PODIUM

Gays, St. Patrick's Day and Cultural War

By Harvey A. Silverglate SPECIAL TO THE NATIONAL LAW JOURNAL

IT'S A TALE OF TWO CITIES—Boston and New York—each with large Irish-American populations, as well as substantial and activist gay and lesbian communities. In both cities, old-line Irish patriotic, cultural and fraternal organizations for years have sponsored a parade in honor of Ireland's patron saint, St. Patrick, and in the particular year in question—1994—each group privately sponsored and paid for its parade, without city money. Both cities were living under the same U.S. Constitution, with the same First Amendment guaranteeing freedom of speech and association.

Yet in New York, a U.S. district judge refused to issue an order allowing that city's gay community, marching under an identifiable gay liberation banner, to crash the traditional parade sponsored by the Ancient Order of Hibernians. Whereas, in sharp contrast, a Superior Court judge in Boston issued an injunction (later affirmed by the state's highest court, the Supreme Judicial Court) requiring the sponsors of that city's parade to allow a similarly identifiable gay liberation group to march under its banner.

Two parades, same Constitution. What happened?

Now that the U.S. Supreme Court has granted certiorari in the Boston case, will the discrepancy be reconciled? Is a parade an expressive event such that its private sponsors are entitled to keep out unwanted groups visibly bearing dissenting or discordant messages (as the New York court held)? Or is a parade a "public accommodation," like a restaurant or hotel, to which all comers must be welcomed (as the Boston courts held)?

It is, actually, a tale of more than two cities, now that the issue is about to be resolved nationally. Savannah, Ga., has a big St. Patrick's Day parade each year, as do Chicago (which dyes the Chicago River green for the occasion), Milwaukee, Pittsburgh and Cleveland. Soon, we will know whether the traditionalist sponsors of these events can dictate who may participate in their private parties on public streets, or whether groups bearing very non-traditional (some would say anti-traditional) messages, and displaying and supporting different lifestyles, will be able to insist on being included. (We will also know, of course, whether the traditionalists will be able to crash the dissidents' shows.)

Public Accommodation

In the Massachusetts case, the plaintiff, the Irish-American Gay, Lesbian and Bisexual Group of Boston, invoked the city's public accommodations law. The trial court judge, J. Harold Flannery, concluded that because the parade's sponsor, the South Boston Allied War Veterans Council, traditionally welcomed a wide variety of marching groups with no apparent ideological unity, the parade sponsor, by "failing to circumscribe the marchers' messages," did not intend to exercise its First Amendment associational right. This being so, there was no constitutional bar to the application of the public accommodations law, which prohibits discrimination on the basis of, among other factors, sexual preference.

The Boston parade traditionally commemorates both St. Patrick's Day and the liberation of Boston from British occupation troops. At the end of his 35-page opinion, in which he found that the Boston parade does not have "any specific purpose entitling the Parade to protection under the First Amendment," Judge Flannery ordered that it would, indeed, henceforth have a specific message. But this time the message would be dictated by the court: "History does not record that St. Patrick limited his ministry to heterosexuals or that General Washington's soldiers were all straight. Inclusiveness should be the hallmark of their Parade."

The Supreme Judicial Court of Massachusetts affirmed in 1994, by a vote of 4-to-1, just in time for that year's parade. The dissenting justice called it a "sad and frustrating day in the history of the First Amendment" and observed that "one must strain to recall or even imagine such an obvious violation of the revered right to free speech."

The Massachusetts and New York courts managed to ignore each other with weak attempts to distinguish each city's parade rather than by taking pokes at each other's opinions, but a reading of the opinion of U.S. District Judge Kevin Thomas Duffy indicates that no minor distinction between two parades or two cities—but, rather, a wholly different constitutional vision—accounted for the differing results.

"A parade," Judge Duffy wrote, "is by

[SEE 'PARADE' PAGE A22]

MARTIN MAYO

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Justice Souter's other reason for finding the former statute unconstitutional is also no longer applicable. The fact that the residents of Kiryas Joel, who share a common religious belief, received civic or political authority from the state was not the reason for the former statute's undoing. Had it been, the entire village's incorporation would have been deemed unconstitutional, a result rejected by all nine justices.

Rather, the earlier statute, according to Justice Souter, delegated the state's authority over public schools to a local school district "defined by the state in order to grant political control to a religious group." Although authority over the public school was granted to the voters of Kiryas Joel and not to its religious leaders, Justice Souter still found New York state was "purposeful[ly] delegati[ng political authority] on the basis of religion," as opposed to "a delegation on principles neutral to religion to individuals whose religious identities are incidental to their receipt of civic authority."

Neutral Criteria

Under the new statute, New York has granted authority to any municipality to create its own school district provided it meets neutral criteria. Thus, the new statute also should receive Justice Souter's vote.

Only Justice Stevens' reason for declaring the former statute unconstitutional may apply to the new statute. But, only two other justices agreed with Justice Stevens, and one, Justice Harry A. Blackmun, has retired.

All of which makes it safe to predict that, barring unforeseen changes in

St. Patrick's Parades: Two Cities

['PARADE' FROM PAGE A21]

its nature, a pristine form of speech." Any effort by a government agency or even a court to dictate to a parade sponsor which identifiable groups should or should not be included in the march is prohibited because it seeks "to dictate how the Parade sponsors would express their thoughts." Taking a page from George Orwell, Judge Duffy termed New York's Human Rights Commission the "Thought Police."

The Veterans Council in Boston, however, took their case to Washington, and the Supreme Court, in January, granted review.

Cultural War

At bottom, what distinguishes Judge Duffy from his confreres in Massachusetts is not some minor distinction between the Boston and New York parades, nor, in fact, solely the conflicting visions as to the breadth of the First Amendment. Rather, Judge Duffy recognized, as the Massachusetts courts did not, that there is a fundamental "cultural war" in progress in this country, and that issues of inclusion vs. exclusion, traditional vs. non-traditional values, "us" vs. "them," are all theaters in that war. Any event in which like-minded people band together to show their colors is an expressive event within the meaning of the First Amendment's speech and associational clauses.

"Every parade," Judge Duffy wrote, "is designed to convey a message," inarticulate though the

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opinion, the court will uphold the new statute.

rassroots Support

Three-quarters of those polled thought average citizens enjoyed less access to the legal system than the wealthy.

Broad segments of the public would like to enlarge access rather than restrict it. A Yankelovitch survey conducted early this year found overwhelming majorities favoring the retention of broad rights to sue. Thirty-nine percent prefer to retain the present balance between the injured and insurers, but another 39 percent favor reform that would "tilt things a little more in favor of those injured in accidents," and only 7 percent wish to tilt things more the other way.

The years since World War II have witnessed a prolonged expansion of the scope and adequacy of legal remedies for many of the calamities that invade the lives of ordinary Americans. Now, many of the injured and abused, unlike their predecessors, manage to obtain some significant remedy for their losses. The new accountability imposed on society's managers and authorities has provoked a fierce reaction against the civil justice system and heightened the hostility toward lawyers.

But the strains of discontent with law and lawyers are themselves in conflict: Elites resent "too much law," while wider publics are apprehensive about "not enough justice." Although "too much law" currently dominates public debate, "not enough justice" is not about to disappear. Attempts to curtail the perceived excesses of litigation will inescapably collide with less vocal but equally tenacious concerns to broaden access to the legal system's remedies and protections.

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The right to exclude those who bear a different message is the "corresponding right to associate with whomever one chooses." The Massachusetts courts, on the other hand, refused to recognize the Veterans Council's "traditional values" as a message worthy of protection.

Significantly, the traditionalists never had excluded a gay marcher. What caused the court fight was the insistence of the gay marchers on banding together under an identifiable gay liberation banner, which the traditionalists saw as at odds with the conservative family values that the parade was meant to celebrate. To Judge Flannery, the attempted exclusion was discriminatory. To Judge Duffy, it was an unfortunate but constitutionally protected associational selectivity.

It is unlikely that the Supreme Court will not recognize that the parade conflict is just another arena in which the cultural war is being fought. Washington, after all, is one big battlefield these days between conflicting cultural armies.

A resolution of the case in favor of the Veterans Council—and, not so incidentally, in support of the First Amendment—will not benefit only traditionalist groups such as the Hibernians and the Veterans, however.

Last summer, for example, the Washington Times reported that a homosexual rights group, San Diego Lesbian and Gay Pride, denied the request of a traditionalist group, defiantly named "Normal People," to march in Gay Pride's annual parade. Normal People got the idea of organizing itself and trying to break into Gay Pride's parade when a local businessman heard about the homosexual group's victory in Boston.

If the Supreme Court rules, as it probably will, that the traditionalists have the right to exclude gays from their parade, the obverse will be true as well. It would be nice if we could all march together but, as Judge Duffy observed, "It is the American way for political leaders to seek to convince citizens of the correctness of some view by persuasion and not by fiat."