potential offenders are deterred, drug trafficking will not be curtailed if there are other persons willing to take the place of convicted offenders. This appears to be true in the profitable drug business. (*Id.* at p.11).

The report indicates that the federal mandatory sentencing law is not sweeping the kingpins out of the system; only five percent under mandatory drug statutes in FY92 were organizers or leaders of an extensive drug operation, over 85 percent were low-level offenders who are easily replaced. The Judicial Center's report makes the case that mandatory sentencing laws actually get in the way of truth-in-sentencing guidelines which can offer a more effective sentencing strategy.

The Case:

B. Other Alternative Policies Are More Promising

Alternative strategy:

* Attack recidivism rate of 57%;
* Prevent present "drift" into justice system by closing community-based treatment gaps for drug/alcohol, mental health services;
* Reduce pre-trial detention bed requirements through speedy trial initiatives;
* Get non-violent offenders out of prison;
* End present sentencing policy inconsistencies between mandatory sentences and truth-in-sentencing philosophies in favor of truth-in-sentencing policy.

Lowering Recidivism: When Do We Start In Earnest?

The last published recidivism rate for adult corrections shows that 57 percent of inmates serving a prison sentence (over one year) are back serving another prison sentence within five years (**EXHIBIT J**: DelSAC, March 1999). At the same time, we know that eight out of 10 inmates screen positive for drug or alcohol problems. While DoC has exemplary drug treatment programs which have proven results in lowering recidivism (**EXHIBIT K**: *Sentencing Trends and Correctional Treatment in Delaware*, April 10, 2002), less than half of the inmate population benefit from these programs by time of release. Ninety-seven percent of all inmates will be released, some tomorrow. The most expensive component of residential drug/alcohol treatment is the residential component, which we have already paid for with these inmates, yet the opportunity to treat most of them escapes us.

Coerced substance abuse treatment is just as effective as voluntary treatment.

Norman S. Miller, M.D., and Joseph A. Flaherty, M.D.
Effectiveness of Coerced Addiction Treatment (Alternative Consequences): A Review of Clinical Research. Journal of Substance Abuse Treatment 2000; 18:9-16

Delaware's DoC Key and Crest therapeutic treatment programs are national models, heavily researched and copied. Why, then, do we let inmates go without treatment? Correction Commissioner Stan Taylor indicates it costs $67.12 per day to maintain an inmate, and another $7.70 to treat them. Can we afford not to spend the $7.70?

Reentry initiatives, mostly supported by faith-based organizations, are demonstrating that released offenders receiving support in making their transition back to the community show a measurably lower rate of recidivism. The Criminal Justice Council, putting seed money into some of these programs, has documented an 18 percent recidivism rate in the first two years for The Way Home program serving inmates leaving Georgetown Correctional. The cost per inmate of these bare-bones programs is an investment shouting to be made.

Prison-to-work initiatives, if put in place and coordinated properly with the Delaware Department of Labor, could increase the potential for released offenders to secure gainful employment.

The next great opportunity to reduce crime is to provide treatment and training to drug and alcohol abusing prisoners who will return to a life of criminal activity unless they leave prison substance-free and, upon release, enter treatment and continuing aftercare.

Shoveling Up:
The Impact of Substance Abuse on State Budgets, January 2001

Prevent Present "Drift" Into Justice System — Close the Treatment Gaps

Many citizens are in need of drug/alcohol and mental health treatment in Delaware. On any day there is a 15,000 to 25,000 person treatment gap for citizens in need of these services (**EXHIBIT L**: *Treatment Task Force Report to General Assembly*, Henry and Howell, March 2002).

The untreated substance abuser and the untreated mentally ill, sometimes the same person, are the feeder source for much of the low level anti-social behavior which is picked up in the criminal justice system. Then, with a record, is it any wonder that they become further entrenched in the justice system?

Today, 40 percent of the persons served by the Department of Health and Social Services drug/alcohol and mental health network of community services already have a record with the Department of Correction. Closing the treatment gap for community services is far less expensive than the $24,500 to incarcerate an inmate for one year.

Full parity for mental health and substance abuse services in private health insurance plans that tightly manage care would increase family insurance premiums less than 1%.

The Cost and Effects of Parity for Mental Health and Substance Abuse Insurance,
Substance Abuse and Mental Health Services Administration Study

Reduce Pre-trial Detention Bed Requirements Through Speedy Trial Initiatives

The Superior Court's recent "blitz" to reduce the number of pending cases involving incarcerated detentioners awaiting trial is evidence enough that DoC beds are unduly consumed by persons awaiting trial. According to the Court's report (**EXHIBIT M**: March 22, 2002), 535 cases were disposed of in the four-week blitz in New Castle County, including 95 that were dismissed or Nolle Prossed by the State. How many DoC beds could be saved annually by the cases that the State dismissed or Nolle Prossed when the trial date became real?

The Delaware Code includes a long list of offenses which carry prison sentences, requiring them to go through extensive due process procedures for which offenders are rarely sentenced to prison (theft F, shoplifting F, perjury 2nd to mention a few). Why not clean up the statutes and remove these cases from the logjam of Superior Court?

And what about the detained inmate whose jury returns a "not guilty" verdict or a "time served" verdict on a Friday afternoon, but who sits in Gander Hill until Monday because of the lag in processing the court release order? How many beds are wasted on those high-volume weekends?

Get Non-violent Offenders Out of Prison

The State's announced policy is to reserve expensive prison space for violent offenders, yet non-violent offenders still occupy some of this capacity. The Attorney General's sentencing reform proposal to remove certain motor vehicle violators from prison is one example of a possible step.

And let's take a new look at how we apply the "non-violent" definition. Today, by definition, drug offenders are ipso facto "violent."

End Intellectual "Dyslexia" Between Mandatory Sentencing and Truth-in-Sentencing

Today, Delaware's justice system has a truth-in-sentencing policy with a jumble of mandatory minimum sentencing requirements overlaying it. Recent analysis suggests that truth-in-sentencing is working quite well in Delaware (see **EXHIBIT K**). Meantime, minimum mandatory sentences are adding to the consumption of prison capacity with no obvious benefit beyond a "get tough" satisfaction that it may provide to some.

"In none of these cases does the court have the option upon conviction to craft a sentence after careful consideration of the totality of the circumstances. We are on auto-pilot."

Henry duPont Ridgely
President Judge, Delaware Superior Court
Remarks on Mandatory Drug Sentencing, May 7, 1999

The Case:

C. Reallocate Resources to Preventive Measures, Avoiding Projected Bed Demand

The State of Delaware makes a very significant expenditure of resources related to substance abuse, but only a tiny part of that investment is for treatment and prevention. The National Center on Addiction and Substance Abuse at Columbia University published an analysis of the impact of substance abuse on state budgets (**EXHIBIT N**: *Shoveling Up: The Impact of Substance Abuse on State Budgets*, January 2001).

The state-by-state survey, based on input from each state's budget office, shows that some $344 million was spent by the State of Delaware to address substance abuse in a variety of ways in FY98. The bottom line is that Delaware spent $468.70 per capita, with six cents of each dollar going to treatment and prevention and the other 94 cents going to what the report calls "shoveling up" the consequences of substance abuse. This includes the justice system and health care costs as the leading expenditures.

Closing Statement

The State and its citizens have the opportunity to accept a continuation of the trends of a decade or to decide to apply some new thinking to some old issues. The considerations are not about sacrificing public safety for costs savings. Rather they are about alternative ways to seek policies that have better prospects of producing the desired results.

The significance of the rising correction population is an issue attracting increased attention. The popular publication *Scientific American* ran an article in its December 2001 issue titled "Why Do Prisons Grow?: For the Answers, Ask The Governors" (**EXHIBIT O**). The article notes that North Carolina and South Carolina had about the same crime rates during the late 1980s and early 1990s. In South Carolina, where Governor Carroll Campbell had a tough-on-crime policy, the prison population grew 63 percent, while North Carolina grew only 25 percent under Governor James Martin, who did not pursue such a policy. Commenting on rising prison populations, the article goes on to say:

> This increase, which some say did little to deter crime, profoundly disrupted minority communities. Based on current incarceration rates, the Bureau of Justice Statistics estimates that 28 percent of black and 16 percent of Hispanic men will enter a state or federal prison during their lifetime. (The comparable figure for whites is four percent.)

. . . mandatory sentences should seem most appealing to people with very short time horizons...mandatory minimums are analogous to financing purchases with a credit card, conventional enforcement to paying cash, and treatment to investing.

Jonathan P. Caulkins, C. Peter Rydell, William L. Schwabe, James Chiesa
Mandatory Minimum Drug Sentences: Throwing Away The Key Or The Taxpayers' Money?
Drug Policy Research Center RAND, 1997, p.78

Delaware has invested in the capital facilities to meet present and future needs, but can do better in confronting substance abuse than the present 6 cents on the dollar going for treatment and prevention. Allowing the correction system expenditures, already the highest per capita in the nation, to consume more because of policies that are on auto-pilot would be a failure in leadership.

Public opinion on crime and criminal justice has undergone a significant transformation over the past few years. Support for long prison sentences as the primary tool in the fight against crime is waning, as most people reject a purely punitive approach to criminal justice...The public now favors dealing with the roots of crime over strict sentencing by a two to one margin, 65% to 32%.

Peter D. Hart Research Associates, Inc.
Changing Public Attitudes Toward the Criminal Justice System:
Summary of Findings, February 2002, p.1 ◆

FEATURE

Mark W. Seifert

PREVENTING RACIAL PROFILING AND ENSURING PROFESSIONAL TRAFFIC STOPS

"In order for law enforcement organizations to be effective, they must have the public's confidence in their ability to perform not only the most complex duties but also the most basic responsibilities."

—U.S. Attorney General John Ashcroft
July 17, 2001

Racial profiling has emerged as a major issue affecting law enforcement officers, community leaders, citizens, policymakers, and stakeholders in the criminal justice system. With the notoriety of national cases emerging in our neighboring states of New Jersey and Maryland, the Delaware State Police (DSP) has proactively worked to address community concerns and develop policies to address this issue. Allegations that police stop motorists based strictly on their race or ethnicity are damaging to the public trust, which is a core component of a healthy relationship between the police and the community. These allegations cannot be ignored.

The DSP already had the ability to analyze data from traffic arrests to ensure that racial profiling was not occurring. However, data was not available on the frequent encounters between a trooper and a motorist not resulting in traffic citations. To begin looking at this issue, Secretary of Public Safety James L. Ford, Jr., and Metropolitan Wilmington

Urban League President Antoine J. Allen, Ph.D., began a series of meetings to bring a diverse group of community advocates and criminal justice practitioners together in a common effort.

The committee, unofficially titled the Data Collection Committee, has been meeting since August 2001. This committee consists of representatives of: Metropolitan Wilmington Urban League, the American Civil Liberties Union-Wilmington Office, National Conference for Community and Justice, Governor Minner's office, Delaware Criminal Justice Information System (DELJIS), the Delaware Department of Public Safety, the Delaware State Police, the University of Delaware, the Delaware State Troopers Association, the Multicultural Judges and Lawyers, and the Attorney General's office.

While the goal of the committee was to research methods by which the Delaware State Police could begin systematically collecting data on all traffic stops, the DSP continues to advance numerous other positive outcomes of the committee's work. Among these are the following:

• An opportunity for committee members to participate in a "ride-a-long" with a Delaware trooper on a normal tour of duty.

• Analysis of data elements from approximately 75,000 traffic arrests made by the DSP in 2001. The University of Delaware School of Urban Affairs reported to the committee that the results of this analysis demonstrated no apparent racial profiling on the part of Delaware troopers.

• Beginning May 1, 2002, the DSP started a pilot program in which Delaware state troopers began systematically collecting 26 data elements on all traffic and pedestrian stops.

• The creation of a web-based data collection form which troopers will use to compile the information on their in-car mobile data computer. The forms can be completed in less than one minute, alleviating the concern regarding additional delays of motorists by the police.

• The creation of a new policy which expressly prohibits race-based enforcement efforts. This policy provides a clear statement to all troopers concerning expectations of professionalism and integrity. It also communicates to the community that the Delaware State Police is aware of this issue and is sensitive to its concerns.

• Expanded training for every trooper in the prevention of racial profiling. Every Delaware trooper went through training addressing racial profiling. Additionally, troopers involved in the pilot program and all first-line supervisors attended an eight-hour training curriculum by a national expert. Future plans include expanding this training to all incoming recruit classes. The national expert also trained a new core group of trooper-trainers who will carry the information to their colleagues.

• A mandate from the Superintendent that all traffic stops will be radioed to the communications center and this information will be recorded in the computer-aided dispatch system.

• A partnership with the University of Delaware School of Urban Affairs in which statistical experts from the University will independently analyze data provided by the DSP.

• A partnership with the Office of Highway Safety which will allow the DSP to receive grant funding to begin purchasing and installing mobile video cameras in patrol cars.

• The issuance of business cards to all troopers. These business cards will be issued to motorists who are stopped and request to make a complaint or a compliment about the troopers' conduct during the stop.

Some may argue that in light of events in New York City, the Pentagon and Pennsylvania, profiling should be perceived as good police practice. However, academic research tells us otherwise. David Harris, professor of law at the University of Toledo College of Law and the author of *Profiles in Injustice: Why Police Profiling Cannot Work*, has proved an interesting fact. He found that even when minority motorists were stopped and frisked for concealed weapons at a higher rate, the arrest rates for black motorists carrying contraband is less than that evidenced by the "hit rates" for non-minority motorists.

Further, a Gallup poll found that 80% of Americans disapprove of the practice of racial profiling. According to the same poll, 59% believe racial profiling is a widespread problem. The DSP, through extensive training, has shared this research with Delaware troopers. Additional training addressed the core elements of established law, which already prohibit racial profiling, including:

• The Fourth Amendment protection against unreasonable search and seizure.

• The Fourteenth Amendment provision of the fundamental rights to all citizens: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

• Title 42 USC Section 1983's creation of a federal civil cause of action for the recovery of damages against any person who, while acting "under color of any [state] statute..." deprives a person of their "rights, privileges, or immunities secured by the constitution and laws" of the United States.

Racial profiling significantly impacts law enforcement operations, the trust that citizens place in their police officers, and the overall community welfare. The balance between police as enforcer of the law and upholder of all constitutional rights in a very complex and evolving society requires enlightenment of both the police and the community.

The Data Collection Committee took the responsibility of addressing this important issue very seriously and carefully reviewed a host of policies, initiatives and established efforts from police agencies nationwide. In most cases, the committee found that legislative initiatives to address racial profiling fell short of expected results. Delawareans have been well-served by this partnership. A variety of viewpoints from experienced academics, community advocates, criminal justice experts and others have been and will continue to be considered.

With guidance from our partners on the Data Collection Committee, the DSP will continue to strive to be a leader in addressing racial profiling and to ensure that all traffic stops are conducted professionally, without bias, and conclude as a positive experience for the motorist. Future success will depend on public trust, especially as policing encounters evolving national security issues and a culture that is more diverse, more mobile and more complex. The Delaware State Police and our partners in the community must continue to collaborate to determine how best to address these matters. ◆

FEATURE

Timothy J. Houseal

RLUIPA: PROTECTING HOUSES OF WORSHIP AND RELIGIOUS LIBERTY

When President William Jefferson Clinton signed into law the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), he concluded a unique chapter in the judicial and legislative odyssey and tug of war that surrounded the protection of religious liberties in America. RLUIPA (pronounced ri-loo-pa by civil rights attorneys) was passed unanimously by the United States Senate and House of Representatives and became law on September 22, 2000.[1]

Even more dramatic than this overwhelming bipartisan support is that RLUIPA was drafted and supported by a team of religious liberty and civil rights lawyers who are frequently divided as to how the United States Constitution should be interpreted and applied. These attorneys represented a diverse collection of groups which included the American Civil Liberties Union, The Christian Legal Society, Americans United for the Separation of Church and State, The American Jewish Congress, The Family Research Council, People for the American Way, The National Association of Evangelicals, The United States Catholic Conference and a variety of other national associations and religious groups too numerous to list here.

In recognition of this unparalleled cooperation, President Clinton stated, "I applaud the Congress, particularly Senators Kennedy, Hatch, Reid, and Schumer and Representatives Canady and Nadler for their hard work in passing this legislation. . . . I also want to thank the Coalition for the Free Exercise of Religion and the civil rights community for the central role they played in crafting this legislation. Their work in passing this legislation once again demonstrates that people of all political bents and faiths can work together for a common purpose that benefits all Americans."[2]

Summary of the Act

RLUIPA provides that governments shall not implement land use regulations in ways that substantially burden religious exercise unless such a burden is justified by a compelling governmental interest which is being implemented in a manner that is least restrictive of religious exercise.[3] This restriction and required analysis controls all government land use regulations in the enumerated contexts, even those that are of general application.[4]

RLUIPA also provides that governments may not treat religious assemblies and institutions on less than equal terms with non-religious assemblies, may not discriminate against any institution on the basis of religion, may not totally exclude religious assemblies from a jurisdiction nor unreasonably limit such uses within a jurisdiction.[5]

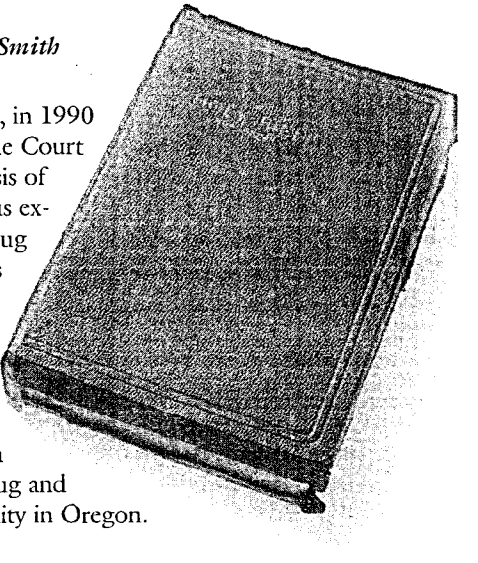
In a separate part of the Act, RLUIPA also prohibits governments from substantially burdening the "Free Exercise" rights of prison inmates without a compelling governmental interest.[6] These prohibitions also apply to any program receiving federal aid or any case affecting interstate commerce.[7] This article will focus on the religious land use aspects of the Act.

History Leading Up to the Enactment of RLUIPA

Sherbert v. Verner "Strict Scrutiny" Analysis

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ."[8] Beginning in 1963, under *Sherbert v. Verner*,[9] Free Exercise claims were analyzed under the "compelling state interest" test, which provided that when a governmental action or regulation imposed a significant burden on a sincerely-held religious belief, that governmental action was unconstitutional as against the religious institution or practitioner unless it was the "least restrictive" means of furthering a "compelling governmental interest" (commonly referred to as the "strict scrutiny" test).

Employment Division v. Smith Alters the Analysis



Unexpectedly, however, in 1990 the United States Supreme Court altered the *Sherbert* analysis of First Amendment religious exercise protections in a drug possession case known as *Employment Division v. Smith*.[10] The *Smith* decision arose out of an unemployment compensation dispute involving two Native American employees of a private drug and alcohol rehabilitation facility in Oregon.

The two were fired after they admitted ingesting peyote, a sacrament of the Native American Church, during a religious ceremony. Oregon law prohibited the knowing or intentional possession of a "controlled substance," which included peyote. The employees sued, challenging the Oregon law as applied to their religious practice.

The Oregon Supreme Court held that the State's prohibition on sacramental peyote use violated the Free Exercise Clause, thereby reaffirming a previous holding that the State could not deny unemployment benefits. The United States Supreme Court reversed and declined to employ the "compelling state interest" standard it had espoused and applied for almost three decades since *Sherbert*.

Many Supreme Court observers commented that the Court reached the proper conclusion but arrived there by applying the wrong analysis. Civil rights lawyers were surprised by the Court's altered approach because it was anticipated the Court could have reached the same conclusion by employing its "strict scrutiny" test.

The *Smith* decision was limited to government action that constituted a neutral law of general application and which did not specifically single out religious belief or practice.[11] The *Smith* opinion was also careful to enumerate other exceptions to the Court's ruling by distinguishing earlier decisions that invalidated similar neutral, generally applicable laws on Free Exercise grounds when those claims were coupled with the violation of other constitutional protections.[12]

The *Smith* employees' claim was limited, however, to the Free Exercise Clause and did not fall within the category of "coupled" or "hybrid" constitutional claims. The Smith opinion also found that the heightened standard of review adopted in *Sherbert* would apply: (i) when the challenged law was either facially non-neutral; (ii) even if facially neutral, when the law had the surreptitious purpose of burdening religious practices; and (iii) when the law was not generally applicable because it failed to regulate secular conduct that implicated the same government interest as the prohibited religious conduct.[13]

The Passage of the Religious Freedom Restoration Act ("RFRA")

Despite these limitations and exceptions, the unanticipated change in the controlling analysis from the "compelling state interest" test to the "rational basis" test and the corresponding burden of proof switch sent shock waves across the country, especially among faith communities and those who practiced constitutional law. In short order, as governments altered their practices in light of *Smith*, religious institutions and people of faith asserted many hundreds of claims of violations of First Amendment religious liberty protections. A significant percentage of these reported violations and the resulting litigation concerned various governments' land use decisions.[14]

As a result of these claims of improper restrictions on religious expression, Congress began a three-year process of hearings, study and the eventual drafting and redrafting of the Religious Freedom Restoration Act ("RFRA"). Ultimately, RFRA was enacted by Congress and signed into law by President Clinton. The Act's purpose was to restore legal protections for religious exercise by requiring all Free Exercise claims to be examined under the United States Supreme Court's previous standard — the "strict scrutiny" analysis.

RFRA codified the balancing test that had been used by the courts in the three decades prior to the *Smith* decision. Under RFRA's balancing test, "government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling governmental interest."[15]

Congress based its authority for RFRA on Section 5 of the Fourteenth Amendment of the United States Constitution. This Section provides Congress with the "power to enforce" by "appropriate legislation" the Constitution's guarantee that no state shall deprive any person of "life, liberty, or property, without due process of law" or deny any person "equal protection of the laws."[16]

The Supreme Court Overturns RFRA in *City of Boerne v. Flores*

However, in *City of Boerne v. Flores*,[17] the Supreme Court ruled that in enacting RFRA, Congress had exceeded its enforcement authority under Section 5 of the Fourteenth Amendment. In *Boerne*, the Archbishop of San Antonio granted permission to Saint Peter Catholic Church, located in Boerne, Texas, to meet the needs of its growing congregation by enlarging its existing mission-style structure that had been built in 1923. Subsequently, the Boerne City Council approved an ordinance that required the approval of an Historic Landmark Commission prior to any construction that would affect historic landmarks or buildings located within an historic district.

In response to the Archbishop's application, city authorities denied the permit and retroactively changed the boundaries of the historic district to include the church. The Archbishop then filed suit in federal court, relying on RFRA to challenge the permit denial. The District Court held that Congress exceeded its Section 5 enforcement power, but the United States Court of Appeals for the Fifth Circuit reversed, holding that the statute was constitutional.

The Supreme Court reversed the Fifth Circuit. In an opinion by Justice Kennedy, the Court ruled that, while Congress has the power to enact legislation "enforcing" the constitutional right to the free exercise of religion under Section 5 of the Fourteenth Amendment, its Section 5 power is limited to enacting laws that will "remedy" violations of the Free Exercise Clause as the Court has interpreted it.[18] Such power exists when Congress has "reason to believe that many of the laws affected by the Congressional enactment have a significant likelihood of being unconstitutional."[19] However, Congress lacks the authority to decree the substance of the Fourteenth Amendment, and, thus, cannot legitimately determine on its own what substantive rights were protected by it.[20]

Despite this holding, RFRA continues to be controlling as to the federal government.[21] Central to the *Boerne* Court's analysis was the Supreme Court's view that RFRA's legislative record lacked sufficient evidence of discriminatory laws.[22] The Supreme Court also deemed RFRA to contradict the principle of separation of powers.[23]

In Response to *Boerne*, Congress Develops Proper Legislative Record, Narrows Scope and RLUIPA Becomes Law

Mindful of the *Boerne* Court's finding that there was an insufficient legislative record of laws impinging upon religious practices and expression, the House of Representative's Subcommittee on the Constitution conducted a series of hear-

ings over a two-year period to assess the need for federal protection of religious freedom. These Hearings led to the introduction of various bills, including the Religious Liberty Protection Act of 1999[24] ("RLPA") and the eventual unanimous passage of RLUIPA.

The incidents presented in oral and written testimony before the Subcommittee involved government action which either required violation of religious beliefs or practices or which restricted the fulfillment of religious beliefs or practices. Much of this testimony concerned land use provisions that were intended to be neutral and of general application but nonetheless were alleged to be improperly restrictive of religious belief or practice.[25]

The presentations outlined the types of alleged improper impacts on religious expression and the types of restrictions Conress intended to eliminate by the passage of RLUIPA. Several witnesses made the point that state and local governments took the message of *Smith* to be that they never have to make exceptions for religious believers, and can simply refuse to respond to their requests. Due to the fact that RFRA gave citizens a potentially viable claim, officials had an incentive to engage in discussions with potential claimants, which often resulted in mutually acceptable concessions and solutions.[26]

In the wake of the *Smith* and *Bourne* opinions a wave of religious discrimination in land use practices had developed which violated the First Amendment's religious liberty protections.

The Record of Religious Discrimination in Land Use Practices

After six House Subcommittee Hearings, three Senate Committee Hearings, extensive testimony and the entry into the Congressional Record of a variety studies, Congress found that in the wake of the *Smith* and *Boerne* opinions a wave of religious discrimination in land use practices had developed which violated the First Amendment's religious liberty protections. Space only permits a brief highlighting of some of these studies and testimony and a partial outline of the evidence of such religious discrimination.

One study showed that while small religious groups account for less than 9% of the population, they were litigants in nearly 50% of the religious land use decisions. In contrast, large religious groups, which constitute 65% of the population, were involved in only 31% of such lawsuits. Thus, the study concluded that minority religious groups were ten times more likely to be involved in religious land use litigation.[27] Similarly, a Brigham Young University study concluded that Jewish congregations, small Christian denominations and non-denominational churches were vastly over-represented in reported church zoning cases.[28]

A partial list of the infringements and abuses of the religious liberties rights of mosques, temples, churches and their congregants in the land use area include:

1) in Miami, an Orthodox Jewish Rabbi was threatened with criminal prosecution for leading morning and evening prayers in a converted garage in one of the city's single-family residential areas;[29]

2) in Arapahoe County, Colorado, officials enforced specific numerical restrictions of the number of students that may be enrolled in religious schools and on the number of persons in various congregations;[30]

3) in Douglass County, Colorado, administrative officials proposed restricting the operational hours of churches thereby eliminating the religious expressions of prayer vigils and the sacred act of devotion preformed in Catholic churches known as the Perpetual Adoration of the Blessed Sacrament;[31]

4) some land use regulations deliberately excluded all new churches from an entire municipality;[32]

5) some land use schemes permitted houses of worship only in residential areas;[33]

6) the opposite approach can also have a discriminatory effect as Rabbi Chaim Barouch Rubin of the congregation Etz Chaim of Los Angeles, California testified that some regulations prohibit houses of worship in residential areas, which has a disproportionately discriminatory impact on Orthodox Jewish congregations who may not use motorized vehicles on the Sabbath and, therefore, must live within walking distance of the synagogue or shul;[34]

7) similarly, land use regulations were further utilized to discriminate against Orthodox Jewish congregations by requiring there to be as many parking spaces as the number of seats in the synagogue, even though members walked to services;[35]

8) further testimony revealed that it was not uncommon for ordinances to establish standards for houses of worship that differed from those applicable to other places of assembly;[36]

9) another study revealed that in 22 of 29 suburbs of Chicago, houses of worship were not permitted to relocate except by grant of "special use permit," which gave broad discretion to land use regulators. This discretion was applied in discriminatory fashion against religious assemblies. Furthermore, similar uses were permitted as of right for certain non-religious assemblies such as: banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls and theaters;[37]

10) these burdens on religious institutions and individuals were exacerbated because houses of worship must commit to an expensive lease or mortgage to hold the property while they litigate in order to ensure standing;[38]

11) testimony also included statements of a pattern of abuse that existed among some land use authorities who denied certain religious groups' attempts to locate in their areas by relying on mere pretexts such as traffic, safety or behavioral concerns to mask the actual effect of limiting or prohibiting constitutionally protected religious liberties;[39]

12) testimony also revealed that land use regulations were utilized to prohibit home religious meetings and Bible studies, used to close soup kitchens and

WHO CAN YOU DEPEND ON WHEN YOUR CLIENTS ARE INJURED?

Depend on us to get you better faster.

GETTING YOUR CLIENT BETTER FASTER!

BOARD CERTIFIED PHYSICAL MEDICINE AND REHABILITATION SPECIALISTS

A MULTI-SPECIALTY TEAM DEDICATED TO TREATING YOUR CLIENT'S PAIN WITH NON-SURGICAL CARE & REHABILITATION

ACCEPTING NEW MOTOR VEHICLE & WORKERS COMPENSATION CASES

Physical Medicine / Rehabilitation / EMG

Barry L. Bakst, D.O.
Craig D. Sternberg, M.D.
Arnold B. Glassman, D.O.
Anne C. Mack, M.D.
Stephen M. Beneck, M.D.
Susan T. Depoliti, M.D.
Asit P. Upadhyay, D.O.

Pain Management Counseling

Irene Fisher, Psy.D.

Chiropractic Care

Kristi M. Dillon, D.C.
Brian S. Baar, D.C.
Debra Kennedy, D.C.
Kenneth Ward, D.C.
Mary B. Beierschmitt, D.C.
Marjorie E. MacKenzie, D.C.

Interventional Pain Management

Emmanual Devotta, M.D.
Pramod K. Yadhati, M.D.

Depend on Teamwork for: Physical medicine & rehabilitation, Interventional Pain Management / Injections, EMG, Chiropractic Care, Rehabilitation therapy, Psychology / Pain management counseling, Massage therapy and QFCE's

Depend on Time Saving Solutions: Centralized communication — we'll keep track of every phase of your clients' care. Prompt scheduling — often within 24 hours. Timely response — to your requests for documentation. One call — for any record requests.

Depend on Convenience: Five convenient locations. Hospital consultations at St. Francis, Christiana Care and Kent General. Early morning, lunchtime and early evening appointments. Free, handicapped accessible parking. Transportation provided for auto, work and personal injury. Accessible to public transportation. ONE STOP SHOPPING!

GETTING YOUR CLIENTS BETTER FASTER IS JUST A PHONE CALL AWAY. CALL US TODAY!

Wilmington

2006 Foulk Road
Wilmington, DE 19810
302-529-8783

700 Lea Boulevard
Wilmington, DE 19802
302-764-0271

Newark / Glasgow

87-B Omega Drive
Newark, DE 19713
302-733-0980

2600 Glasgow Avenue
Newark, DE 19702
302-832-8894

Dover

830 Walker Road
Dover, DE 19901
302-730-8848

TRANSPORTATION AVAILABLE

homeless shelters, and were used to prevent the renovation or expansion of worship facilities, especially in historic districts;[40] and

13) Congress also heard testimony about religious bigotry in zoning hearings and frequently overlapping racial and/or ethnic discrimination, especially involving African-American churches, Korean churches, Hispanic churches and Jewish congregations.[41]

Congress's Conclusions and How RLUIPA Operates

Following the Supreme Court's guidance in *Boerne*, Congress specificaly and painstakingly developed the factual record that supported the passage of RLUIPA, upon which the above outline only touches. Armed with this record and the statistical and anecdotal evidence, Congress found that many exercises of land use regulations were unconstitutional as applied to the faith community, even many that were intended to be neutral and of general application.

Thus, Congress exercised its enforcement power pursuant to Section 5 of the Fourteenth Amendment by passing RLUIPA as a means of remedying these abuses of the First Amendment's right to the free exercise of religion. Congress concluded that there was a widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship.[42]

Congress also found that while some land use regulations are couched in terms of neutral and generally applicable rules, they in fact are commonly administered through individualized processes that are often vague, discretionary and subjective.[43] Furthermore, Congress concluded that such regulations as applied through the regulators' discretionary power have a disparate impact on faiths that have a relatively small percentage of adherents, on non-denominational churches, and on houses of worship whose practitioners are primarily African-American, Jewish, Hispanic and Asian.[44]

RLUIPA was enacted to address this intentional and unintentional religious discrimination. This Act simplifies the litigation of all such Free Exercise claims by shifting the burden of persuasion to the government once the claimant shows a *prima facie* case. Once the claimant demonstrates a *prima facie* violation of the Free Exercise Clause, the burden of persuasion then shifts to the government on all issues expect the issue of religious exercise.[45] RLUIPA facilitates enforcement of the right to religious exercise as defined by the Supreme Court. This return to the "strict scrutiny" test versus the "rational basis" analysis favors the constitutional right to free exercise of religion over government action that may indeed have some generally applied, rational goal.

It should be noted that the Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits, exceptions, hardship approval, or other relief provisions in land use regulations when available without discrimination or unfair delay. Rather, the Act requires regulators to use their discretion to protect religious liberty and to accommodate religious practice, and ensures that when religious liberty is impacted, the government's regulations must address compelling interests and do so by the least restrictive means.

Testimony revealed that land use regulations were utilized to prohibit home religious meetings, close soup kitchens, and prevent the renovation of worship facilities.

Is RLUIPA Constitutional?

While ultimately the United States Supreme Court will have to determine the constitutionality of RLUIPA, the one court in the country that has considered this question has ruled that RLUIPA is constitutional in the land use arena. Courts have previously upheld the constitutionality of the Act's institutionalized persons religious liberty provisions.[46] On May 8, 2002 Judge Stewart Dalzell handed down a comprehensive review of the constitutionality of RLUIPA's religious land use provisions in *Freedom Baptist Church of Delaware County v. Township of Middletown*.[47] Pursuant to 28 U.S.C. § 1292(b), the court then certified an interloctory appeal to the Third Circuit Court of Appeals, and the Township and related parties are pursuing that appeal. If the Township loses its challenge before the Third Circuit, it is unclear whether they will pursue the matter to the United States Supreme Court. However, if the Third Circuit does not uphold Judge Dalzell's opinion, it is inevitable that the church and intervener the United States Department of Justice will pursue the case to its judicial end.

Interestingly, Judge Dalzell's opinion confirms the analyses of many religious liberty scholars who have previously opined on the constitutionality of RLUIPA. The opinion also recognizes the careful steps taken by Congress to craft legislation that was narrowly tailored to address the specific impositions on religious liberties identified by Congress and that was confined to fit within the parameters of the Supreme Court's *Boerne* and *Smith* decisions.

The *Freedom Baptist Church* court found that Congress made special effort to ensure the Act would withstand constitutional scrutiny. First, Congress conducted an extensive investigation and heard testimony regarding abuses of religious liberty in the land use context.[48] Second, unlike its predecessor RFRA, RLUIPA is narrowly tailored to address the specific harms identified.[49] Third, Congress employed its constitutionally allocated "power to remedy" abuses of religious liberty rights without usurping the court's power to define what those rights are.[50] Fourth, the court found that RLUIPA is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment to pass civil rights enforcement legislation.[51] RLUIPA is designed to remedy violations of both the "Equal Protection Clause" of the Fourteenth Amendment and the "Free Exercise Clause" of the First Amendment. Fifth, the court also found that RLUIPA was a proper exercise of Con-

gress's Commerce Clause powers found in Art. I, § 8, cl. 2 of the Constitution.[52] Sixth, the court found that RLUIPA did not implicate the "Establishment Clause" provisions and, therefore, the court did not need to subject RLUIPA to the three-part analysis of *Lemon v. Kurtzman*.[53] In addition, the court did not have to analyze Congress's identification of the Spending Clause Authority under Art. 1, § 8, cl.1 of the Constitution because there was no claim of any federally-assisted program, activity or funding.

The facts and the court's opinion in *Freedom Baptist Church* present an interesting case study which tracks the legislative history and intent of RLUIPA. While there was no allegation of overt discrimination against the congregation, the effect of the Township's zoning ordinances discriminated against religious institutions in general and, in practice, made it difficult or impossible for any new house of worship to be built in the Township. An outline of the Church's allegations include: 1) the Township's zoning ordinances created 17 districts in which no "religious worship is a permitted use";[54] 2) in those districts where religious worship is an allowed use, the Church claimed such activity was a "conditional use and is subject to onerous requirements, i.e., there must be a minimum lot of five (5) acres as well as parking requirements";[55] 3) the land requirement alone made it almost impossible for a new religious institution to locate within the Township because there is limited land available that satisfies the requirements and any such land would be prohibitively expensive;[56] 4) the ordinances treat schools less onerously than churches;[57] and 5) the ordinances have the effect of "shutting out any religious group from locating within the Township."[58]

While the court did not have to analyze this statement of facts, the allegations echo the legislative history that prompted Congress to pass RLUIPA and provide context for the court's constitutional analysis. In this regard, Judge Dalzell noted "no one contests that zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations. They are, therefore, of necessity different from laws of general applicability which do not admit to exceptions on Free Exercise grounds."[59]

The court recognized the likelihood of unscrutinized abuses that can be inflicted in this context and confirmed Congress's ability to address such wrongs through RLUIPA. Since RLUIPA was designed to address this concern, the court was able to distinguish it from its statutory predecessor RFRA and to hold that it complied with the Supreme Court's *Smith* and *Boerne* decisions. "What Congress manifestly has done in this subsection is to codify the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in *Sherbert v. Verner*."[60]

While there was no allegation of overt discrimination, in practice, the zoning ordinances made it difficult or impossible for a new house of worship to be built in the Township.

As outlined above, the court then went on to analyze each of RLUIPA's religious liberty provisions and to confirm their constitutionality. However, the court differed from intervener U.S. Department of Justice on one point. The Justice Department had claimed that RLUIPA merely codifies existing law. The court held that while RLUIPA does codify some First and Fourteenth Amendment protections, RLUIPA also changes the standards by which courts analyze land use cases. "RLUIPA is something new under the federalism sun."[61]

This distinction was not fatal, however, because the court found this new regime was a proper exercise of Congress's power to remedy and did not run afoul of the "court's power to define constitutional rights and 'say what the law is.' "[62] Since RLUIPA was drafted to address specific wrongs, the court distinguished it from the constitutional flaws of RFRA. "It is precisely at this point that the RLUIPA critically differs from the RFRA. In limiting its applicability outside of the Spending and Commerce Clauses to those cases where governments make 'individual assessments,' the statute draws the very line *Smith* itself drew when it distinguished neutral laws of general applicability from those 'where the State has in place a system of individual, exemptions' but nevertheless 'refuses to extend that system to cases of "religious hardship,"' . . . RLUIPA here is targeted solely to low visibility decisions with the obvious — and for Congress, unacceptable — concomitant risk of idiosyncratic application."[63]

"Further, since, as we have demonstrated, the RLUIPA's limitations and proscriptions codify firmly-established Supreme Court rights under its Free Exercise and Equal Protection jurisprudence, it does not 'attempt a substantive change in constitutional protections.' "[64]

In concluding that RLUIPA's land use provisions are constitutional on their face as applied to states and municipalities, the court recognized that the Act will likely "open the door to municipalities facing federal litigation in cases that were heretofore customarily considered in state court."[65] However, the court noted that localities and states "long ago became accustomed to defending themselves in federal court under § 1983, and for the past half dozen years" in Telecommunications Act litigation and, therefore, the court does not "believe that the new statute unduly offends the federal structure."[66]

The Future of RLUIPA

While the *Freedom Baptist Church* case winds its way through the federal courts on its way to a definitive determination of RLUIPA's constitutionality, it is clear that practitioners of many faiths will rely upon its religious land use protections. Alan C. Weinstein, a Professor of Law and Urban Studies at Cleveland State University has estimated that the Act

"has produced a torrent of litigation, . . . we've seen easily 30 to 40 cases filed and in terms of disputes another 30 or 40 are churning along at some level."[67] However, estimates of RLUIPA's non-litigation impact are significantly greater than these figures

Since RLUIPA returns the burden of proof to the government entity to justify its ordinance and application to the religious institution and requires the application of the "strict scrutiny" analysis, the more immediate impact of RLUIPA is that it provides minority religions and small congregations leverage to assure more fair individual assessments. The Act also provides the opportunity to negotiate reasonable and acceptable land use restrictions. Since the outcomes of such negotiations are rarely reported nor the information gathered on a national level, is impossible to assess RLUIPA's full impact in this context.

In Delaware, RLUIPA has not been cited in any reported opinions, however, it has been relied upon in two matters involving New Castle County and attempts to locate houses of worship. The first matter concerned exceptions to the County's Development Code to permit the conversion of a house into a synagogue in Brandywine Hundred for the Chabad Lubavitch of Delaware group. Many of the group's members walk to the synagogue in strict observance of the Sabbath. After some controversy, the New Castle Board of Adjustment and Land Use Department approved the variances for the synagogue and that decision was affirmed on appeal.[68] Since the County accommodated this religious observance and placement, it is unclear the extent to which RLUIPA played a role. However, the Act's application was considered.

RLUIPA was also referenced by Alpha Baptist Church, a predominately African-American congregation that wishes to expand or relocate its facilities from Belvedere. Alpha Baptist is continuing to consider its options under RLUIPA and with respect to available parcels.

Similarly, provided that its constitutionality is confirmed by the federal courts, RLUIPA will continue to have a strong behind-the-scenes role in ensuring religious liberty protections in the land use arena. In addition, when necessary, the Act will be the cornerstone of litigation when disputes cannot be resolved consensually. ◆

FOOTNOTES

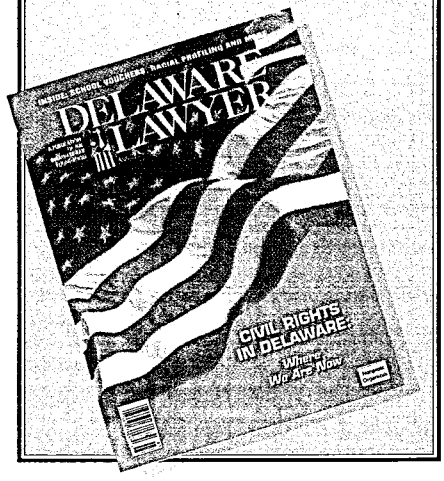
1. Pub. Law 106-274 (S.2869), codified at 42 U.S.C. § 2000cc.
2. Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000 (September 22, 2000).
3. *See* 42 U.S.C. § 2000cc(a)(1).
4. *See* 42 U.S.C. § 2000cc(a)(2).
5. *See* 42 U.S.C. § 2000cc(b).
6. *See* 42 U.S.C. § 2000cc-1.
7. *See* 42 U.S.C. § 2000cc(a)(2).
8. U.S. Const. Amend. I.
9. 374 U.S. 398 (1963).
10. *See Employment Division v. Smith*, 494 U.S. 872 (1990).
11. *Id.* at 879.
12. *Id.* at 881.
13. *Id.* at 883-885.
14. *See infra* notes 26-28.
15. 42 U.S.C. §2000bb-1.
16. U.S. Const. Amend. XIV.
17. 521 U.S. 507 (1997).
18. *Boerne*, 521 U.S. at 519.
19. *Boerne*, 521 U.S. at 532.
20. *Id.*
21. *Id.* at note 3; see also *Kikumura v. Hurley*, 242 F.3d 950, 959-60 (10th Cir. 2001).
22. *Boerne*, 521 U.S. at 530.
23. *Id.* at 532.
24. H.R. 1691, 105th Cong., 2nd Sess. (1999).
25. *See infra* notes 26-30.
26. *See The Need for Federal Protection of*

CASE CLOSED!

Delaware Lawyer
is your best way to reach the state's most active and influential leaders.

For advertising information, please contact:
Vera Malkowski
410.879.9606
vera.malkowski@mediatwo.com

www.mediatwo.com



Religious Freedom After Boerne v. Flores, 1997: Oversight Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. March 26, 1998 ("Subcomm. Hearings") (Statements of Mark Chopko, Esquire, General Counsel, U.S. Catholic Conference and Mark Stern, Esquire, Director, Legal Department, American Jewish Congress).

27. *See* Von G. Keetch and Matthew K. Richards, "The Need For Legislation To Enshrine Free Exercise In The Land Use Context," 32 U.C. Davis L. Rev. 725 (1999). *See also* Christian Legal Society report entered into the Congressional Record by Rep. Henry J. Hyde. 146 Cong. Rec. E1564-67 (September 22, 2000).

28. Statement of Von Keetch, Esquire, Partner, Kirton & McConkie, Oversight Hearings before the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Congress, May 12, 1999.

29. Subcomm. Hearings, Statement of Steve McFarland, Esquire, Director, Center for Law and Religious Freedom, March 26, 1998.

30. Subcomm. Hearings, Chopko Statement, March 26, 1998.

31. *Id.*

32. *See, e.g., Corporation of the Presiding Bishop v. Board of Comm'rs.*, No. 95-1135, Chancery Court Davidson County, Tenn. (January 27, 1998).

33. *See, e.g., Cornerstone Bible Church v. City of Hastings*, 740 F.Supp. 654, 663 (D. Minn. 1990), *rev'd in part on other grounds*, 948 F.2d 464 (8th Cir. 1991); and *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 707 N.E.2d 53, 59 (Ill. App. Ct. 1999).

34. Subcomm. Hearings, Statement of Rabbi Chaim Barouch Rubin, February 26, 1998.

35. *See, e.g., Orthodox Minhan v. Cheltenham Township Zoning Hearing Board* 552 A.2d 772, 773 (Pa. Commw. Ct. 1989).

36. Subcomm. Hearings, Statement of Bruce D. Shoulson, Esquire, June 16, 1998.

37. Subcomm. Hearings, Statement of John Mauck, Esquire, June 16, 1998.

38. *See Love Church v. City of Evanston*, 896 F. 2d 1082 (7th Cir. 1990).

39. *See also Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993); and *Islamic Center of Mississippi v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988).

40. Subcomm. Hearings, McFarland Statement, March 26, 1998.

41. Additional information about RLUIPA's legislative history can be found at www.RLUIPA.com, which is a website organized and maintained by the Becket Fund for Religious Liberty.

42. Joint statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000 (September 22, 2000).

43. *Id.*

44. *Id.*

45. 42 U.S.C. § 2000cc-2(b).

46. *See Mayweathers v. Terhune*, C.A. No. S-96-1582 LKK/GGH P, 2001 U.S. Dist. LEXIS 22300 (E.D. Calf. July 2, 2001) *aff'd sub nom.*, 258 F.3d 930 (9th Cir. 2001) (upholding the statute's constitutionality in a class action brought by Muslim state prisoners); and *Johnson v. Martin*, C.A. No. 2:00-CV-075, Magistrate Opinion, Greeley, M.J. (W.D. Mich. Apr. 16, 2002), citing *Mayweathers.*

47. 204 F.Supp.2d 857, 2002 U.S. Dist. LEXIS 8258 (E.D. Pa. May 8, 2002).

48. *Freedom Baptist Church*, 204 F.Supp.2d at 861-63

49. *Id.* at 872-74.

50. *Id.*

51. *Id.* at 868-72.

52. *Id.* at 865-68.

53. 403 U.S. 602 (1971).

54. *Freedom Baptist Church*, 204 F.Supp.2d at 859.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 868.

60. *Id.*

61. *Id.* at 871-72.

62. *Id.* at 872.

63. *Id.* at 873-74.

64. *Id.* at 874.

65. *Id.*

66. *Id.*

67. Adam Liptak, "No-Church Zoning Faces a Challenge," *N.Y. Times*, June 3, 2002, at A13.

68. Charlotte Hale, "Judge Upholds Variance for Synagogue," *Wilmington News Journal*, Apr. 18, 2002, at B3.

Corbett & Associates

Your Court Reporters

STATE-OF-THE-ART RESOURCES

⇒ New, CD-ROM Digital Video Deposition System Gives You:
⇒ Instant Access To Any Spot On Video
⇒ Text-To-Video Synchronization
⇒ Easy Editing Capability For Courtroom Playback
⇒ Two In-House Videographers
⇒ Discovery ZX
⇒ ASCII Disks On Request
⇒ LiveNote
⇒ Courtroom Playback

QUALITY DOCUMENTS, SERVICES AND STANDARDS

⇒ Transcripts
⇒ Video Depositions
⇒ Min-U-Script - Free With All Transcripts
⇒ Accurate And Dependable
⇒ Rapid Turnaround
⇒ Twelve Reporters On Staff
⇒ Reporting On All Types Of Legal Proceedings
⇒ Certified Real-Time Reporting

1400 N. French St, P.O. Box 25085, Wilmington, DE 19899-5085
302 571 0510 800 462 2233 Fax: 302 571 1321
ecorbett@erols.com

» Member of the National Court Reporters Association «

OPINION

William E. Wiggin

A CIVIL LIBERTIES PARADOX

The recent uproar over the Ninth Circuit ban on the words "under God" in the Pledge of Allegiance as recited in a public school classroom has led me to reflect on the occasionally odd consequences of adjudication. A legally sound decision may result in absurdity and an arguably absurd one may yield outstanding social benefits.

I find the *Newdow* ("under God") decision[1] rationally impeccable and *Roe v. Wade*,[2] the law of the land for nearly thirty years, questionable. But to embrace or revile either of these emotionally charged rulings is not a conclusion, but a beginning.

Let me state my credentials for what I am about to say: I belong to a church (which I even occasionally attend when not deflected from the paths of righteousness by the *New York Times* Sunday crossword puzzle). Furthermore, I am hardly an "atheistic Communist" but a conservative Republican, who nonetheless resents the hijacking of his party by the religious right.

I believe the decision in *Newdow* is correct because it condemns the coercion implicit in a governmental requirement that an atheist watch and listen as his teachers and classmates proclaim belief in what to him is an imaginary deity.

Contrary to the hysteria this opinion had provoked, it does not doom the singing of "God Bless America" in a ballpark. Those in attendance are free to snap their jaws tight — not so in the minatory atmosphere of a grammar school classroom.

Is This Ego Trip Necessary?

Do I suggest by the foregoing that I think this decision should be enforced? Certainly not! I am confident that agnostic school children will recite the offending words and will survive the contamination of enforced piety.

If some rancid-tempered village atheist chooses to throw a monkey wrench into the creaking machinery of an overworked Federal Court system, he must be heard — BRIEFLY. Should he not be told something like this?

> "The evil of which you complain is so petty and innocuous that, while we concede you may be right as a matter of law, we decline to disrupt the public school system by affording you such trivial relief. Enough already! *De minimis non curat lex.* Next case!"

Just as the federal courts impose a dollar minimum in certain kinds of civil litigation, some creative type should design a materiality threshold to weed out litigation that comes dangerously close to abuse of process.

Flawed Utility

Roe v. Wade is quite another matter. It arises from a supposed right of privacy deriving — more than a bit obscurely — from the due process clause of the Fourteenth Amendment. In his politely devastating dissent, then-Justice Rehnquist stated that the "right" the majority found within the Amendment was unknown to those who drafted it. He also suggested that the majority had engaged in judicial legislation. I think he had a point. The majority opinion seems to be trying rather desperately to grow a previously non-existent abortion right in singularly barren soil. It reminds me of Oscar Wilde on Wordsworth in the Lake District, where, according to Wilde, the poet found his sermons beneath the stones where he had already hidden them.

But if one cannot respect the decision, one can rejoice in its result: the establishment of a woman's right to control her own body beyond the intervention of politicians and sanctimonious busybodies.

Paradox and Consequence

We have first a correct but unnecessary decision which has provoked nearly unanimous offense and will almost certainly be reversed, leading to an increased pietist stranglehold on our public life. Secondly, we have a very questionable decision, which has extended and protected the freedoms of half the populace. Sometimes the law can be a very odd institution. ◆

1. *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002). [*Editor's Note: The ACLU was not involved in the* Newdow *case.*]
2. 410 U.S. 113 (1973).

Today is the Age of the Specialist

You want a full service CPA firm that can provide you and your clients the level of accounting and financial services they need.

The Horty Group of Companies

Helping your Business Succeed

Forensic Accounting
Business Valuation
Litigation Support
Mergers & Acquisitions
Management Consulting
Human Resources Consulting
Succession Planning
Audit & Assurance Services
Tax Planning, Preparation & Compliance
Information Technology Consulting

Horty & Horty, P.A.
Hamilton Merger & Acquisition Services, Inc.

Horty Consulting, LLC
Hamilton Information Systems, Inc.

29 Hill Road
Wilmington, DE 19806
(302) 652-4194
Fax (302) 656-9846

www.horty.com
horty@horty.com
1-888-968-7168

34 The Green
Dover, DE 19901
(302) 730-4560
Fax (302) 730-4562

YOUR PROTECTION IS OUR PROFESSION

Wilmington, Delaware
302.658.8000

London, England
171.962.2003

BUSINESS

Disability

LIFE/

Professional Liability

Health

Malpractice

PERSONAL

unusual Risks

We know all about protecting the things you value. Since 1940 Zutz has specialized in creating innovative insurance solutions for professionals. We are well known for covering unusual risks faced by firms of all sizes and descriptions.

Zutz professionals tailor complete insurance coverages to meet very specific needs, including comprehensive life and health coverage for you and your employees and personal insurance for your home and valuables.

Over the years, we have earned the endorsement of many professional organizations, including state bar associations, medical and dental societies. For quality insurance protection, contact Zutz, *the last word in insurance.*

www.zutz-pli.com

PLI
Professional Liability Insurance, Inc.

Sponsored administrators for professional liability insurance by the Delaware State Bar Association since 1979. Lawyers who value quality value Zutz.

ZUTZ
INSURANCE