

# CIVIL RIGHTS INSIDER

Federal Bar Association Civil Rights Law Section's Newsletter

Spring 2017

## From the Desk of the Chairperson

“The Ultimate Measure of a person is not where they stand in moments of comfort and convenience, but where they stand at times of challenge and controversy.” Martin Luther King.

Civil Rights lawyers from around the country joined the FBA Civil Rights Section in New Orleans on April 7 for the First annual Civil Rights Etouffee CLE. With the incredible help of the FBA New Orleans Chapter, President Kelly Scalise and Executive Director, CC Kahr, the event was destined for greatness, and greatness was delivered.

The excitement shared by the Etouffee organizing team of Stephen Haedicke (New Orleans), Darpana Sheth (Washington, DC), Theresa Powell (Springfield, IL) and your intrepid Section Chair (me!) from New York City had spread throughout our membership, from local NOLA law students, counsel from Southern Poverty Law

Center, Southeastern Louisiana Legal Services, ACLU and private practice attorneys from New York, Massachusetts, Texas, Illinois, California, Pennsylvania, Colorado, Idaho and more. In mid-March, two weeks before, the inaugural Etouffee, the CLE was sold out!

The day went off without (almost any) hitch. From the first panel on Immigration led by Jeffrey Feinbloom, exploring civil rights issues in light of the recent executive orders; to the full day of break out sessions, each panel was well-attended, thought-provoking and timely. The Hon. Kenneth Polite, making his first public speech following the end of his term as U.S. Attorney for the Eastern District of Louisiana, delivering a powerful talk on issues ranging from successful prosecutions he had brought while US Attorney to a review and response to the

*Chair continued on page 3*

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## In this Issue:

RECAP: FBA Civil Rights Law Section in New Orleans on April 7, 2017 for the Civil Rights Etouffee CLE .....	2
Disparate Impact Claims: Recent Case History and Application for Fair Housing Claims .....	4
Immigration & Civil Rights: An Exploration of Issues .....	5
“Religious Freedom” vs. LGBT Equality: Legislative Attempts to Empower Anti-LGBT Discrimination .....	6
After <i>Kingsley v. Hendrickson</i> —What’s Next for Pretrial Detainee Civil Rights Claims? .....	7
An Examination of the Use of Federal Prohibitions on Medical Marijuana and Interstate Traveling with Medicinal Marijuana .....	8
Charters, Cybers and Special Education: Old Wine in New (and Leaky) Bottles .....	9
From Training to the Streets: What are the Standards for Street Protest and First Amendment Policing? .....	10

## RECAP: FBA Civil Rights Law Section in New Orleans on April 7, 2017 for the Civil Rights Etouffee CLE

Civil Rights lawyers from around the country stood with the FBA Civil Rights Section in New Orleans on April 7, 2017 for the Civil Rights Etouffee CLE. With supportive help of the FBA New Orleans Chapter, President Kelly Scalise and Executive Director CC Kahr, the event was destined for greatness, and greatness was achieved.

The excitement of the Etouffee team of Stephen Haedicke (New Orleans), Darpana Sheth (DC), Theresa Powell (Illinois) and FBA Civil Rights Section Chair Wylie Stecklow (NYC) had spread to local NOLA law students, public interest counsel from Southern Poverty Law Center, Southeast Louisiana Legal Services, ACLU and private attorneys from New York, Massachusetts, Texas, Illinois, California, Pennsylvania, Colorado, Idaho and more. Two weeks before, the inaugural Etouffee, the CLE was sold out!

From the morning plenary Immigration panel led by Jeffrey Feinbloom, exploring civil rights issues and executive orders; to the break-out sessions, each panel was well attended, topically current and thought provoking. Attendees were treated to a true Nola lunch catered by Café Reconcile of blackened catfish, jambalaya, vegetarian red beans and shrimp etouffee.

The Hon. Kenneth Polite, making his first public speech following the end of his term as U.S. Attorney for the Eastern District of Louisiana, delivering a powerful talk on issues ranging from successful prosecutions he had brought to a review and response to the recent Department of Justice commentary that consent decrees involving police departments were based on anecdotal evidence.

“That opinion is false, misleading & misinformed ... Let me

tell you an anecdote about the Danziger Bridge and a conspiracy coverup of epic proportions.” A detailed story about murderous abuse of power in a post Hurricane Katrina New Orleans followed. While Mr. Polite began his key-note repeating, “I’m not running for Mayor, I’m not running for Mayor, I’m not running for Mayor,” I, for one, cannot wait for the day that our incredible key-note speaker does seek public office.

The afternoon plenary session of Impact Litigation and Social Justice Advocates, moderated by the Honorable Judge Ivan Lemelle, joined by Stanley Young (Covington & Burling), Elissa Johnson (Southern Poverty Law Center), & Professor Tracie Washington (Dillard University). Among other topics, this panel explained the impact litigation which led to the inglorious fall of infamous Arizona Sheriff Joe Arapo. The four afternoon break out panels, including one with education attorney specialist Caryl Oberman, and another organized by David Thompson on behalf of the nascent LGBT Law Section of the FBA concerning recent litigation seeking to overturn Religious Freedom laws (which seek to legalize LGBT discrimination).

The Etouffee’s success is undeniable. Handwritten reviews received from participants included commentary, “Best CLE I’ve ever attended” to “All speakers and topics were timely and well-informed” to “it is so hard to find civil rights CLE’s, more of this please.”

Planning soon begins for the next Etouffee, and its CLE team is in formation. If you are not an active FBA Civil Rights Section member, but want to step up, please let us know. Our goal is to continue the Etouffee as the go to Civil Rights CLE each year. ■



Panel 6B; "Religious Freedom" vs. LGBT Equality: Legislative Attempts to Empower Anti-LGBT Discrimination. David Thompson, Stecklow & Thompson; Robert McDuff, McDuff & Byrd; Alysson Mills, Fishman Haygood; J. Dalton Courson, Stone Pigman Walther Wittmann. Photo Credit: Dwight Marshall



Social justice advocacy panel: (Left to right) Afternoon Plenary Panel, Impact Litigation and Social Justice Advocates: Elissa Johnson, Southern Poverty Law Center; Stanley Young, Covington & Burling, Professor Tracie Washington, Dillard University, Hon. Ivan L. R. Lemelle, III, USDJ EDLa, Wylie Stecklow, FBA Civil Rights National Chair. Photo Credit: Dwight Marshall

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“That opinion is false, misleading & misinformed ... Let me tell you an anecdote about the Danziger Bridge and a conspiracy coverup of epic proportions.” A detailed story about murderous abuse of power after Hurricane Katrina that nobody present at the Etouffee will soon forget. While Mr. Polite began his keynote by repeating, “I’m not running for Mayor, I’m not running for Mayor, I’m not running for Mayor,” I, for one, cannot wait for the day that our incredible key-note speaker does seek public office.

The afternoon sessions began with the plenary session of Impact Litigation and Social Justice Advocates, moderated by the Honorable Judge Ivan Lemelle, joined by Stanley Young of Covington & Burling, Elissa Johnson of the Southern Poverty Law Center, & Professor Tracie Washington of Dillard University. Among other topics, this panel connected the dots on how impact litigation brought by Covington & Burling led to inglorious fall of infamous Arizona Sheriff Joe Arapo. The four afternoon break out panels, including one with education attorney specialist Caryl Oberman, and another organized by David Thompson on behalf of the nascent LGBT Law

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The current concern about civil rights survival in today’s America is further evidence that is the time for all good counsel to join the FBA Civil Rights Section and help us expand our network of attorneys. Planning soon begins for the next Etouffee, and its CLE team is in formation. If you are not an active FBA Civil Rights Section member, but want to step up, please let us know. Our goal is to continue the Etouffee as the go to Civil Rights CLE each year.

It is legacy time for our section, and the future of the Etouffee is bright.

Laissez L’Etouffee Rouler!  
*Wylie*

# Disparate Impact Claims: Recent Case History and Application for Fair Housing Claims

by Joy F. Willig, Jones Walker, LLP, New York City

This panel of housing professionals discussed three different types of housing discrimination: discrimination in the development of affordable housing, discrimination against victims of domestic violence and discrimination faced by the formerly incarcerated. The disparate impact on a protected class of individuals forms the basis of adjudicating each of these types of discrimination.

Addressing disparate impact in the development of affordable housing, Antoinette “Toni” Jordan, Jones Walker LLP, presented *Texas Department of Housing and Community Affairs Et. Al., v Inclusive Communities Project, Inc.*, 576 U.S. \_\_\_, 135 S. Ct. 2507 (2015). Plaintiffs alleged that federal Low Income Housing Tax Credits (“Tax Credits”) were allocated by the state for too many projects sited in predominately black inner-city neighborhoods and too few in predominately white suburban neighborhoods. It was alleged that this caused continued segregated housing, violating the Fair Housing Act (“FHA”). The Court found that disparate impact claims under the FHA were cognizable and remanded the case to allow the state to establish whether the claim was linked to a defendant’s non-discriminatory policy causing the disparity. Public officials and developers must be given an opportunity to establish that there were valid policy, non-race based considerations for the allocation of Tax Credits which may have a statistically disparate impact on minority communities. Developers and policy makers must not only be mindful of preventing the concentration of poverty, but must consider the need for decent affordable housing in these communities. While it may be discriminatory to encourage development of low income housing in segregated minority neighborhoods, those neighborhoods are also in the greatest need of affordable housing options. Additionally, the costs of development are lower in these neighborhoods, thus, subsidies would have a broader impact in being able to develop the maximum number of housing units. Practitioners should be vigilant of state plans and decisions that may exacerbate segregation without also clearly considering the needs of the communities in which they are sited and the practical alternatives which may lessen segregation.

Cashauna Hill, Executive Director of the Greater New Orleans Fair Housing Action Center (GNOFHAC) focused on discrimination against victims of domestic violence. Such discrimination is a significant cause of homelessness among families. Because it disproportionately affects women, it was found to be cognizable as a disparate impact case under the FHA. Domestic violence victims are often subject to rental agreements which allow landlords to evict the family if an incident of violence

is reported. Thus, these victims are placed in the untenable position of either not reporting violence to the police, or of doing so and losing their homes. In 2001, advocates in Oregon sued on behalf of an evicted victim in the US District Court of Oregon under FHA. That case established that landlords who evicted victims of domestic violence were perpetrating discrimination against women. Following the Oregon case, GNOFHAC represented a victim of the domestic abuse who was evicted from her home. After successful settlement for their client, the case became the basis for The Louisiana Violence Against Women Act of 2015, which bans housing discrimination against, and provides protections for, survivors of domestic violence.

Laura Tuggle, Executive Director, Southeast Louisiana Legal Services, educated our audience about housing discrimination faced by the formerly incarcerated. Over 680,000 prisoners are released nationally each year; over 95% of those incarcerated are eventually released. African American males return to the community with criminal records in vastly disproportionate numbers relative to white males. Federal law requires Public Housing Authorities to screen applicants for admission to housing voucher programs and for entry into public housing. Screening criteria that prevent persons with criminal records from these programs significantly impact the options of African American men which is particularly acute in Louisiana, as Louisiana is the most incarcerated jurisdiction in the world. HUD regulations prohibit individuals convicted of several specific serious crimes from residing in public housing or participating in the voucher programs. Beyond these enumerated situations, however, Public Housing Authorities craft their own admission policies. Entirely barring persons with criminal records from public housing resources exacerbates the homelessness problem among these men, and prevents unification of families and re-integration of these people into their communities. With Ms. Tuggle’s initiative, HANO worked with advocates, housing developers and managers, and government officials to craft a policy with specific criteria to allow formerly incarcerated individuals who were determined not to pose a threat to the community to be able to avail themselves of public housing resources and rejoin their families who were living there.

We trust that attendees left with a different perspective on types of housing discrimination, with new tools to think about how to address these issues in their practices and with inspiration from these dedicated professionals. ■

# Immigration & Civil Rights: An Exploration of Issues

by Jeffrey Feinbloom, Feinbloom Bertisch LLP, New York City

The Civil Rights *Etouffee* in New Orleans on April 7 featured a dynamic opening panel on Immigration Law, moderated by Jeffrey A. Feinbloom of New York City. The topic was the Department of Homeland Security's broad power to enforce immigration law and the civil rights consequences of the agency's enforcement agenda. The distinguished panelists included Kathleen Gasparian of New Orleans, Professor Hiroko Kusuda of Loyola University New Orleans College of Law, and Laura Olson, Chief of the Immigration Law Section of the Department of Homeland Security's Office of Civil Rights and Civil Liberties (CRCL).

The panel featured lively discussion and exchanges among the panelists, moderator and audience members. Discussion centered around the dramatic shift in the agency's approach to immigration enforcement – specifically, the policies introduced by the new administration and Donald Trump's Executive Orders on immigration, particularly the January 25<sup>th</sup> EO on Interior Enforcement and Secretary Kelly's implementing memoranda.

Following opening remarks from Mr. Feinbloom, Professor Kusuda provided an overview of the DHS's power to enforce immigration law. She discussed the bureaus responsible, including Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE) and Citizenship and Immigration Services (CIS), and the jurisdiction of each. She then explained the broad nature as well as the statutory and regulatory bases of the agency's authority to stop, detain, interrogate and remove non-citizens from the United States. The authority to issue civil detainees – a formal request to local law enforcement to hold an individual who may be deportable beyond his or her date of release from criminal custody – and the authority to remove certain classes of aliens from the United States without a hearing were among the topics discussed.

The discussion next centered around the concept of prosecutorial discretion and the importance this doctrine plays in the enforcement of immigration law. Professor Kusuda provided a brief historical overview of prosecutorial discretion in the immigration context, which included the approach developed by the Bush and Obama administrations and President Obama's Priority Enforcement Program (PEP). She noted how PEP focused the agency's limited resources on serious criminals and threats to national security and how Donald Trump eliminated this program

during his first week in office in favor of a much broader, less circumstance-specific approach.

Ms. Gasparian then discussed the new Executive Orders and implementing memoranda. She focused on the EO which has garnered far less media attention than the so-called travel bans, but has by far the most far reaching civil rights implications for immigrants and their US citizen families, to wit: the January 25<sup>th</sup> EO on Interior Enforcement. Ms. Gasparian delved into a section-by-section analysis of the EO, exploring such key issues and concepts as the agency's new policy to “[e]nsure the faithful execution of the immigration laws ... against all removable aliens;” priorities for enforcement (i.e. all removable aliens); expansion of civil detainees; expansion of the “287(g)” program; command to withhold funding from so-called “sanctuary jurisdictions;” and reintroduction of the failed Secure Communities program, among others. Ms. Gasparian also discussed Secretary Kelly's implementing memorandum on border security, which provides for increased detention of arriving aliens (and profits for private prisons); hiring of more border agents; expansion of 287(g) in border areas; border wall construction & financing; expansion of expedited removal; “enhancement” of the asylum referral and credible fear processes; resource allocation; “proper” (i.e. substantially more limited) use of parole authority; processing of unaccompanied minors; prioritizing criminal prosecution of border offenses; and increased public reporting. Various civil rights remedies were also explored, including motions to suppress in removal proceedings, habeas corpus, and affirmative remedies such as mandamus, claims under 42 USC 1983, the *Bivens* doctrine, and claims under the FTCA.

Ms. Olson then delivered a presentation regarding CRCL. She discussed her office's mission, programs and policies and the role of the Immigration Section. She addressed how immigrants and their advocates can utilize CRCL as well as the civil rights complaints process.

The session concluded with an open Q&A, which contributed to the dynamic nature of the program. The panel was lively and engaged and delivered on its promise to contribute to the legal education of those in attendance regarding an extremely timely topic in the area of civil rights law. ■

# “Religious Freedom” vs. LGBT Equality: Legislative Attempts to Empower Anti-LGBT Discrimination

by David Thompson, Stecklow & Thompson, New York City

A panel at the Civil Rights *Étouffée* in New Orleans on April 7, 2017 provided insiders’ insights on litigation relating to an anti-LGBT “religious freedom” law, Mississippi’s HB 1523, placing it in the context of the larger struggle for LGBT rights, with panelists J. Dalton Courson of Stone Pigman (NOLA); Robert McDuff of McDuff & Byrd (Jackson, MS); Alysson Leigh Mills, Fishman Haygood, (NOLA), with moderator David Thompson of Stecklow & Thompson (NYC).

Until the turn of the millennium, opposition to LGBT equality was almost uniformly successful in resisting the LGBT community’s attempts to win legal protections against discrimination. During this time, anti-LGBT forces employed three main arguments against LGBT equality. First, they characterized LGBT equality as creating a danger to society, especially children. For example, Anita Bryant’s 1977 “Save Our Children” campaign successfully argued that LGBT people are predators, inducing voters to repeal an anti-discrimination law. The campaign to prevent LGBT people from marrying was characterized as a campaign to “save marriage” from destruction by LGBT people. Second, any request by LGBT people for equal treatment was framed by opponents as being, in fact, a demand for “special rights.” “Gay marriage” was said to be fundamentally different from “regular” marriage. Allowing LGBT marriage would create a new kind of marriage, unfairly granting a “special right” to the LGBT minority. Third, anti-LGBT forces argued for majority rule, saying that since LGBT claims to equality were historically new, LGBT rights were not fundamental rights, and could be withheld by vote.

However, beginning around the time of the 1969 Stonewall riot, LGBT people increasingly came out of the closet and lived their lives in public and without shame. By doing so, LGBT people slowly convinced the majority of Americans that LGBT lives are basically the same as hetero/cis lives, and LGBT rights are basically the same as hetero/cis rights. None of the previously-successful anti-LGBT arguments works when the majority no longer sees LGBT people as an alien “other.”

Trailing the change in public opinion, major court victories followed, beginning in 2003 with *Lawrence v. Texas*, in which the Supreme Court held that LGBT sexual relationships could not be criminalized. In *Obergefell v. Hodges* (2015), the Supreme Court held that marriage is a fundamental right which must be extended to LGBT people.

Anti-LGBT forces are now seeking ways to perpetuate anti-LGBT discrimination without relying on the old, no-longer-effective arguments. One method is to shift the focus from the dangerous otherness of LGBT people to the purported “rights” of those seeking to discriminate.

A law passed in Mississippi in 2016, HB 1523, is an example of this strategy. It identifies three anti-LGBT religious doctrines,

and the State grants these anti-LGBT beliefs special protection. The three protected beliefs are:

1. “Marriage is or should be recognized as the union of one man and one woman,”
2. “Sexual relations are properly reserved to such a marriage,” and
3. “Male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”

HB 1523 forbids the state from taking any action against a person or entity acting in accordance with one of these anti-LGBT beliefs. Among other things, HB 1523 allows discrimination in: employment and housing; foster care and adoption; and **any** services involving children, including assisting abused or neglected children. State employees who deny services to LGBT people cannot be fired or disciplined.

Mississippi already grants broad protection to religious believers with the Mississippi Religious Freedom Restoration Act (“RFRA”). Passed in 2014, the RFRA already requires strict scrutiny of any action taken by the state which “substantially burdens” religious exercise. HB 1523, on the other hand, does more: it forbids “any action taken by the state government” (regardless of the asserted government interest) if it conflicts with a person or entity’s assertion of a protected anti-LGBT belief. HB 1523 also creates a cause of action to sue for injunctive relief, damages, and attorneys’ fees. It creates a legal defense that can be raised even in suits among private parties. The Mississippi RFRA – at least in theory – provides the same protection to Wiccans and Baptists, while HB 1523 only protects holders of the three identified protected beliefs.

When HB 1523 was passed in April 2016, several lawsuits were filed to enjoin it from taking effect. Two such suits, *Barber v. Bryant*, 3:16-cv-00417 (S.D. Miss.) and *Campaign for Southern Equality v. Bryant*, 3:16-cv-00442 (S.D. Miss.), obtained a preliminary injunction preventing the law from taking effect. The Fifth Circuit heard oral argument on the state’s appeal of that injunction in April 2017.

HB 1523 presents an obvious establishment clause problem: the state declares the three religious doctrines to be worthy of special protection, simultaneously expressing the state’s disdain for contrary religious beliefs. The law presents two distinct equal protection clause problems. It denies LGBT people equal protection by promoting and privileging anti-LGBT discrimination. It discriminates among religious believers, by protecting some but not others. Plaintiffs in the two successful cases include both LGBT people and religious practitioners.

*Freedom continued on page 6*

# After *Kingsley v. Hendrickson*—What’s Next for Pretrial Detainee Civil Rights Claims?

by Stephen Haedicke, Law Office of Stephen Haedicke, New Orleans

Are pretrial detainees granted greater civil rights protection than convicted prisoners? Should they be? What are the implications—and limitations—of the Supreme Court’s decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which clarified the standard for pretrial detainees proving excessive force claims? These questions and more were explored during a recent panel discussion at the FBA Civil Rights Section’s first annual *Civil Rights Etouffee CLE* in New Orleans on April 7, 2017.

The discussion started with a brief overview of the history leading up to the *Kingsley* decision. In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Supreme Court held that the rights of pretrial detainees are protected under the Fourteenth Amendment’s due process clause, as opposed to the Eighth Amendment’s cruel-and-unusual punishment clause. But the Court apparently declined to elaborate on exactly how the standards under the two clauses differed, noting that pretrial detainees enjoyed “at least those constitutional rights that are enjoyed by convicted prisoners . . .”. That phrase, it turns out, would ultimately lead the circuit courts to differ as they tried to determine the proper standard by which to judge pretrial detainee civil rights claims.

Next came *Farmer v. Brennan*, 511 U.S. 825 (1994), a case involving a convicted prisoner who alleged a failure to protect from harm by other prisoners. The Supreme Court held that a convicted prisoner had to prove “subjective deliberate indifference” in order to prevail on such a claim. Subjective deliberate indifference requires that an individual defendant both be aware of facts from which an inference could be drawn that a serious risk of harm exists, and they also must in fact draw that inference but then disregard it. This standard contrasts with the objective deliberate indifference standard described in *City of Canton v. Harris*, 489 U.S. 378 (1989), which requires only that an official knew or should have known that an action would create a risk of harm to an individual.

In the wake of *Farmer*, most (if not all) Circuit Courts of Appeal

decided that civil-rights claims by both pretrial detainees and convicted prisoners should be decided under the same standard, that is, *Farmer*’s subjective deliberate indifference standard. The Fifth Circuit’s decision in *Hare v. City of Corinth*, 74 F.3d 633 (1996), was a leading case setting forth the analysis for this position.

Then came *Kingsley*. Seemingly brushing aside the nearly forty year history of debate over the proper standard of review for pretrial detainee civil rights claims, the Supreme Court relied on *Bell v. Wolfish* to hold that a detainee may prevail on a § 1983 excessive force claim if he or she shows that the force used was objectively unreasonable, regardless of whether the officer had a subjective intent to cause the detainee harm. According to the Court, that had been the standard for detainee claims all along, and it was plain to see from the decision in *Bell* (even if few had actually seen it).

Now the debate has begun over how broadly to interpret *Kingsley*, which addressed only excessive force claims explicitly. Both the Ninth and the Second Circuits have interpreted *Kingsley* to apply to all § 1983 claims brought by pretrial detainees, not just those founded on allegations of excessive force. *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016); *Darnell v. Pineiro*, 849 F.3d 17 (2017). No circuit has taken a contrary position, but of course the issue is percolating in courts across the country and the possibility of a circuit split is very real.

After this review of the law, the panel members debated the pros and cons of an expansive reading of *Kingsley*, with some arguing that a lower standard for detainee suits would actually worsen detainee conditions by discouraging people from working in jails. Others rejected that position, questioning why the law should shield the wrongful actions of defendants who are engaged with legally innocent individuals (ie. pretrial detainees). But there was at least one point of agreement— *Kingsley* will almost certainly not be the last word from the Supreme Court in this volatile area of civil rights law. ■

# An Examination of the Use of Federal Prohibitions on Medical Marijuana and Interstate Traveling with Medicinal Marijuana

by Bonnie Kift, Law Office of Bonnie Kift, Ligonier, PA; WDPA Chapter FBA President, 2014-2016

This *Etouffee* CLE panel on medicinal marijuana addressed the use of marijuana, both recreational and medicinal, among the many states and their apparent conflict with federal law, particularly as it promises to be more greatly challenged by the new administration. Attendance overflowed our conference table as additional people brought in extra chairs or leaned against the wall. The hour was both productive and provocative.

Presenter Attorney Jerry S. Goldman, of New York City, New York, is licensed in New York and Pennsylvania and practices in, among other fields, complex litigation, general business law, white collar criminal defense and intellectual property. He educated his audience primarily regarding the business of growing and dispensing marijuana as he talked about various acceptable forms of medicinal cannabis, inclusive of the industry's efforts to change them to be compliant with both state and eventual federal law as well as the legal significance of THC. Mr. Goldman shared with us the Cole Memorandum which he advised currently affords some protection from federal prosecution particularly where a state's regulatory scheme is in accordance with earlier established federal public policy goals, noting that dispensaries compliant with the public policies of federal government are less likely to be controlled by it, particularly where they are not dispensing for nonmedical child use or to the black market. Mr. Goldberg stressed that the more complex the regulation, the better. He cautioned however that United States Attorney General Sessions has attitudes not in alignment with previous enforcement limitations but offered also that not only the states, but also the federal government, make great revenues from marijuana at this point in time. He also addressed federal taxation and noted that even where criminal activity is involved, its proceeds are taxable. Notably, Goldberg had served as a former prosecutor in Brooklyn, New York.

Presenter Attorney Sean T. McAllister, of Denver, Colorado, who is licensed in both Colorado and California, is one lawyer of the very few so licensed. Between 2000 and 2003, he served as an Assistant Attorney General to the state of Colorado. In Colorado, he founded "Sensible Colorado," an organization that ultimately achieved the legalization of recreational marijuana in Colorado in

2012. He has worked on marijuana law reform for the past 20 years. Mr. McAllister discussed the major marijuana cases in which he has participated either on behalf of the industry or for the individual. He acknowledged that the use of marijuana should be a civil right capable of enforcement through 42 U.S.C. §1983. While he noted being well aware of the potential conflicts with federal law, he also noted that he has handled cases before the federal courts regarding marijuana use within states legalizing its use without any great disruption. McAllister noted too that there are other legal issues arising in, among others, public housing and the medicinal use of marijuana, the ADA, domestic relations and particularly child custody issues, and public zoning.

Today, a growing number of 29 states have legitimized the use of medicinal marijuana and/or the use of adult recreational marijuana. For an extensive period of time, the federal government, though having laws to the contrary, was not enforcing them, recognizing that marijuana was at least medicinally acceptable in some states and that others also legitimized recreational marijuana for adult use. However, under the Trump administration, it appears that federal enforcement of federal criminal laws may be undertaken with more seriousness, particularly since Attorney General Sessions has announced that though he will comply with Mr. Trump's wishes whatever they may prove to be, he does believe that greater enforcement is necessary to prevent harm to the individual.

Earlier the Department of Justice had observed a difference between the medicinal and recreational uses of marijuana and had directed all federal law enforcement agencies to observe priorities established for criminalizing its use, inclusive of protection for the ill minor. Although Attorney General Sessions has recently publicly voiced that he sees marijuana as a "gateway drug" and intends to pursue the prosecution of marijuana possession or use, House Bills currently on the table do attempt to continue the earlier paths taken, to de-schedule marijuana from the Controlled Substances List and/or to otherwise limit federal prosecution, particularly where they are favorably countenanced by state law. Reportedly, greater than 50 percent of the voting public looks more favorably upon marijuana use. ■

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*Freedom continued from page 4*

The district court held that HB 1523 indeed violates both the Establishment Clause and the Equal Protection Clause. The Fifth Circuit focused its attention on plaintiff standing, suggesting that it may rule that some of these issues are not ripe for decision until the statute is implemented.

President Trump is contemplating an executive order that mirrors HB 1523, and a parallel bill has been introduced in Congress. The future of LGBT equality may be determined by the outcome of the HB 1523 litigations. ■

# Charters, Cybers and Special Education: Old Wine in New (and Leaky) Bottles

by Ken Gelburd, Esq., Elkins Park, PA

Section member Ken Gelburd moderated the panel “Charters, Cybers and Special Education: Old Wine in New (and Leaky) Bottles.” The presentations addressed the efforts of parents to enforce the rights of special needs students to receive a free, appropriate public education (“FAPE”). These rights were established under the decades-old federal Individuals with Disabilities Education Act (IDEA). Over time, however, these rights have been made more elusive by exemption of religiously-affiliated schools, by the proliferation of quasi-public charter schools, and by voucher systems.

Under IDEA, receipt of federal funding subjects state education agencies (SEAs) and local education agencies (LEAs) to obligations which they are not always equipped and/or inclined to fulfill; nor are they always knowledgeable about these obligations. Cyber charters, for example, can have brick-and mortar obligations to specific students. Furthermore, even the most well-meaning and well-equipped charter schools, which in most states function as LEAs, can be financially and administratively volatile and close down without warning to those they must serve.

Section member Caryl Oberman, eastern Pennsylvania’s leading private attorney for special-needs students and a practitioner in the field for over forty years, opened the discussion with a history of disability rights in the education law context. IDEA’s core principles include education of disabled students to the maximum extent appropriate with their non-disabled peers, full access to education, individualized evaluation and prescriptive program development, full parental participation, prior written notice, and parents’ opportunity to challenge educational decisions. Statutory and case law have evolved to make various rights more available in theory: access to education in the 1970s, curriculum availability in the 1980s, inclusion in the 1990s, and since then transition to post-schooling life, state and local accountability, and procedural due process. Remedies to vindicate those rights include pendency of an existing placement challenged by the LEA, compensatory education, and reimbursement for private-school tuition costs incurred as a result of LEA failure to provide appropriate resources. Attorneys representing parents must be familiar with all these items, as well as their interplay with rights and remedies under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973.

The next speaker was Eden Heilman, Managing Director of the Louisiana office of the Southern Poverty Law Center, addressing the potential impact of Louisiana charter schools’ LEA status on delivery of special education services. Ms. Heilman was counsel in SPLC’s now-settled class action lawsuit under the IDEA, ADA and Section 504 against Louisiana’s Department of Education and Board of Elementary and Secondary Education on behalf of current and future New Orleans students with disabilities. That action was grounded in the systemic failure to address special-education needs by the post-Katrina Special Recovery District (SRD). The SRD essentially comprises charter schools and vestigial public schools, neither of which were providing mandated services, and both of which evidenced serious discrimination against disabled students. The suit was concluded in a 2015 Consent Judgment which establishes an administrative framework to provide identification of, services for, and due process respecting services and student discipline.

The final presenter was Jaimme’ Collins, an experienced advocate for school districts and charter schools. She is a partner at the New Orleans office of the firm Adams and Reese, to which our Section is obliged for the use of its facilities. Ms. Collins explained that Louisiana education law is atypical (no surprise to those familiar with civil law generally), and analyzed the SEA-LEA relationship, which in New Orleans is unusual even for Louisiana. She further noted that school charters can be revoked or nonrenewed on very short notice, resulting in more school responsiveness to complaints, and then explained how the system functions in provision of education to disabled students.

The panelists concluded by agreeing on two separate points. First, the Supreme Court was correct in its March 2017 decision in *Endrew F. v. Douglas County School District*, adopting the minority Circuit view that the education mandated by IDEA must be “meaningful” and not merely “more than de minimis.” Second, it is crucial to bear in mind that parents of disabled students will typically have to work with school officials and LEAs over extended periods of time, and cooperation wherever possible pays off better than an adversarial relationship for all concerned. ■

# From Training to the Streets: What are the Standards for Street Protest and First Amendment Policing?

by Wylie Stecklow, Stecklow & Thompson, New York City

From Occupy Wall Street to Black Lives Matter to Anti-Trump protest, cities and towns in America have seen an increase in street protest over the past decade, with a mainstream increase since January 20 of almost daily street protests in frequency and volume of participants never before seen in our history. At the Etouffee, this panel featured attorneys from both sides of the aisle discussing how criminal laws apply when First Amendment activity is in play, how municipalities can train their police forces to properly apply such standards and how protestors and police can work better to ensure expressive speech activities are given the proper constitutional safeguards. We were honored to have Magistrate Judge Richard Bourgeois from the Middle District of Louisiana as the moderator for this topical and thought provoking panel. Panelists at the event were Tara Johnston from Baton Rouge, Louisiana, who represents the Baton Rouge Sheriff's department, and Wylie Stecklow, current chair of the FBA Civil rights section who has represented Occupy Wall Street, The Yes Men, Reverend Billy among other movement activists involved in street protest in New York City, and around the country. Eileen Rosen, past chair of the FBA Civil Rights Section and counsel for the Chicago Police Department, participated in the preparation of the panel, but unfortunately was unable to make it to New Orleans.

The panel began by setting forth that "the First Amendment protects symbolic conduct as well as pure speech," *Virginia v. Black*, 538 U.S. 343 (2003), and by example pointed to the use of tents and tent images in Occupy Wall Street. Litigation arising from Occupy Wall Street consistently held that tents were held to be protected as first amendment speech. *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320 (M.D. Fla 2011) (Tents can be expressive speech activity); *Watters v. Otter*, 955 F. Supp. 2d 1178 (D. Idaho 2013) (Occupy Boise's tent city is a political protest of income inequality, it is expressive conduct protected by the First Amendment); *Freeman v. Morris*, 2011 U.S. Dist. LEXIS 141930 (D. Me. 2011) (The (Occupy Augusta) Plaintiffs will likely prevail on their claim that their tent city is expressive conduct.). The panelists also cited to cases that held, even in light of tents as expressive speech, that this right to occupy a tent anywhere, was not absolute, and that numerous cases ruled that local municipalities had the right to place time, place and manner restrictions on tents and occupations in its parks, sidewalk and town hall public spaces. *Dukore v. D.C.*, 799 F.3d 1137 (DC Cir. 2015).

Wylie Stecklow presented information about a failure to train NYPD on proper standards of constitutionally compliant sidewalk protest, that has led to a policy whereby the police violate the rights of protesters seeking to exercise sidewalk protest rights.

Citing to the consistent use of disorderly conduct subsection 5 by NYPD to break up sidewalk protest in New York, the penal law reads: A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly

creating a risk thereof: 5. **He obstructs vehicular or pedestrian traffic.** Identifying a single paragraph in the NYPD student guide, plus caselaw, by the Second Circuit, Stecklow showed that it is well-settled that constitutionally compliant policing must interpret the word obstruct in the statute softly, not strictly. Specifically within the confines of the City of New York, there will always be some sidewalk obstruction, with or without protest occurring. "New York courts have interpreted this statute to permit punishment only where the conduct at issue does more than merely inconvenience pedestrian or vehicular traffic." *Papineau v. Parmley*, 465 F.3d 46 (2d Cir. 2006).

Further, the Etouffee audience learned that via Rule 30(b) (6) deposition testimony, the City of New York has admitted, that (1) the police academy conducts all of the First Amendment training, and (2) the police academy does not instruct on anything more than the specific wording of the disorderly conduct statute (notwithstanding the singular paragraph in the NYPD Student guide that recognizes "**There is always some incidental blocking** of the street or sidewalk whenever one or more persons use public areas to communicate their views...**Incidental obstruction is not illegal** if it is less than a **serious annoyance** or only **mere inconveniencing** of pedestrians.")

Comparing this wording to similar statutes in Illinois, Louisiana and Texas, Stecklow identified 13 words in the Texas statute that should be included in the New York statute. Texas: Obstructing Highway or Other Passageway § 42.03 ((b) "For purposes of this section, **"obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous"**

Tara Johnston reviewed with the Etouffee attendees, the litigation and factual history behind *Vodak v. City of Chicago*, both its district opinion, 624 F.Supp.2d 933, (N.D. Ill 2009) and the 7<sup>th</sup> Circuit, 639 F.3d 738 (2011) holding written by Judge Richard Posner. A fluid discussion ensued with audience participation discussing the friction between allowing spontaneous marches to occur when Courts have consistently ruled that the constitution allows for permitting as a time, place and manner restriction. Local attorney, Stephen Haedicke, was able to share personal experience from attending this protest in Chicago in 2003 (that was planned for weeks before the march date, but the specific date was left open to coincide with the unknown starting date of the Iraq War).

Johnston also identified the caselaw surrounding the balance needed in regards to protest at women's reproductive clinics, *McCullenv. Coakley*, 134 S.Ct 2518(2014) as well as the difficulty in disallowing a heckler's veto as set out in *Bible Believers v. Wayne County*, 805 F.3d 228 (6<sup>th</sup> Cir. 2015).

The panel finished with a discussion of the difficulties that have arisen due to lack of trust between members of these communities and those policing these communities. ■