FREEDOM WATCH

Vexed vets

Why anti-gay parade officials may have the law on their side

by Harvey Silverglate

Even though the state has four times rejected efforts by the South Boston Allied War Veterans Council to ban gay marchers from the St. Patrick's Day Parade, the final word still isn't in.

Chester Darling, the Boston attorney who's representing the veterans council, plans to ask the federal courts to rule that the Massachusetts Commission Against Discrimination, Superior Court Judge Hiller Zobel, Appeals Court Judge Frederick Brown, and Supreme Judicial Court Justice Herbert P. Wilkins have ignored the council's First Amendment rights to freedom of religion and speech.

The council, which has received a city license to sponsor the parade for the past 47 years, says it has a constitutional right to use the event to send a "traditional values" message.

The veterans council's First Amendment claims have been given remarkably short shrift. The council's actions may be intolerant, even distasteful. But the veterans may well have a constitutional right to ban the Irish-American Gay, Lesbian, and Bisexual Group of Boston from marching as an identifiable unit.

In a similar case, in fact, the sponsor of New York City's St. Patrick's Day Parade won an order from the US District Court in Manhattan requiring the city to allow it to conduct its parade even though it has excluded gay groups. Moreover, the New York ruling would appear to be more firmly rooted in constitutional law than any of the Massachusetts decisions.

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First, a little history.

A similar dispute arose in Boston last year. It went before Judge Zobel, a bright if quirky and irascible former law professor, and generally a staunch civil libertarian. The 1992 parade was imminent when the dispute arose; Zobel issued an emergency order allowing the gay group to enter 25 marchers under their own banner, but with no other literature or messages displayed.

Because time was short, the 1992 case did not go through the full cycle of appellate review, and the dispute never reached the federal courts. The stage was therefore set for a resumption of the battle before the 1993 parade.

The case landed before Zobel again just a short time before this year's parade, and he used that excuse to deviate from his normal practice of fully explicating his legal rulings. Zobel rejected the veterans' claim that the parade was a private affair rather than a civic event. This was crucial, because the First Amendment gives private citizens and groups the right to disseminate their message in either verbal or symbolic speech (a parade constituting a symbolic form of speech) free from dictation by the state, whereas an event sponsored by the government may not discriminate against or exclude any group of citizens.

KATHY CHAPMAN

ANTI-GAY spectators in Southie: intolerant, yes; unconstitutional, no.

Zobel found that the parade was "in every rational sense a municipal celebration, a public festival," in part because it coincides with and celebrates Evacuation Day, an obscure patriotic holiday. He rejected the argument that the parade was meant to convey any "views" or "message" "beyond a litany of 'traditional values.'"

"This inability [by the veterans council] to define the theme of the parade . . . merely emphasizes the non-sectarian, civil, and therefore public nature of the entire event," wrote Zobel. He quoted the first inaugural address of Thomas Jefferson, one of the nation's most devoted free-speech advocates, in which the president, referring to his political enemies, urged: "Let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

The question Zobel failed to answer was whether in the "free marketplace of ideas" that the First Amendment protects, the veterans and the gay group had to be joined in the same booth. Even though the gay group has the right to propagate its own political views and make its presence known in the community, does it have a right to do so in a symbolically communicative event sponsored by a group that holds antithetical views?

Putting the shoe on the other foot, one might ask whether an anti-gay group would have the right to march in a Gay Pride Day parade, holding aloft a poster saying KILL THE FAGGOTS — or even a less inflammatory banner merely identifying the group as one opposed to gay rights. If the answer is no, then one has to ask why the veterans have an obligation to allow the gay group to march in its St. Patrick's Day parade.

The issue before the court was not whether gays, lesbians, and bisexuals have a right to march. Indeed, it is almost a statistical certainty that a number of the veterans themselves are gay, including some who will be marching in the parade. The issue is whether gays, lesbians, and bisexuals must be permitted to march as an identifiable group.

Not only did Zobel fail to deal with the veterans' First Amendment rights, but when the case got before the state appeals court, Judge Brown affirmed Zobel's ruling without any extended discussion. "The law does not require that simply because they are gay and lesbian the plaintiffs must be allowed to participate in the parade," wrote Judge Brown; "it does, however, prevent their exclusion simply because they are gay." When the case went before a single justice of the Supreme Judicial Court for emergency review, Justice Wilkins did no better in responding to the veterans' claims.

That could change when the case enters the federal courts. That's because on February 26, in a closely reasoned 34-page opinion, US District Judge Kevin Thomas Duffy of Manhattan upheld the right of the

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Ancient Order of Hibernians, the Irish Roman Catholic sponsors of the New York St. Patrick's Day Parade, to exclude the Irish Lesbian and Gay Organization from marching under its own banner.

Just by the way Duffy worded the question in that case, one got the message as to how he would decide it:

> *Broadly stated, the issue is whether the City of New York can compel the Ancient Order of Hibernians, a private and long-standing sponsor of New York's St. Patrick's Day Parade, to alter the message that it wishes to convey in the Parade by requiring it to include, in the Parade and under their own banner, the Irish Lesbian and Gay Organization, an organization whose tenets are allegedly inconsistent with the message of the Parade's sponsors.*

Whereas Zobel viewed the Boston parade as a "civic event," Duffy focused on "the message that the [Hibernians] believe the Parade should convey" — a message that is at odds with the "sexual practices" with which the gay group was associated. The question, Duffy wrote, was "whether the Parade and its message constitute speech protected by the First Amendment."

"Every parade," concluded Judge Duffy, "is designed to convey a message" and is therefore "by its nature, a pristine form of speech." He went on to rule that "compelled access" by a gay group to the Hibernians' parade "penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." Implicit in the right to free speech when dealing with a parade, wrote Duffy, is "a corresponding right to associate with whomever one chooses" and "the concomitant right not to associate with whomever one chooses."

The Boston parade, Duffy noted, appeared to be somewhat different from the New York parade, because its essentially civic nature was underscored by the fact that it was meant to celebrate not only St. Patrick's Day, a religious holiday, but also Evacuation Day — a patriotic holiday celebrating the British withdrawal from Boston in 1776. Boston's parade, compared to New York's, wrote Judge Duffy, "conveys a general celebratory message" and is "multi-purpose."

But in making those observations, Duffy was relying on Zobel's characterization of the Boston parade. Anyone who has spent even a single St. Patrick's Day in Boston knows that hitching Evacuation Day onto the St. Patrick's Day holiday was simply a way for the state legislature to give Suffolk County municipal officials the day off without making it too obvious that the real occasion was a religious and ethnic holiday.

Duffy's central point, in fact, calls to mind the following trenchant observation buried in the middle of attorney Darling's somewhat meandering brief in the South Boston case:

> *This country is in the process of deciding troubling and bitterly divisive social questions. Consensus is in the formative stages. Each side — traditional and non-traditional — is struggling for acceptance and dominance in the marketplace of ideas, and must be allowed to use whatever forum is available to celebrate and associate with others whose views are not inconsistent with theirs. To parade and display these values, by pure speech and symbolic association, is a form of political speech, which seeks to draw supporters to a viewpoint. A parade says: "This is what we are about; this is who we are."*

By the time Duffy decided the New York case, the Massachusetts case had reached Judge Brown at the appeals-court level. Brown gave it short shrift, relegating his discussion to a footnote with the single concluding sentence: "Nothing said in that opinion . . . would cause us to decide the instant case differently." Brown went on to close his four-page opinion with an eloquent plea for toleration of gays as well as other minority groups, writing of discrimination: "It was wrong then, wrong now, and it can never be right. Bigotry in any form is an obscenity."

Brown was quite right, and one hopes that his civics lesson will not be lost on the war veterans. But at the same time, the courts in Massachusetts should recognize the truth of Duffy's observation about the proper role of government in dealing with private exhibitions of bigotry. "It is the American way," wrote Duffy, "for political leaders to seek to convince citizens of the correctness of some view by persuasion and not by fiat."

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The state courts have not quite finished with the case. The issue thus far before them has involved whether an emergency order should be granted so that the gay group could march in this year's parade. That having been resolved against the war veterans for the moment, the case will at some point go back to Zobel's courtroom for a full-blown trial that should lead to a permanent resolution.

Whether the ultimate state ruling will conflict with the Boston federal court's resolution remains to be seen. The difficulties that the case presents are perhaps exemplified by the fact that the Civil Liberties Union of Massachusetts (CLUM), which last year represented the gay group, stayed out of this year's skirmish and instead has set down for debate by its board of directors the question of which side CLUM should weigh in on this time around.

Meanwhile, CLUM's sister organization, the New York Civil Liberties Union, supported the Hibernians in the New York case. If politics makes strange bedfellows, the First Amendment produces even less likely combinations and, in this case, threatens to split two state affiliates of the American Civil Liberties Union. It is a controversy that has all the markings of a dispute that could make its way up to the US Supreme Court. □