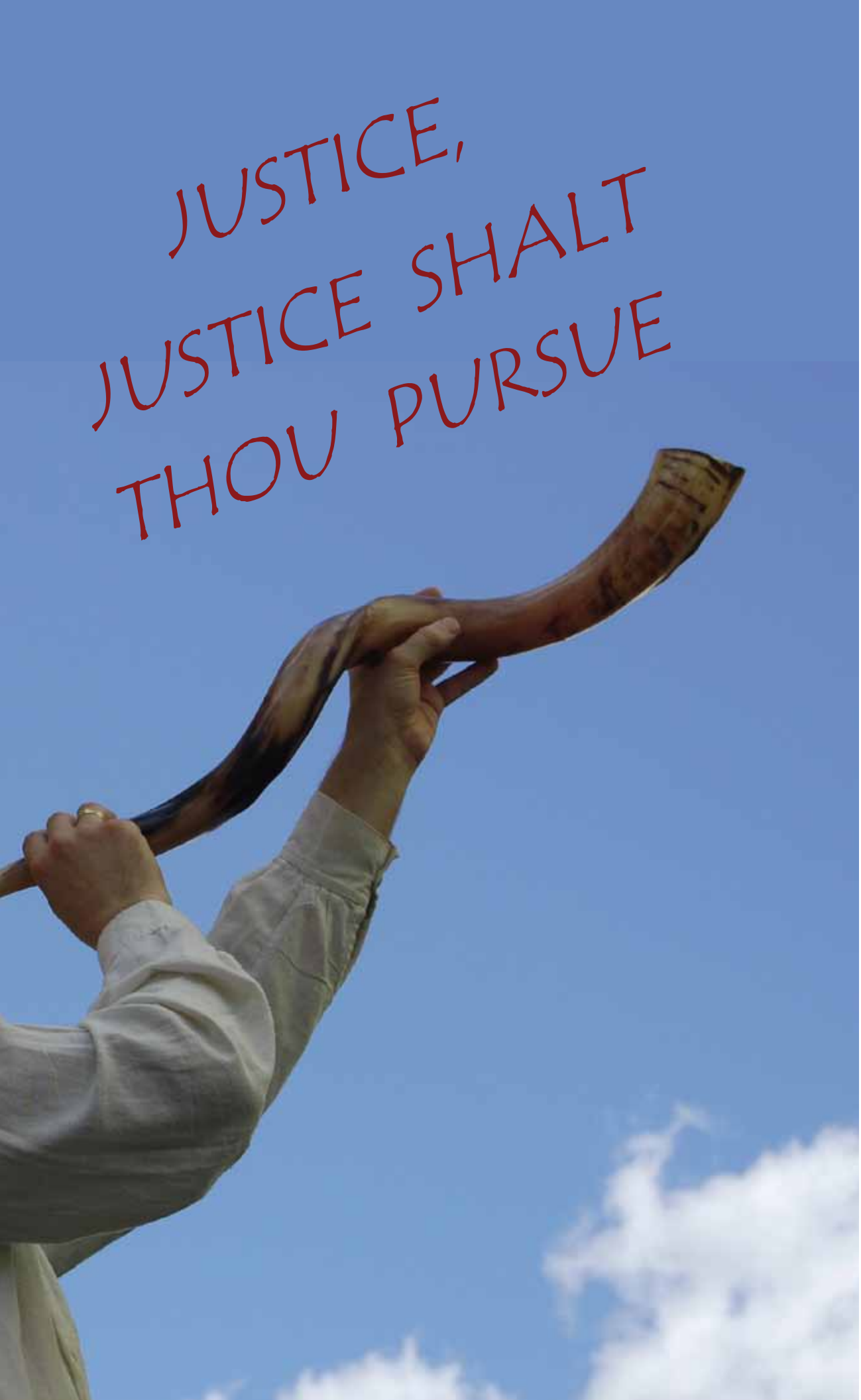


DECALOGUE TABLETS

The Decalogue Society of Lawyers

TABLETS
Fall 2015

President's Column

Excerpts from President Deidre Baumann's June 29th Installation Dinner Speech

There are thousands of attorneys of Jewish heritage in Illinois, yet only a fraction of them choose to join Decalogue Society of Lawyers or otherwise identify as "Jewish" attorneys. There are undoubtedly many reasons for this phenomenon, but it is worth mentioning a few comments I have heard from Jewish attorneys over the years. And, if you are not a member of Decalogue, I urge you to think about why.

First, as attorneys we are committed to the ideal of "blind justice." And although many of us know that, "blind justice" is often more of an ideal than a reality; to identify as a "Jewish" attorney conflicts with our fundamental values. After all, in a world for which we yearn, ethnic or religious identity would matter not one iota. Second, our government was constructed upon the separation of church and state, which suggests that our work as lawyers must be absolutely independent from our private religious beliefs or ethnic considerations. Third, given our past, there may be lingering some unconscious (or not) fear of discrimination. Unlike some other minority groups, "being Jewish" is not necessarily self evident. Why call attention to yourself if doing so might be harmful?

While each of these justifications is understandable, I suggest that our ultimate societal goals may be best achieved through the work of diverse bar associations, whether Jewish, Christian, Muslim, or what have you. We cannot eradicate discrimination against any group unless we understand, and acknowledge, that it still exists. We do ourselves no good as "Jewish lawyers" to pretend that there is no longer any need for a society of lawyers such as ours.

For example, during the past several years we have witnessed several instances of hateful conduct directed toward Jewish university students, attacks far surpassing any constitutionally protected speech. While this type of targeted discrimination should not be acceptable to anyone, if a Jewish bar association cannot attempt to address this issue, who should? One of our constitutional Purposes is "to maintain vigilance against public and private practices which are anti-social, discriminatory, anti-Semitic or oppressive and join with other groups and minorities to protect legal rights and privileges." How can this purpose be incongruous with the goals of every one of us? How can we not join with our brothers and sisters in the profession to combat the racism against African Americans across this country?

Thank you for giving me the opportunity this year to lead you towards a better society, a society where justice truly is "blind" and race, creed, color, and religion truly irrelevant.

Contents

From the Judge's Side of the Bench

Litigation with *Pro Se* Parties

By Judge Alison Conlon

A common challenge for new judges in civil cases is when a *pro se* party must litigate against a party who has a lawyer. Such cases are prevalent in high-volume courtrooms where newer judges tend to be assigned. For example, in my last courtroom where I heard bench trials of contract and property damage cases under $30,000, fully half of the trials involved a *pro se* party litigating against a lawyer.

In these busy courtrooms, new judges must "accord to every person who has a legal interest in a proceeding … the right to be heard according to law." Code of Judicial Conduct, Rule 63(A)(4). Judges also have permissive authority to "make reasonable efforts, consistent with law and court rules, to facilitate the ability of self-represented litigants to be fairly heard." *Id.* While judges must afford *pro se* parties meaningful access to the courts, they must also remain impartial, diligent and unbiased. *Id.* Rules 62(A) & 63((A)(1), (6) & (9). Tensions may arise among these objectives, requiring new judges to make decisions regularly – and rapidly – to best ensure that everyone receives a fair trial.

Recognizing the challenges faced by all parties, here are some best lawyer practices that seem to be effective:

Be clear. Use basic words, not legalese. Plain English is the best way to inform a *pro se* party of your position. Doing otherwise may invite suspicion and defensiveness. Also, avoid the verbal "shorthand" you may use when you have a lawyer-adversary, and aim instead for a more basic and thorough explanation.

Be patient. Judges should be "patient, dignified and courteous to litigants" and "should require similar conduct of lawyers." Code of Judicial Conduct, Rule 63(A)(4). In our context, patience generally means allowing a *pro se* litigant some extra time to fully express his or her position in negotiations and in court. Making people feel heard, especially early in the case, is paramount to helping them trust the process and move toward resolution.

Be respectful. To say that our courts can be unfamiliar, overwhelming and intimidating to *pro se* litigants is an understatement. As an antidote, the most effective lawyers I've seen bring a calmness and poise to their interactions with *pro se* litigants. It is a mistake to lose one's temper when negotiating with a non-lawyer opponent (and also a mistake to think the judge won't know as long as you do it in the hallway).

Be on time. Respecting others includes respecting their time. Judges and opposing counsel may understand that you are covering multiple courtrooms, but unrepresented parties lack this context and will likely be frustrated if they arrive on time and have to wait a long time for you.

Be an officer of the court. A lawyer is not only "a representative of clients," but also "an officer of the legal system and a public citizen having special responsibility for the quality of justice." Preamble, S.Ct. Rules of Professional Conduct, ¶ 1. The Supreme Court expects every lawyer to "further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." *Id.* ¶ 6. The lawyer, the judge, the deputy clerk and the deputy sheriff are all participating in what may be the only experience a *pro se* litigant has with our court system. We must all do so responsibly.

Judge Alison Conlon was appointed to the Circuit Court of Cook County in February 2015. She currently presides in the Civil Jury Section of the First Municipal District.

Tech Tips

Is Your Small Law Firm Keeping Your Passwords Safe?

By Chelsea Lambert

Your firm's lawyers have an obligation to your clients and your firm to keep sensitive information safe. Lawyers have access to a lot of confidential client information on their tech devices, so it's critical they keep computers, phones and tablets safe from hackers. To find out more information about how to keep your technology safe from viruses and data breaches, head on over to http://www.smokeball.com/safety-in-tech-how-to-protect-your-computer-from-a-data-breach/

Data breaches can happen when you use passwords that are incredibly simple or similar on all of your accounts. You're also at risk if your passwords are infrequently changed. Hackers and computer bugs can easily find ways into your accounts when you don't take extra measures to keep your passwords safe. Have your attorneys use these password tips to keep all their tech tools safe from prying eyes:

Use Different Passwords
Don't reuse the same password across programs, devices or accounts. When one account is compromised, a hacker may try accessing other accounts using the same credentials. Choosing a variety of passwords is a defense system. It will slow down hackers and help your firm to contain security breaches.

Case Law Update

Illinois Legislates Privacy Protections for Cell Site Location Information

By Adam J. Sheppard

Justice Roberts accurately quipped that cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 134 S. Ct. 2473, 2484 (2014). And because most smart phone users carry their phones everywhere – "with 12% admitting that they even use their phones in the shower" – if law enforcement officers can track the location of a cell phone, they can track its user. See Riley, 134 S.Ct. at 2490 (citing Harris Interactive, *2013 Mobile Consumer Habits Study* (June 2013)).

I. Cell Site Location Information
Cell site location information (CSLI) reveals the location of the cellular tower or cell site (a portion of the tower) that a cell phone "pings" off at any given time. Even if a cell phone is not making or receiving a call, it is almost constantly pinging off a cell tower. Knowing the location of the cell tower can reveal a phone's location within a relatively small geographic area. In densely populated areas where there are several smaller cell towers known as "base stations," officers may be able to pinpoint a phone's location to a floor or room within a building. *See In* re Application for Tel. Info. Needed for a Criminal Investigation, No. 15XR90304HRL1LHK, 2015 WL 4594558, at *2 (N.D. Cal. July 29, 2015)(citing expert testimony).

In Illinois, until recently, law enforcement officers did not need a search warrant to obtain CSLI. This was so because of the federal Stored Communication Act ("SCA"), enacted in 1986. Under Section 2703(c) of the SCA, a governmental entity may require a "provider of electronic communication service" to disclose cell site location information by obtaining a warrant, issued upon probable cause, *or* by obtaining a "court order" under 18 U.S.C. 2703(d). The latter merely requires the government to offer "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, *are relevant and material to an ongoing criminal investigation*." 18 U.S.C. §2703 (Emphasis added). Under this less exacting standard, government officers have obtained CSLI with relative ease.

II. The "Freedom from Location Surveillance Act"
In August 2014, Illinois passed the "Freedom from Location Surveillance Act," 725 ILCS 168/1 *et. seq.* Section 168/10 of the Act provides:

> "[A] law enforcement agency shall not obtain current or future location information pertaining to a person or his or her effects without first obtaining a court order based on probable cause to believe that the person whose location information is sought has committed, is committing, or is about to commit a crime or the effect [e.g., the cell phone] is evidence of a crime."

The statute also allows access to location information "if the location information is authorized under an arrest warrant." *Id.* The statute contains several exceptions to the court-order/probable cause requirement. *See* 725 ILCS 168/15. Most of the exceptions relate to "emergency circumstances." However, even in emergency circumstances, officers must apply "for an order approving the previous or continuing obtaining of location information . . . within 72 hours of its commencement." 725 ILCS 168/15.

The Act creates a presumption that information obtained in violation of the Act is inadmissible in any judicial or administrative proceeding. *See* 725 ILCS 168/20. The State may overcome that presumption by proving either a "judicially recognized exception to the exclusionary rule" or "by a preponderance of the evidence that the law enforcement officer was acting in good faith and reasonably believed that one or more of the exceptions identified in Section 15 existed at the time the location information was obtained." 725 ILCS 168/20. This latter provision will seemingly invite litigation; officers, in other fourth amendment contexts, routinely cite "good faith" beliefs that exigent circumstances justified bypassing the warrant requirement.

The Act also does not expressly apply to *historical* CSLI – i.e., CSLI that a service provider has already archived (e.g., CSLI for the last 60 days). The Act discusses "current or future location information." 725 ILCS 168/10. Illinois courts have not addressed whether an officer needs a court order pursuant to 725 ILCS 168/10 to obtain historical CSLI. Federal courts sitting in Illinois have held that officers do not need a warrant to obtain historical CSLI. See *United States v. Lang*, 2015 WL 327338, at *3 (N.D. Ill. Jan. 23, 2015). However, six states have legislated greater protection for historical CSLI. And at least one federal court recently required the government to apply for a warrant for historical CSLI. See *In re Application for Tel. Info. Needed for a Criminal Investigation*, 2015 WL 4594558, at *12.

III. Conclusion
Illinois's "Freedom from Location Surveillance Act" undoubtedly enhances privacy protections in the digital age. The Act could go further by expressly applying to historical location information. The Act also invites litigation by delineating a roadmap for officers seeking to bypass the warrant requirement. Accordingly, practitioners should carefully scrutinize applications for CSLI and, in particular, warrantless retrievals of CSLI.

About the Author: Adam J. Sheppard is a partner in Sheppard Law Firm, P.C. which concentrates in defense of criminal cases. Adam was recently the sole lecturer at the National Business Institute's national teleconference on digital searches and seizures. Adam serves on Decalogue's editorial board and the editorial board of the Chicago Bar Association Record magazine. Adam serves on the CJA federal defender panel. He has been published in various legal periodicals.

Jews in Sports

Little Known Facts about Current Jewish Athletes

By Justice Robert E. Gordon

In Professional Football

Ali Marpet, a 6'4", 310 lb. offensive lineman at Hobart, was selected in the second round (61st overall) of the 2015 NFL Draft by Tampa Bay. He was the highest-drafted Jewish football player since Gabe Carimi was chosen by the Chicago Bears in the first round (29th overall) in 2011. No other Jews were selected in the draft, but Mark Weisman, a 6'0", 236 lb. running back at Iowa from Buffalo Grove, was selected as a free agent by the Cincinnati Bengals; Ben Gottschalk, a 6'5", 295 lb. offensive lineman from SMU was signed by Tampa Bay; Jeff Covitz, a 6'2", 255 lb. defensive end at Bryant was invited to the Cleveland Browns camp as a tryout player; and Taylor Mays, who spent three seasons with Cincinnati as a safety, signed with the Detroit Lions.

In Professional Baseball

Joc Pederson, the slugging centerfielder of the Los Angeles Dodgers, is destined to become the Rookie of the Year if he continues hitting home runs at a record pace. He is blond, 6'5", blue-eyed, Jewish, and made the All-Star team.

On June 5, the Cincinnati Reds called up 24-year-old right handed pitcher Jon Moscot, who had a 7-1 record with a 3.15 ERA in 54.1 innings pitched at AAA, to fill the void of another Jewish pitcher Jason Marquis, who was released. On June 15, the Atlanta Braves brought up catcher Ryan Lavarnway.

The 2015 Major League Amateur Draft included 16 Jews (ten from four-year colleges, two from two-year colleges, and four out of high school), a marked increase over prior years. Alex Bregman, a shortstop at LSU, was chosen in the first round, second overall. Ron Blomberg was the only Jewish player in history to be drafted higher. He was drafted in the first round as #1.

Of the 16 players, Scott Effross, a right-handed pitcher at Indiana, was chosen by the Chicago Cubs in the 15th round; Jason Goldstein, a catcher at Illinois from Highland Park, was selected by the Los Angeles Dodgers in the 17th round; and Adam Walton, a shortstop at Illinois from Buffalo Grove, was selected by Baltimore in the 20th round. In addition, Alex Katz, a left-handed pitcher at St. John's, was selected by the Chicago White Sox in the 27th round. Most importantly, White Sox Owner Jerry Reinsdorf's grandson Joseph, a 2B at New Trier High School, was selected by the Chicago White Sox in the 40th and final round.

Tech Tips *(cont'd)*

(continued on page 6)

Change Passwords Regularly
As a rule of thumb, all passwords should be changed **every three months.** This way, if an old password has been compromised without your firm's knowledge, the new password restores a measure of security to the affected account(s).

Create Strong Passwords
Your attorneys should create passwords with a combination of upper and lower case letters, numbers and punctuation. When allowed, passphrases are also a good option. A passphrase can be a line from a song, for example, with numbers or punctuation marks used in place of some of the letters. Such phrases may be easier for your attorneys to remember than a string of random numbers, but, because of their length and origin, harder for hacking software to guess.

Use a Password Manager
If your attorneys follow smart password guidelines, they will have many different passwords to remember. Save the confusion of forgotten passwords by using a secure password manager to keep track of all your firm's login credentials. Password managers securely store all your login information, and many even generate strong passwords for you. Do some research to find the program that's right for your firm. You can start with the reviews found at LifeHacker
http://lifehacker.com/5529133/five-best-password-managers
and PCMagazine
http://www.pcmag.com/article2/0,2817,2407168,00.asp.

While it may seem inconvenient to change passwords often and to use complicated strings of numbers, letters and symbols, it is worth the investment of time and energy if taking these measures protects the integrity of your online accounts.

Chelsey Lambert is Vice President of Marketing and Communications at Smokeball

Best Practices

Criminal Law Practitioners Beware: That "Non-Conviction" of Supervision May Count as a Conviction for Federal Purposes

By Hon. James A. Shapiro (ret.)

I. Introduction
Illinois has a criminal sentence for most misdemeanors called "supervision." *See 730* ILCS 5/5-6-3.1(f). Supervision does not count as a conviction under Illinois law. *Id.* It is essentially a form of a deferred prosecution; if defendants successfully complete the terms of their supervision, they can typically expunge that case two years following the successful completion of supervision. However, under the Federal Sentencing Guidelines ("Guidelines"), Illinois' "supervision" generally counts as a "sentence." Supervision falls into a broader class of criminal sentences the Guidelines call "diversionary dispositions." *See* U.S.S.G. §4A1.2(f). The Guidelines' treatment of "supervision" as a conviction often has a profound effect on defendants who do not otherwise have extensive criminal histories. Guidelines count "[a] diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere as a sentence under §4A1.1(c) *even if a conviction is not formally entered*, except that diversion from juvenile court is not counted." (emphasis added). *Id.*

The Guidelines' treatment of "supervision" as a conviction often has a profound effect on defendants who do not otherwise have extensive criminal histories.

Under the Guidelines, "sentences" are assigned criminal history points. For example, a diversionary sentence, such as court supervision, generally receives one criminal history point. *See* §4A1.2(f). The Guidelines assign a defendant a criminal history category from I-VI based on the total number of the defendant's criminal history points. Under the Guidelines, an increase in the defendant's criminal history category (e.g., criminal history category VI) leads to an increase in the defendant's sentence.

In 2005, the Supreme Court held that the Federal Sentencing Guidelines are now only advisory, not mandatory, yet they remain an integral part of the sentencing process. Federal judges determine a sentence by first calculating a defendant's advisory Guideline range; the judge then determines whether there are any factors which warrant a variance from that Guideline range. Accordingly, defendants with a higher Guideline range are still more likely to receive lengthier sentences.

II. Practical Effect
The Guidelines' treatment of "supervision" as a conviction often has a profound effect on defendants who do not otherwise have extensive criminal histories. For example, in *United States v. Lluvias*, 168 Fed.Appx.732 (7th Cir. 2006), the defendant received a sentence of supervision under Illinois law for drunk driving. However, that non-conviction under Illinois law counted as one criminal history point under the Guidelines. The Guidelines' inclusion of the defendant's supervision raised his number of criminal history points from one to two, which in turn raised his criminal history category from I to II. The increase in the defendant's criminal history category automatically disqualified him from the benefit of the so-called "safety valve" (18 U.S.C. §3553(f)), a provision which would have allowed the defendant to get out from under a statutory mandatory minimum sentence. Thus, the seemingly harmless disposition of "supervision" that the defendant received in the DUI case substantially affected him in his subsequent federal case. *See also e.g., United States v. Arroyo,* 219 Fed. Appx.516, 519 (7th Cir. 2007) (two supervisions for driving uninsured vehicle counted as two criminal history points under the Guidelines).

III. Advice to Practitioners
State criminal practitioners should try to stipulate to the facts of an offense rather than pleading their clients guilty to it. This is so because an order of supervision which is based on a stipulation to facts, as opposed to a guilty plea, is not a countable conviction under the Guidelines. *See* U.S.S.G. § 4A1.2(f); *see also United States v. Kozinski*, 16 F.3d 795, 812 (7th Cir. 1994). Additionally, practitioners should inform judges that they need not enter a finding of guilty as a prerequisite to ordering supervision. See 730 ILCS 5/5-6-1(c)("The court may, upon a plea of guilty or a stipulation by the defendant of the facts supporting the charge or a finding of guilt, defer further proceedings and the imposition of a sentence, and enter an order for supervision of the defendant . . .").

Practitioners should also probably warn their clients that even though supervision does not count as a conviction under Illinois law, it may count as the equivalent of a conviction under federal and other states' laws.

Is It Finally Time to Declare Solitary Confinement as a Form of "Cruel And Unusual Punishment"?

By Alan Mills

125 years ago, the United States Supreme Court, in a case considering a writ of habeas corpus filed by petitioner Medley, found that "A considerable number of the prisoners fell, after even a short [solitary] confinement, into a semi-fatuous condition from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community." *In re Medley,* 134 U. S. 160, 168 (1890). Yet the Supreme Court did not then nor has it ever answered the question of whether solitary confinement is permissible under the Eighth Amendment. That avoidance may be about to end as we consider and evaluate similar characterizations described in a recent U.S. Supreme Court case.

In an otherwise fairly predictable death penalty decision (*Davis v. Ayala*, 574 U.S. ___ (2015), the four conservative judges, joined by Justice Kennedy, made it extremely difficult for any defendant to succeed on claims that prosecutors use preemptory challenges to exclude Blacks and Latinos from juries. Justice Kennedy often serves as the swing vote between the conservative quartet of Chief Justice Roberts, and Justices Alito, Thomas and Scalia and the more liberal quartet of Justices Sotomayor, Ginsburg, Breyer and Kagan. While Justice Kennedy agreed with the majority opinion in all respects, he took the extremely unusual step of filing a concurring opinion to address an issue which everyone agreed was not before the Court—solitary confinement. Taking as his starting point an off-hand comment by counsel for the defendant that Mr. Ayala had spent most of the last 25 years in "administrative segregation," Justice Kennedy spent five pages laying out the case against long term solitary confinement.

Justice Kennedy estimated that "25,000 inmates in the United States are currently serving their sentence in whole or substantial part solitary confinement, many regardless of their conduct in prison." In Illinois, on any given day there are about 8,000 prisoners who are locked in their cells 22-24 hours a day without meaningful social contact. Approximately 2,500 are in segregation because of alleged misconduct. As for the remainder of those prisoners, they have done nothing to warrant being held in isolation—other than having the bad luck to be locked up in a state where prisons are so severely overcrowded, underfunded and understaffed that there is literally nothing for them to do but sit in their cells all day.

Justice Kennedy noted that lawyers, judges and scholars all too often ignore what happens to criminal defendants after they are found guilty. Their conditions of confinement are out of sight, and thus out of mind.

Justice Kennedy concluded his concurrence by stating:

> In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.

Such a weighty observation about the penal system may portend a change in thinking—not only within the judicial system but across the country--about the impact of both solitary and long-term confinement.

In the courts, several cases have been filed challenging the practice of solitary confinement. Initially, those cases focused on prisons dedicated to solitary confinement (typically, high-tech "supermax" prisons). For example, here in Illinois, in June, 2010, Judge Murphy of the US District Court for the Southern District of Illinois issued a 100 page opinion detailing the harm done to people's mental health by long-term solitary confinement (*Westefer v. Snyder*, in which the plaintiff class was represented by DLA Piper and Uptown People's Law Center). Similar cases were brought by the Prison Law Office in California (*Madrid v. Gomez)* and the ACLU in Wisconsin (*Jones-El v. Berge*).

More recently, advocates have begun to challenge more traditional forms of solitary. In July of 2015, the UPLC filed a putative class action case challenging Illinois' use of solitary. The allegations include a lack of due process, a claim that people are sent to solitary for minor offenses in violation of the proportionality requirement of the Eighth Amendment, and a claim that the conditions in Illinois' solitary units are so awful that, standing alone, they violate the Eighth Amendment's prohibition against cruel and unusual punishment. *Coleman v. Taylor.* A similar class action case is pending in New York State (*Peoples v. Fischer*—partial settlement entered in February, 2014), and in California (*Ashker v. Brown*—where the plaintiff class was certified in June, 2014).

Issues relating to solitary confinement are also reaching the general public. In July, 2011, and then again in October, 2011 and the summer of 2013, thousands of prisoners throughout California held a mass statewide hunger strike to protest solitary. [This example of the not uncommon practice in prisons and its harmful impact on those confined was the subject of another article by this author that appeared in the Spring 2014 issue of the Tablets.] Here in Chicago, from May through June, Architects/Designers/Planners for Social Responsibility and the Uptown People's Law Center sponsored an art exhibit on solitary confinement featuring scores of pictures drawn by prisoners in solitary and a life size mock cell. An earlier version of the exhibit was held at UC Berkeley from October through November of 2014. Demonstrations and other actions are now being held regularly in cities across the country on the 23rd day of each month—in recognition of the 23 hours a day prisoners in solitary spend locked in their cells.

(continued on page 10)

Supreme Court: U.S. Citizens Born in Jerusalem Can't List "Israel" as Birthplace on Passports

by Joshua S. Kreitzer

The Supreme Court ruled this year that only the executive branch – not Congress – has the authority to determine whether U.S. citizens born in Jerusalem may list "Israel" as their birthplace on their passports. *Zivotofsky v. Kerry,* No. 13-628 (U.S. June 8, 2015).

A U.S. citizen's passport must indicate the person's birthplace, designated on a form approved by the State Department. For persons born in the United States, the birthplace is given as the state followed by "U.S.A." (example: "Illinois, U.S.A."). Dept. of State, 7 Foreign Affairs Manual (FAM) § 1320(a). For persons born abroad, the birthplace is normally stated as the country which is *now* recognized by the United States as holding sovereignty over the place where the person was born. 7 FAM § 1330. So, for example, U.S. citizens who were born in what was then the U.S.S.R., Yugoslavia, or Czechoslovakia will not have that country name listed as their birthplace on their passport, but will have the successor country listed there instead.

If a U.S. citizen objects to having the foreign country holding sovereignty over their birthplace listed on their passport, the citizen has the option of having the city or town of birth listed there instead. 7 FAM § 1380. (For example, a U.S. citizen born in Belfast, but who believes that Northern Ireland should not be part of the United Kingdom, may request "Belfast" to be designated as the birthplace instead of "United Kingdom.") Such a designation may be problematic in some cases, because a foreign consulate may deny a visa to a passport holder whose birthplace is listed with a city or town instead of a country, or border officials may deny entry based on such a designation.

For U.S. citizens born within Israel's internationally recognized boundaries, the usual rule applies and their passports will list "Israel" as their birthplace. But if they were born anywhere within the current municipal boundaries of Jerusalem (west or east), the State Department requires them to list their birthplace as "Jerusalem" instead. (Persons born in the West Bank or Gaza Strip will have "West Bank" or "Gaza Strip" listed as their birthplace; persons born in the Golan Heights will have "Syria" listed as their birthplace.) 7 FAM § 1360.

In response to this situation, Congress included in the Foreign Relations Authorization Act a provision (Section 214(d)) which states: "For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary of State shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002). Although President George W. Bush signed the Act into law, he issued a signing statement stating that this section "impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. … U.S. policy regarding Jerusalem has not changed."

Menachem Zivotofsky was born in Jerusalem in 2002 to parents who are U.S. citizens. His parents sought to have an American passport and a consular report of birth abroad issued for him which would state that he was born in "Jerusalem, Israel." The American Embassy in Israel informed them that those documents would have to list his birthplace as "Jerusalem" only. Consequently, the Zivotofskys filed a lawsuit on their son's behalf, seeking to have his birthplace listed on his passport and consular report of birth as "Israel" pursuant to Section 214(d).

The Zivotofskys made little headway in the lower courts. At first, the district court ruled that the case posed a non-justiciable political question and that Menachem Zivotofsky lacked standing to bring the case because he had suffered no injury. The United States Court of Appeals for the District of Columbia Circuit found that the plaintiff did in fact have standing, *Zivotofsky v. Secretary of State*, 444 F.3d 614 (D.C. Cir. 2006), but nevertheless agreed that the case posed a political question that the courts could not resolve: "[T]he judiciary has no authority to order the Executive Branch to change the nation's foreign policy in this matter …." *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (2009).

The Supreme Court took a different perspective. "The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise." *Zivotofsky v. Clinton,* 132 S. Ct. 1421, 1427 (2012). Hence, the case was remanded to determine whether Section 214(d) was constitutional.

On remand, the Court of Appeals found that Section 214(d) impermissibly infringed upon the President's power to recognize foreign nations and their governments, which it stated was vested exclusively in the executive branch. *Zivotofsky v. Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013). Then, on June 8, 2015, the Supreme Court rendered its decision holding Section 214(d) unconstitutional.

(continued on page 10)

Jerusalem Passport *(cont'd)*

Justice Kennedy, writing for the majority, stated that the section infringed upon the President's exclusive recognition power. The recognition power is not explicitly stated in the Constitution, but is implied based on the Reception Clause of Article II, Section 3, which directs that the President "shall receive Ambassadors and other public Ministers." According to scholars of international law at the time the Constitution was written, receiving an ambassador was tantamount to recognizing the sovereignty of the sending state, as evidenced by the fact that George Washington recognized the French Revolutionary Government by receiving its ambassador. Recognition of a government may also occur on the conclusion of a bilateral treaty or the formal initiation of diplomatic relations, both of which require presidential action. While the President's power with regard to foreign relations is not unbounded, the Court stated that "[r]ecognition is an act with immediate and powerful significance for international relations, so the President's position must be clear. Congress cannot require him to contradict his own statement regarding a determination of formal recognition." The recognition power encompasses not only the power to recognize the legitimacy of other states and governments, but also their territorial bounds.

According to the Court, requiring the Secretary of State to identify "Israel" on a passport as the birthplace of a person born in Jerusalem would be "a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State. From the face of § 214, from the legislative history, and from its reception, it is clear that Congress wanted to express its displeasure with the President's policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do."

Besides Justice Kennedy, author of the majority opinion, Justices Breyer, Ginsburg, Kagan, and Sotomayor concurred in the majority. Justice Breyer wrote separately to say he still believed the case presented a political question inappropriate for judicial resolution.

Justice Thomas concurred with the majority that Section 214(d) was improper as applied to passports, given that the President has residual foreign affairs authority to regulate passports and because there appeared to be no congressional power that justifies Section 214(d)'s application to passports. He nevertheless disagreed with the majority's analysis, stating that the recognition power was not implicated by this case; a foreign state can gain or lose territory without having its recognition as a sovereign state altered. In addition, Justice Thomas dissented with regard to the consular report of birth abroad, saying that such a document was within Congress's power to establish a "uniform Rule of Naturalization" as contemplated by Article I, Section 8 of the Constitution. The consular report of birth, he said, is used not to communicate with foreign governments as a passport is, but to establish who is eligible for citizenship by birth without need for naturalization, and thus Congress could regulate the document.

Chief Justice Roberts (joined by Justice Alito) dissented, expressing doubt that the recognition power was solely vested in the President with Congress being given no influence. Furthermore, he stated that "the statute at issue *does not implicate recognition*. … [T]he annals of diplomatic history record no examples of official recognition accomplished via optional passport designation." (emphasis in original).

Justice Scalia (joined by Chief Justice Roberts and Justice Alito) also dissented, stating that "[e]ven if the Constitution gives the President sole power to extend recognition, it does not give him sole power to make all decisions relating to foreign disputes over sovereignty. To the contrary, a fair reading of Article I allows Congress to decide for itself how its laws should handle these controversies." Justice Scalia further stated that the framers of the Constitution "did not entrust either the President or Congress with sole power to adopt uncontradictable policies about any subject—foreign-sovereignty disputes included. They instead gave each political department its own powers, and with that the freedom to contradict the other's policies."

Although the *Zivotofsky* decision on its face affects only U.S. citizens born in Jerusalem, the majority opinion places great emphasis on the idea that the recognition power is vested solely in the President, with no room for Congressional involvement. Such a decision may have significant repercussions in the future for foreign policy issues affecting not only Israel and its neighbors, but the rest of the world.

Joshua S. Kreitzer is a senior associate attorney with The Law Offices of Marc J. Lane and a board member of the Decalogue Society of Lawyers.

Solitary Confinement *(cont'd)*

Senator Richard Durbin of Illinois has used his position as Chair of the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Human Rights to hold two hearings on solitary confinement, the first in June, 2012, and the second in February, 2014. Most recently, President Obama questioned the use of solitary in an address on criminal justice before the NAACP on July 14, 2015. The President stated, in a context that may invite a continuing dialogue and possible action:

> Social science shows that an environment like that is often more likely to make inmates more alienated, more hostile, potentially more violent. Do we really think it makes sense to lock so many people alone in tiny cells for 23 hours a day for months, sometime for years at a time? That is not going to make us safer. It's not going to make us stronger.

Alan Mills is the Legal Director of Uptown Peoples' Law Center

Obergefell v. Hodges: Let Same-Sex Couples Eat Cake (Even if Baked by Those with Religious Objections)

By Gail Schnitzer Eisenberg

Wedding bells began chiming across the country when the United States Supreme Court struck down the remaining 14 state same-sex marriage bans on June 26, 2015.[1] See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015). Almost immediately, commentators began raising alarm bells about the implications of the decision on religious liberty.[2] For the most part, their fears, though certainly valid, are unfounded. *Obergefell* does not mean that Orthodox Rabbis will be forced to perform same-sex marriage ceremonies, but religious businesses may not be able to discriminate based on the sexual orientation of their customers.

Marriage in this country is both a religious and a civil institution (and not always occurring at the same time). 135 S. Ct. at 2638 (Thomas, J., dissenting); *see also* 135 S. Ct. 2584 at 2594 (recognizing that the significance partners glean from their marriage may be religious or secular). The *Obergefell* "decision might change the former, but it cannot change the latter." *Id.* The Supreme Court held that the exclusion of same-sex couples from *civil* marriage on the basis of their gender alone violated the individual's fundamental right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 135 S. Ct. at 2604-05. The Court did not intend to "disparage" the "[m]any who deem same-sex marriage to be wrong . . . based on decent and honorable religious or philosophical premises." *Id.* at 2602. The Court was concerned only with the *legal* treatment of opposite-sex couples. *Id.* Religious conscience remains intact:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Id. at 2607.

This admittedly minimal treatment of religious conviction did not alleviate the concerns of the dissenting Justices. Chief Justice Roberts, for example, asserted that the decision "creates serious questions about religious liberty." 135 S. Ct. at 2625. Justice Scalia suggested that the majority of Americans would find their religious views overruled by the decision. 135 S. Ct. at 2627 ("It is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.") Justice Thomas wrote that "the majority's decision threatens the religious liberty our Nation has long sought to protect." 135 S. Ct. at 2638.

Chief Justice Roberts was concerned that the majority never mentions the right of religious objectors to "exercise" their religious beliefs, suggesting that religious objectors would be limited to advocating or teaching their opposition to same-sex marriage. 135 S. Ct. at 2625. Justice Thomas echoed those concerns, noting that "[r]eligious liberty is about freedom of action in matters of religion generally." *Id.* at 2638. As an example of the threat the *Obergfell* decision could pose to religious liberty, Justice Thomas pointed to a Virginia law that "imposed criminal penalties on ministers who performed marriage in violation [of antimiscegenation laws] though their religions would have permitted them to perform such ceremonies." *Id.*n.7.

But as the Chief Justice notes, the freedom to exercise religion is "spelled out in the Constitution." *Id.* In fact, it is in the very same Amendment providing that "Congress shall make no law respecting an establishment of religion." Const. Am. I. These two clauses have always required balance. Thus, the government will not be able to require religious groups or individuals to solemnize a same-sex marriage.[3]

Following up on Justice Thomas's example, a more appropriate historical comparison would be to analyze whether officiates opposed to interracial marriage based on their religious convictions were forced to perform such marriages.[4] This author could find no examples of this. The closest was Bob Jones University, a Christian fundamentalist university which "lost its tax exemption in 1983 after a 13-year battle with the Internal Revenue Service, which said the school's [ban on interracial dating was] discriminatory."[5] The school did not, however, lift its ban until 2000, more than thirty years after *Loving v. Virginia,* 388 U.S. 1(1967), held state bans on interracial marriage unconstitutional.

Just because the government cannot discriminate on a particular basis does not mean that a religion can't. The government cannot require a *get* before a Jewish woman remarries, yet a Rabbi can. The government cannot restrict a married couple's access to birth control, *Griswold v. Connecticut,* 381 U.S. 479 (1965), while a Catholic priest may condemn its use by those he marries. The government cannot restrict marriage to only Christians or Muslims or Hindus, but an officiate may refuse to perform intermarriages.

This means that business owners may find that their religious beliefs are in conflict with the secular law.[6] "It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples." *Obergefell,* 135 S. Ct. at 2638 (Thomas, J., dissenting).

(continued on page 14)

Obergefell v. Hodges *(cont'd)*

> Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage.

Id. at 2625 (Roberts, dissenting).

Chief Justice Roberts' concerns are yanked from the headlines. A same-sex couple sued an online adoption service after their application was denied based on the owners' religious beliefs. *See Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022* (N.D. Cal. 2007). The New Jersey Department of Environmental Protection revoked a portion of a religiously-affiliated camping association's tax benefits when it refused a lesbian couple's application to use its public facilities for their civil union.[7] A New York court forced Yeshiva University to allow a same-sex couple to rent married student housing on the same basis as opposite-sex couples under New York City's Human Rights Law. *See Levin v. Yeshiva Univ.,* 96 N.Y.2d 484, 754 N.E.2d 1099 (2001). But note that Yeshiva University[8] was *not* required to bless the students' relationship, nor was the camping association required to provide a minister for the civil union. The court merely held that a private housing provider could not discriminate against same-sex couples.

Whether an organization will be compelled to cater to same-sex couples will come down to whether it is acting as a business or a religious institution. In contrast to the Yeshiva University in *Levin*, an appellate court in California held that a Lutheran high school was not liable under civil rights laws for their expulsion of a lesbian couple. The court emphasized that the overall purpose of the school was religious education in specific values and moral principles such that it was not a "business establishment" subject to the act. *Doe v. California Lutheran High Sch. Ass'n,* 170 Cal. App. 4th 828, 839 (2009). The adoption website at issue in *Butler,* however, was a public business despite its owners' subjective desire to "publish" their opinion that "children should be adopted by heterosexual couples only." 486 F. Supp. 2d at 1056.

Accordingly, those involved in the marriage industry whose religious conscience dictates that marriage is between a man and a woman will be required to be available for same-sex marriages to the same extent they are available for opposite sex marriages. The New Mexico courts, for example, concluded that a husband and wife photographer team impermissibly discriminated against a lesbian couple when they refused to photograph their commitment ceremony in 2007 based on their sincere religious belief that marriage was a union between a man and a woman.[9] *Cert denied, Elane Photography, LLC v. Willock,* No. 13-585 (U.S. Apr. 7, 2014).

A similar result will occur where an organization originally founded for expressly religious purposes opens itself up as a public accommodation. The Ocean Grove Camp Meeting Association of the Methodist Church, for instance, was founded "for the purpose of creating a permanent Christian camp meeting community on the New Jersey shore." *Ocean Grove Camp Meeting Ass'n of United Methodist Church v. Vespa-Papaleo*, 339 F. App'x 232, 235 (3d Cir. 2009). But when its seaside pavilion was not being used for worship, bible study, or gospel concerts, it was open to the public. *Id.* Accordingly, the New Jersey Division on Civil Rights concluded that the Association unlawfully discriminated against a lesbian couple who sought to use the Association's pavilion for their civil union.[10]

An employee whose religious beliefs dictate opposition to same-sex marriage may be required to participate in marriage-related activities unless the employer can accommodate their religious beliefs without undue hardship. Thus, the Vermont Supreme Court held in 2001 that a clerk could refuse to perform a civil marriage "because there were other civil servants who would."[11] And the Supreme Court of California held that a physician could not deny a patient *in vitro* fertilization treatment because she was in a lesbian relationship even if the physician objected on religious grounds to the lesbian raising a child. *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 44 Cal. 4th 1145, 1156, 189 P.3d 959, 967 (2008). This area of personal resistance may see much future litigation given that a number of state officials issued statements that state or local workers need not grant marriage licenses to same-sex couples in violation of their religious beliefs. [12]

Those persons working in the secular wedding or healthcare industries who believe their facilitating of a same-sex marriage conflicts with their deeply held religious beliefs might be well-advised to get out of the business. Alternatively, private business owners should utilize their other First Amendment rights to make their views clearly known—although such publicity may steer same-sex patrons and their ever-growing supporters away from those businesses, thereby elevating the conflict and diminishing profits.

Individuals may maintain their religious belief and cannot be forced to personally participate in the religious aspects of same-sex marriages. If they choose to participate in the public sphere, however, "equal dignity in the eyes of the law" demands that they not discriminate against same-sex couples. 135 S. Ct. at 2608.

Gail Schnitzer Eisenberg is a litigation associate at Dentons US LLP where she focuses on class action defense, complex commercial litigation, and appeals. She is a member of the Decalogue Society Board of Managers and the chairperson of the Legislative Committee.

Footnotes to Obergefeell v. Hodges

[1] Before *Obergefell,* Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas banned same-sex marriage.

[2] *See, e.g.,* Mollie Hemingway, *Dissenting Obergefell Justices Sound Alarm On Religious Freedom*, THE FEDERALIST (June 29, 2015), http://thefederalist.com/2015/06/29/dissenting-obergefell-justices-sound-alarm-on-religious-freedom/

[3] The public is another story. The majority of Americans now support same-sex marriage, with the percentage amongst millennials at 70%. *Changing Attitudes on Gay Marriage, Pew Research Center* (July 29, 2015), http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage/. Certainly those numbers are lower among the religious. *See* Barna Group, *The Shocking Proportion of Americans Who Believe That 'Religious Institutions or Clergy' Should Be Forced to Perform Gay Weddings*, THE BLAZE, http://www.theblaze.com/stories/2015/07/01/the-shocking-proportion-of-americans-who-believe-that-religious-institutions-or-clergy-should-be-forced-to-perform-gay-weddings/. Interestingly "26 percent of Americans under the age of 40 believe that churches and clergy should be forced to preside over gay nuptials." *Id.* That is still quite a minority.

[4] Peggy Pascoe, *Why the Rhetoric Against Gay Marriage is Familiar to this Historian of Miscegenation,* HISTORY NEWS NETWORK (April 19, 2004), http://historynewsnetwork.org/article/4708 (noting that one of the arguments in favor of the expansion of antimiscegenation laws during the Reconstruction was that "interracial marriage was contrary to God's will").

[5] Jim Davenport, University *Surprised by Lifting of Ban*, THE WASHINGTON POST, March 5, 2000, A09, available at http://www.washingtonpost.com/wp-srv/WPcap/2000-03/05/096r-030500-idx.html.

[6] For various examples of this conflict see Barbara Bradley Hagerty, *Gay Rights, Religious Liberties: A Three-Act Story*, NPR, June 16, 2008, http://www.npr/templates/story/story.php?stordi=91486340.

[7] *Id.*

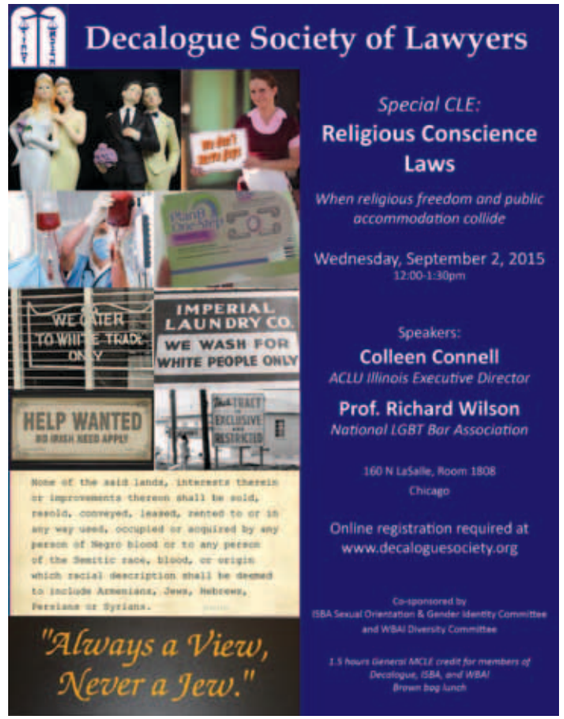
[8] You do not need to be Jewish to attend Yeshiva University. Notable non-Jewish alumni include Gov. Howard Dean and restaurateur Eddie Huang. *Yeshiva U.*, WIKIPEDIA, (last accessed Aug. 7, 2015), https://en.wikipedia.org/wiki/Yeshiva_University#Student_groups_and_organizations; Baohaus Menu, (last accessed Aug. 7, 2015), http://www.baohausnyc.com/menu/.

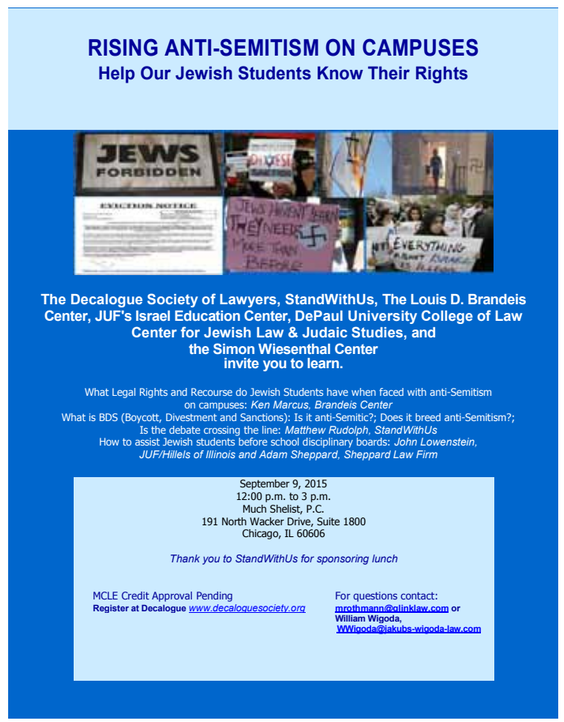
[9] Richard Wolf, *Supreme Court won't hear case on gay wedding snub*, USA TODAY (Apr. 7, 20014), *available at* http://www.usatoday.com/story/news/nation/2014/04/07/supreme-court-gay-lesbian-marriage-photographer/7304157/.

[10] See Hagerty, *supra* note 5.

[11] *Id.*

[12] *See* Krishnadev Calamur, *In Some States, Defiance Over Supreme Court's Same Sex Marriage Ruling*, NPR (June 29, 2015), http://www.npr.org/sections/thetwo-way/2015/06/29/418600672/in-some-states-defiance-over-supreme-courts-same-sex-marriage-ruling; Daniel Anderson, et. al., *Local Government Responses to Obergefell v. Hodges,* BALLOTPEDIA (last updated July 24, 2015), http://ballotpedia.org/Local_government_responses_to_Obergefell_v._Hodges.





Illinois State and City Pension Litigation

By Clint Krislov
(Note: The author has acted as counsel in cases involving the issues discussed below.)

Brewing over the past thirty years, the parallel "Pension Crises" facing both the State of Illinois and the City of Chicago have spawned two sets of parallel litigation as well. At issue in both is the extent and nature of the protections afforded to government employees under the Pension Protection Clause of the 1970 Illinois Constitution (Article XIII, Section 5):

Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.

The State and City Retirement Funds have been underfunded for decades. Past efforts to remedy the problem were ultimately futile, except when the funds were on the brink of insolvency. *People ex rel Sklodowski v State*, 162 Ill. 2d 117 (1994). More than two decades later, with continued failures to adequately fund the pensions, both the State and City are still looking for ways to substantially reduce their financial obligations to retirees. These efforts have led to the litigation covered in this article.

The Healthcare Cases. In one set of cases, the State and City each has sought to reduce the cost of retiree healthcare benefits. The State has sought to do so by reducing the subsidies for retirees. The City has tried to do so by winding down and ending the program entirely. In these cases, the issue is whether the Pension Protection Clause protects whatever "benefits" to which a participant is entitled, or just the nominal amount of the person's accrued retirement annuity.

The City's healthcare case actually dates back to 1987 when, subjected to liability for misusing tax levies belonging to the pension funds, the City retaliated by seeking (in *City of Chicago v. Korshak*) a declaration that it was not obligated to continue funding retiree healthcare coverage. The case went to trial in the summer of 1988 but was settled between the pension funds and the City, over retirees' objections, effective through 1997. The retirees then revived their objections, and resolved them in 2003 by a settlement extending through June 30, 2013, with the right granted to each party to refile the case thereafter, which right the retirees exercised later in 2013. The City removed the case to federal court, where then Chief Judge Holderman dismissed it, opining that the Illinois Supreme Court would rule the Pension Protection Clause protected only "pensions," not health benefits. The participants' appeal to the Seventh Circuit was stayed pending the Illinois Supreme Court's ruling on that issue in a case dealing with State retirees' healthcare.

Kanerva v. Weems. On July 3, 2014, the Illinois Supreme Court, in a 6-1 decision, held that the Pension Protection Clause protects all benefits to which participants are entitled and should be construed liberally in favor of the participants. *Kanerva v. Weems,* 2014 IL 115811, id. at ¶¶ 54-55. This Opinion reversed the Sangamon Country Circuit Court's ruling that State retirees were not protected against reductions in their healthcare subsidies.

That outcome resolved the issue for the State retirees' healthcare benefits. It is no surprise that the City retirees claimed K*anerva* dictated the same outcome for themselves. But the City proposed even more reasons for rejecting the City retirees' claim to healthcare benefits. Viewing it as a purely Illinois state law issue, the Seventh Circuit vacated Chief Judge Holderman's dismissal of the *Korshak* case and remanded it to the Circuit Court of Cook County, where it is currently pending as a class action under the title of *Underwood v. City of Chicago*.

The Pension Reform Cases. On the other issue track, the Illinois legislature in 2011 enacted P.A. 98-599 (for State retirement benefits) and P.A. 98-641 (for City retirement benefits). Both laws identically defer and slice the "Automatic Annuity Increases" otherwise built into participants' annuities. For the State retirees challenging such restrictive laws, five cases were consolidated in Sangamon County, where Circuit Judge John W. Belz declared Public Act 98-599 unconstitutional as applied to persons who were participants on January 1, 2011.

On May 8, 2015, in the case of *In re Pension Reform Litigation,* 2015 IL 118585, the Illinois Supreme Court rendered a unanimous decision, in an opinion by Justice Karmeier, declaring the statutory reduction in benefits a violation of the Constitution. The Court rejected the State's argument that it may use its police powers, when necessary, to unilaterally alter its own contract obligations, noting that economic conditions like those underlying the dispute are not unique but cyclical and expected.

The Court next set out the fundamental philosophy of Constitutional democracy, in which the people, not the government, are the sovereign and create their government, with such powers as the people, by their Constitution, grant to the government. *Id.* at ¶ 82. The Court also found the legislature's repeated efforts to reduce retirement annuity benefits extended beyod its Article VIII authority and then underscored society's need to keep the legislature within its bounds. The Court concluded that the invalid provisions could not be severed, rendering the entire statute invalid. ¶ 96.

Following that ruling, Cook County Circuit Court Judge Novak struck down the same changes for the City's Municipal and Laborers Funds participants. The refusal of the court to stay that decision resulted in restoration of the participants' Automatic Annual Increases, and a probable refund of current employees' increased contributions.

The Current Situation. While the author was writing this article, the Illinois Supreme Court, in response to the City's appeal of Judge Novak's July ruling that applied the conclusion reached in I*n re Pension Reform Litigation*, issued a brief order announcing an expedited briefing cycle. Per the August 13 order, that scheduling will enable oral arguments in the appeal to take place in November. As for the State, it has indicated it may petition the United States Supreme Court for a ruling that the police power trumps all. It is highly unlikely the U.S. Supreme Court would have jurisdiction to take such a case, however, as the decision in *In re Pension Reform Litigation* relies on adequate and independent state law grounds.

Saving Children Through Restorative Justice

By Michael Strom, *Decalogue Past President*

OK, the title sounds presumptuous. However, Decalogue Society of Lawyers accepts "tikkun olam" as humanity's shared responsibility to repair and transform the world. Restorative justice programs in schools are a great way to apply our legal, analytical and communication skills to help communities plagued by violence.

In 2009, Archbishop Desmond Tutu challenged the audience at the Chicago Bar Association's dinner meeting to save Chicago's children from lives of violence, "to view each child who is killed as your own son or daughter, a human being." For the last few years, Decalogue volunteers worked with the Chicago Bar Association and helped recruit additional volunteers through our colleagues in the Black Women Lawyers Association, the Cook County Bar Association and the Hispanic Lawyers of Illinois to work on programs addressing Chicago's unsettling violence. I have consistently found this project to be among the most enjoyable and fulfilling work of my career. You would enjoy it, too – I hope you will join us.

Here are answers to some frequently asked questions:

1. What is restorative justice?
For purposes of this program, restorative justice consists of community-based methods to resolve potential conflicts before they lead to violence, police and the criminal justice system. Volunteer attorneys visit a public school once a week for 8 to 10 weeks to train one group of 6th, 7th and 8th grade students to do a demonstration mock trial. Two separate groups of students are trained by social work professionals on how to use dispute resolution methods of peace circle and peer jury mediation. All three groups together demonstrate the respective methods of resolving the same disputes from the same fact pattern. The demonstrations are done at a school assembly hall, community center or downtown courthouse.

Our goal is to work with the school administration and the students to help them understand and apply these different tools to solve internal tensions early and peacefully.

Barton School (Englewood) lunch reception - kids listening intently to remarks from Illinois Appellate Court Justice P. Scott Neville.

2. Where are these schools located?
So far, we have worked in South Shore, Englewood, Back of the Yards and similar neighborhoods.

3. Is it risky for us to go there?
I've been doing this sort of work for over 30 years in these neighborhoods. No volunteer attorneys with my groups have ever been hurt or had any unpleasant incidents. Anything you can do for over 30 years without injury or incident cannot fairly be considered "risky." Although you may see plenty about violence in those neighborhoods in newspapers or TV news, I have never seen it in school buildings or parking lots during the school day. Check out the intimidating group Decalogue sent to Bradwell (an Elementary school in South Shore):

4. What are the kids like?
They are so normal! Despite the problems all around them after school and on weekends, the kids we see are the usual mix of children: shy, outgoing, quiet, talkative, funny, serious, inquisitive – and smart.

5. Are they too young to understand the situation?
Sadly, no. In 2014, the Chicago Tribune published a piece written collaboratively by fifth-grade Bradwell students protesting the neighborhood's constant negative publicity from gun violence. Here is an excerpt:

> *"We saw your news trucks and cameras here recently and we read the [article] … "Another mass shooting in Terror Town." … but you don't really know us. Those who don't know us see the police on the corner and think that we're all about violence and drugs.*
>
> *We want you to know us. We aren't afraid. … When the sun shines here, it's not God saying he wants to burn us; he sees us all with bright futures. Those who know us look at the ones who want to go to college, not the ones who dropped out of school. [T]his neighborhood is filled with love. This isn't Chiraq. This is home. This is us."*

Chicago Tribune, July 27, 2014

6. How do the kids respond to lawyers who aren't from the neighborhood and are not "like them?"
Although you might expect eye-rolling, or a muttered "not them again," the consensus is that they like us. When we return to a school we visited the previous year, we get smiles and hugs. Schools establish steady routines to helps sustain learning, so when something different comes to the classroom, it gets their attention. We are different.

7. Can This Work?
We believe restorative justice methods can work where schools or communities are committed to making them work, and adapting them to their needs. We are under no delusion that this will cure everything tomorrow. But our ancient rabbinic sages taught that "saving one person's life is like saving an entire world."

8. Any hopeful signs so far?
According to our Bradwell sources, at some point after the conclusion of our first program there, students decided on their own they needed to convene a peace circle to deal with a fight involving Bradwell students. We need more information on the circumstances, but it sounds like a good start. Bradwell wants us to return in the fall semester.

Based on my own observations, "zero tolerance policies" and increasing suspensions/expulsions have produced more, younger dropouts (many before high school), and more kids involved with street gangs. These "get tough" policies were supposed to improve the learning environment inside the schools by eliminating "problem kids." Increased gang activity from "turf wars" between gangs (or internal factions) made some neighborhoods more dangerous with little or no perceptible improvement in school performance. Now that public school policies are moving away from inflexible zero-tolerance expulsions and urging restorative justice alternatives, we have many new opportunities to develop peacemakers who can defuse minor problems before they deteriorate to tragedies.

For every three additional volunteers, the program can be introduced to another school. Consider being part of a three-person team doing this important work.

Certificate presentations at Bradwell

Thank you to our Decalogue Society Friends for their continued support of the Gerry Schur Scholarship benefiting students in the Clinic.

Student Action

Law School Chapter Updates

Questions about the Law School Chapters?

Email the 2015-2016 Decalogue Chapter President listed below or Decalogue Law Student Board Rep Maria Zyskind (mzyskind@gmail.com), or Decalogue Young Lawyers Division Chair Melissa Gold (mgold812@gmail.com)

2015-2016 Decalogue Chapter Presidents (Alphabetical Order)

DePaul University College of Law
• Alysa Levine (alevine9@mail.depaul.edu) – President

IIT Chicago-Kent College of Law
• Maria Zyskind (decalogue@kentlaw.iit.edu) – President

John Marshall Law School
• Mitchell Robbins (mrobbins1016@gmail.com) – Co-President
• Michelle Milstein (mmilste@law.jmls.edu) – Co-President

Loyola University Chicago School of Law
• TBD

Northwestern University Law School
• Haley Wasserman (h-wasserman2017@nlaw.northwestern.edu) – Co-President
• Beth Holtzman (b-holtzman2017@nlaw.northwestern.edu) – Co-President

Southern Illinois University School of Law
• Aaron Goldman (agoldman@siu.edu) – President

University of Chicago Law School
• Jacob Grossman (jgrossman@uchicago.edu) – Co-President
• Ryan Halimi (ryanhalimi@uchicago.edu) – Co-President

University of Illinois College of Law
• Dan Gutt (Dgutt10@gmail.com) – President

Thank you to all of our Outgoing (2014-2015) Decalogue Law Student Chapter Presidents!

Alex Giller, DePaul University College of Law
Paul Geske, IIT Chicago-Kent College of Law
Mitchell Robbins, John Marshall Law School
Ilana Schwartz, Loyola University Chicago School of Law
John Zukin, Northwestern University School of Law
Aaron Goldman, Southern Illinois University School of Law
Max Looper & Casey Prushe, University of Chicago Law School
Matt Gold, University of Illinois College of Law

Congratulations to the Law Student Scholarship Recipients recognized at the June 2015 Annual Dinner!

Mateo Aceves, 2015, University of Chicago
Paul G. Annes Scholarship
Corey Berkin, 2015, Northwestern University
Richard G. Kahn Scholarship
Nathan Hakimi, 2016, Kent Law School
Judge Abraham Lincoln Marovitz Scholarship
Jennifer Radis, JD, 2016, Loyola University
Decalogue Scholarship
Jacob Polin, 2016 Northwestern University
Oscar M. Nudelman Scholarship
Andrew Brodsky, 2016, John Marshall Law School
Philip Bain and Professor Melvin Lewis Scholarships
Alexander Giller, JD 2015, DePaul University
Samuel Shkolnik Scholarship
Matthew Gold, JD, 2016, University of Illinois
Decalogue Scholarship

Young Lawyers' Corner

Questions about the Young Lawyers Division (YLD)?
Email Decalogue Young Lawyers Division Chair, Melissa Gold (mgold812@gmail.com)

GET INVOLVED

- Join Decalogue on Facebook
  - Main Decalogue FB Page: https://www.facebook.com/DecalogueSociety
  - Decalogue Young Lawyers & Law Students FB Page: https://www.facebook.com/pages/Decalogue-Society-of-Lawyers-Students-and-Young-Lawyers/213607028707709
- Join Decalogue on LinkedIN https://www.linkedin.com/groups/Decalogue-Society-Lawyers-4477040/about

RESOURCES

- Check out the Decalogue Internship /Volunteer Page link below. If you have suggestions let us know and we will add it to our list of opportunities. http://www.decaloguesociety.org/Pages/Internships.aspx
- Check out the Decalogue Membership Directory for case referrals and more! http://www.decaloguesociety.org/Pages/MemberDirectory.aspx
- Check out Decalogue's FREE CLE classes http://www.decaloguesociety.org/Pages/LegalEducation.aspx

UPCOMING YLD EVENTS

Thursday, September 17th from 6:00pm to 8:00pm
YLD Happy Hour, Highline Bar, 169 W Kinzie, Chicago

Chai-Lites

Past President **Su Horn** and husband (also a Decalogue member) **Donald Honchell** will celebrate their 40th anniversary in September.

Every July 4th the Carnegie Corporation of New York honors a group of naturalized citizens who have made notable contributions to the progress of our society. The group is called Pride of America Honorees. **Hon. Ilana Rovner** is one of this year's honorees. Her profile can be found at http://greatimmigrants.carnegie.org/profile/ilana-rovner/

Decalogue Board Member & Young Lawyers Division Chair **Melissa Gold** was selected to join the University of Illinois College of Law Alumni Board for the coming two year term starting July 2015.

Hon. Morton Denlow (Ret.) was honored with the Edwin A. Rothschild Award for lifetime achievement in civil rights at the 46th Annual Meeting and Volunteer Recognition Luncheon of the Chicago Lawyers' Committee for Civil Rights Under Law (CLCCRUL) on July 30, 2015.

For over ten years, **Barry L. Gordon** has been broadcasting, on both T.V. and Streaming from the Chicago Bar Association, programs on every field of law. These talk shows, called 'You and the Law', are sponsored by the CBA and are now available on You Tube, Vimeo and the CBA website.

Congratulations to Board Member and Legislative Committee Chair **Gail Schnitzer Eisenberg** for being honored by the JUF as one of this year's 36 under 36 at the JUF's Young Leadership Division's summer party at John Barleycorn in River North on Thursday, August 13 at 7pm. Check out her bio at: http://www.oychicago.com/36under36/bio36.aspx?id=26808

Congratulations to Past President **Barry Goldberg** on the occasion of his son Gabe's Bar Mitzvah on August 29, 2015 at Congregation Ezras Israel of West Rogers Park.

Congratulations to **Danny Azulay** for several happy occasions, including the recent wedding of his grandson Nate Chertok to Dahlia Gruen in Boston, Massachusetts; the recent wedding of his grandson Tuvia Chertok to Eliana Borochov in Jerusalem, Israel; and the Bar Mitzvah of his grandson Gabe Goldberg in Chicago, Illinois.

Congratulations to Decalogue's 2nd Vice President **Mitchell Goldberg** for serving as Vice President and Treasurer of the Chicago Lincoln American Inn of Court for the 2015-2016 term.

First Vice President **Curtis Ross** recently was re-appointed to several positions with the Illinois State Bar Association including as Chair of the Finance Committee for the Assembly, member of the Family Law Section Council and member of the Personnel Committee. On June 24 Ross was part of a panel including Judge Pamela Loza and Margaret Bennett that presented a CLE to the Northwest Suburban Bar Association concerning a proposed income shares child support statute.

Nathan H. Lichtenstein has been appointed Co-Chair of the Commercial Litigation Group at Aronberg Goldgehn Davis & Garmisa.

Charles Aron was featured in both the Chicago Athlete Magazine and the Weiss Hospital Magazine in recognition of his work to raise money for the Alzheimer's association through sponsorhips of his running the Chicago Marathon.

Past President **Judge Martin Moltz** has been appointed to the Executive Committee of the Illinois Judges Association.

Michael Erde was recently honored by Thomas Reuters as an Illinois Super Lawyer for 2015. Michael has also been active on the CLE speakers' circuit, presenting programs on Trusts in Chicago and Naperville and scheduling CLE events for the fall when he'll be speaking on Medicaid and Elder Law for Lorman (9/29), participating in the ISBA's Guardianship Bootcamp (October 10), and advising lawyers about the Probate Process from Start to Finish (October14). He is also scheduled to appear at the Illinois Seniors and Caregivers Expo on September 12.

Financial Secretary **Helen Bloch** became the leader of the National Association of Women Business Owners' Lincoln Park Business Exchange group.

Ed (Eli) Steinlauf (Jerusalem based member) recently filed an appeal in the Israel District Court (Central) against the decision of the Liquidator of a debtor Israeli company denying a $350,000 debt for breach of an early notice of cancellation of the business relationship contract. Hearing on the issue is expected this fall.

Tablets Co-editor **David Lipschutz** has been hired as an Associate Attorney at Markoff Law, LLC.

Rebecca Neubauer has been promoted to Associate Attorney at Romanucci & Blandin, LLC.

Tablets Co-editor **Sharon Eiseman** has been appointed by the ISBA to serve on the Diversity Leadership Council and as Vice-Chair of the Standing Committee on Racial and Ethnic Minorities and the Law. She was also reappointed for another term on both the ISBA's CLE Committee and its Real Estate Law Section Council. Sharon also continues as a member of the Association's Assembly.

Board member **Joelle Shabat** was selected as a member of the Legal Assistance Foundation of Metropolitan Chicago's Young Professionals Board.

Diane Redleaf's report "When Can Parents Let Children Be Alone?" was cited in an August 6 article in the *Washington Post*. Read the report at the website: http://www.familydefensecenter.net.

Board member **Justice Robert Gordon** was elected Chair of the Executive Committee of the Appellate Court of Illinois for Cook County starting September 1, 2015.

Spot-Lite in the Chai-Lites

Helen Bloch has been featured in a wonderful documentary about mezuzot. In the documentary, Helen gives an impassioned presentation about her and her family's case against Shoreline Towers for taking down her mezuzah and refusing to let her put it back up again. The documentary can be viewed at https://youtu.be/fx8vVtCo6IM, and Helen's piece comes in just before 29:30 of the video.

Helen speaks eloquently and passionately about the home in which she grew up. She speaks about her parents of blessed memory, including her father's military service, holding up pictures of him in uniform. She shares the pain she and her family went through when Shoreline Towers and the president of its condo board unilaterally ripped their mezuzah from their doorpost. She talks about the financial sacrifice she and her family had to endure in order to litigate their case against Shoreline all the way up to the Seventh Circuit. And perhaps most importantly, she talks about what an insult it was to our community as a whole to have such an important symbol of our faith summarily taken down by anti-Semitic condo board president under the pretext of removing hallway clutter.

Helen is immediately followed by State Senator Ira Silverstein, who discusses the legislation he sponsored in the wake of Helen's case. For any Jew, whether observant or not, who believes in freedom of religion – nay, for any American who believes in freedom of religion – Helen's part in this documentary is inspirational and a must-see.

Welcome New Members!

Daniel Joseph Applebaum
Erica N. Bernstein
Michael B. Cohen
Alison Conlon
Adam Ford
Edward Goykhman
Jacob Grossman
Patrick Dankwa John
Karen Klass
Andrew Levenfeld
Elizabeth Markopoulos
Rebecca Elyse Neubauer
Edward Rice

Annual Dinner Photos

(Photo credit: Frederic Eckhouse)
See our Facebook page for more photos

Jewish Holidays 2015-2016

Holidays begin at sunset the previous day

September 14-15
Rosh Hashanah

September 23
Yom Kippur

September 28-29
Sukkot

October 5
Shmini Atzeret

October 6
Simchat Torah

December 7-14
Chanukah

March 24
Purim

April 23-30
Passover

June 12-13
Shavuot

Visit our website
www.decalogueuesociety.org
for fast days and festivals and details about activities and customs practiced or proscribed on the various holidays

Study in the Loop with
Rabbi Vernon Kurtz

Thursday, November 12
Thursday, December 17
Thursday, January 14

12:00-1:30pm
at the Decalogue Office

Call the Rabbi's assistant, Lennie Kaye 847-432-8900x221 to make a reservation.

2015-2016 Decalogue Society Of Lawyers Legal Education Series

On-line registration will be available for all classes at http://www.decalogueuesociety.org/Pages/LegalEducation.aspx
All classes are at 134 N. LaSalle, Room 775 and earn 1 hour of general MCLE credit unless otherwise indicated.
Effective July 1, 2015 only members of Decalogue and co-sponsoring organizations receive CLE credit. Brown Bag Lunch.
Dates, locations and speakers are subject to change.

Wednesday, Sep 2, 12:00-1:30pm
Topic: Religious Conscience Laws
Speakers: Colleen Connell, Prof. Richard Wilson
Location: 160 N LaSalle Room 1808
Co-sponsored by ISBA Sexual Orientation & Gender Identity Committee and WBAI Diversity Committee

Wednesday, Sep 9, 12:00pm-3:00pm
Topic: Anti-Semitism on Campus: Helping Our Students Learn Their Rights
Speakers: Ken Marcus, John Lowenstein, Matt Rudolph, Adam Sheppard
Location: Much Shelist, 191 N Wacker
Free Kosher lunch provided by Stand With Us
Co-sponsored by Brandeis Center for Human Rights, Stand With Us, JUF Israel Education Center, DePaul Center for Jewish Law & Judaic Studies, and Simon Wiesenthal Center

Wednesday, October 14, 12:00pm-2:00pm
Topic: Good Wife Video
Speaker: Prof. Cliff Scott-Rudnick
Location: John Marshall Law School, 315 S Plymouth
Co-sponsored by John Marshall
Professional Responsibility credits pending

Wednesday, October 28, 12:15pm-1:15pm
Topic: Domestic Relations Mediation Rule
Speakers: Presiding Judge Grace Dickler, James Feldman, Jeffrey Brend

Wednesday, November 4, 12:15pm-1:15pm
Topic: Jewish and Muslim Issues in Family Law
Speakers: Candace Wayne, Kamran Bajwa
Location: TBA

Sunday, November 8, 1:30pm-4:30pm
Topic: Sexual Abuse of Children in the Jewish Community
Speakers include Rabbi Jerome Blau, Michael Salamon, Rena Wolf, and Sharon Kantor. Moderator: Prof. Steven Resnicoff
Location: Congregation Ezras Israel, Chicago

Wednesday, November 18, 12:15pm-1:15pm
Topic: Illinois Marijuana Law
Speaker: State Representative Lou Lang

Wednesday, December 2, 12:15pm-1:15pm
Topic: Chancery Unplugged
Speaker: Judge Mary Mikva

Sunday, December 6, 9:30am-1:00pm
Hon. Gerald C. Bender Memorial Lecture
Topics and speakers TBA
Lincolnwood Jewish Congregation AG Beth Israel

Wednesday, December 16, 12:15pm-1:15pm
Topic: EEOC
Speaker: Deidre Baumann

Wednesday, January 13, 12:00pm-3:00pm
Topic: Honoring Dr. Martin Luther King, Jr.
Speakers TBA
Location: John Marshall Law School, 315 S Plymouth
Co-sponsored by John Marshall

Wednesday, January 27, 12:15pm-1:15pm
Topic: Traps to Avoid Before, During and After Mediation
Speaker: Judge (ret.) Michael Jordan

Wednesday, February 10, 12:15pm-1:15pm
Topic: Income Tax Update
Speaker: Lawrence Krupp, *Director, Kessler Orlean Silver*

Wednesday, March 2 12:15pm-1:15pm
Topic: Bankruptcy
Speaker: Cindy Johnson

Wednesday, March 9 12:15pm-1:15pm
Topic: Class Actions
Speaker: Clint Krislov

Wednesday, March 30 12:15pm-1:15pm
Topic: Dealing With Difficult Clients II
Speaker: Charles Silverman
Professional Responsibility credits pending

Wednesday, April 13 11:30am-1:30pm
Topic: Ethics Update
Speaker: Wendy Muchman, *ARDC Director of Litigation*
Location: John Marshall Law School, 315 S Plymouth
Co-sponsored by John Marshall
Professional Responsibility credits pending

Wednesday, May 4 12:15pm-1:15pm
Topic: The Art and Science of Remediating Burnout in Lawyering: Cultivating Emotional Balance in the Legal Profession
Speaker: Alice Virgil, *Lawyers Assistance Program*
Professional Responsibility credits pending

Wednesday, May 11 12:15pm-1:15pm
Topic: Criminal Law and the Constitution
Speaker: Donna Makowski

Wednesday, May 25 12:15pm-1:15pm
Topic: Intersection of Religious and Secular Law II
Speaker: Jonathan Lubin

The Decalogue Society of Lawyers
134 North LaSalle Ste 1430
Chicago IL 60602

The Decalogue Tablets is published semi-annually by
The Decalogue Society of Lawyers, Inc.

(Photo credit: Frederic Eckhouse)