

PARADIGM PUBLICATIONS INC.

THE RELIGION CASE REPORTER

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A monthly reporting federal and state cases addressing the free exercise of religion, state establishment of religion, the clergy and religious institutions. Analysis of federal and state legislation. Complete coverage of religion as it impacts on family law; bankruptcy; employment; medical care; rights of association; public accommodations and fair housing; fora analysis; criminal law and prisoner rights; evidence and privileges; commercial law; immigration and the right of asylum; immunity from suit; education and schools; subject matter jurisdiction; real property law; taxation; libel and defamation; church membership; sports; statutes of limitation; insurance; negligent counseling, hiring, training, retention and supervision; organizational operation of religious institutions; display of religious symbols and prayer; damages; sexual abuse; standing; state financial aid; unemployment and workers' compensation benefits; unions; zoning and land control, along with hundreds of other indexed topics.

TABLE OF CONTENTS

Index
Table of Statutes
Cases # 403 – 430
Subsequent History of Previously Reported Cases
Table of Cases

To Order

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INDEX

AIRPORTS

See **Case # 410** (D. Nev.) under **PUBLIC AND GOVERNMENT PROPERTY** “Religious Symbols, Prayer, and Speech on”

AMISH

Amish petitioner was not exempt from statutory requirement that an application for a pistol permit be accompanied by a photograph **Case # 423** (N.Y. App. Div.)

BIBLE**Holding During Testimony**

Evidence of good character cannot be introduced until after the witness' character has been attacked; the act of a key witness giving testimony while holding a Bible serves to impermissibly bolster his credibility with the jury prior to any attempt by defendant's trial counsel to impeach his character **Case # 427** (Ky.)

BLOOD TRANSFUSIONS.—See **MEDICAL CARE AND PROCEDURES**, “Blood Transfusion”

BREACH OF FIDUCIARY DUTY. – See **CLERGY MALPRACTICE AND BREACH OF FIDUCIARY DUTY**

CHARGE TO JURY

Defendant, claiming that his religion required him to violate a zoning ordinance, was not entitled to have the jury charged with the language of the free exercise of religion clause from the state constitution; whether state action has unconstitutionally abridged defendant's religious freedom is a question of law for the court, not the jury **Case # 426** (N.Y.)

CHARITABLE TRUST

See **Case # 415** (Utah) distinguishing between a charitable trust and a private trust.

CHRISTMAS TREES.— See **PUBLIC AND GOVERNMENT PROPERTY**, “Religious Symbols, Prayer, and Speech on”

CLERGY MALPRACTICE AND BREACH OF FIDUCIARY DUTY

After being accused of sexual contact with teenage boys, *X*, a member of defendant Mormon bishop's ward, pled guilty to misdemeanor assault and was sentenced to community service; the bishop, who arranged for *X* to help *M* build a home, undertook to monitor *X*'s community service; having met *M*'s daughter *D* while performing his community service, *X* married *D* for “time and eternity” in a Mormon temple after the bishop and another church official certified that the couple were worthy for a temple marriage; thereafter, *X* and *D* moved to Montana, followed by *M* and her son *S*; two years later, *X* was arrested in Montana for sexual contact with

a teenage boy, following which *S* revealed that he too had been sexually abused by *X* in Montana; action by *S* against bishop for breach of duty to protect him from actions of fellow church member dismissed; the bishop did not have a special relationship with *X*, nor did he take charge of *X*, so as to impose on him a duty to control *X* from inflicting harm on others; and even if there were a breach of duty on the part of the bishop, such breach was not the proximate cause of *S*'s injuries which were inflicted at least one year after the termination of the bishop's supervision of *X*'s community service; action by *D* against bishop for breach of duty to protect her from marrying *X* for “time and eternity” also dismissed **Case # 417** (Wash. Ct. App.)

CRECHE.— See **PUBLIC AND GOVERNMENT PROPERTY**, “Religious Symbols, Prayer, and Speech on”

CRIMINAL LAW

Charge to Jury.— See **CHARGE TO JURY**

Defendant's Right to be Present

Defendant's right to be present during a critical stage of a criminal trial is not violated when, in his absence, but in the presence of his attorney and the prosecuting attorney, the court asks the jury foreperson when she needs to leave so as to observe the Sabbath **Case # 429** (N.Y. App. Div.)

Evidence and Testimony.— See **EVIDENCE**

Jurors and Jury Deliberations

Jurors who had religious bias against homosexuals were properly dismissed for cause in criminal action where the victim was gay; jurors were not improperly dismissed because of their Christian faith **Case # 428** (W. Va.)

Prisons and Prison Inmates.—See **PRISON INMATES**

EMPLOYMENT**Discharge, Discrimination, Hostile Work Environment**

Employee's claim for religious discrimination and hostile environment dismissed; additional claim that the employer failed to accommodate employee's religious observance of Yom Kippur dismissed on procedural grounds; the complaint filed with the EEOC was silent with respect to defendant's alleged failure to accommodate and the failure to accommodate claim was not “like or reasonably related to” the religious discrimination claim **Case # 404** (N.D. Ill.)

Employee at Orthodox Jewish nursing home discharged for stealing can of soda and for bringing in non-kosher food into the facility in violation of work rules was entitled to unemployment insurance benefits **Case # 403** (N.Y. App. Div.)

Discharged employee did not suffer an adverse employment action in response to her request to take vacation time to attend a religious convention; plaintiff also failed to file a charge of religious discrimination with the EEOC within 300 days after

the allegedly discriminatory act occurred **Case #**
(N.D. Ill.) **Case # 405** (N.D. Ill.)

EVIDENCE

Bible; Bolstering Credibility of Witness by Holding.—
See **BIBLE**

Priest-Penitent Privilege

A defendant's threats of violence against a third party which defendant reveals to clergyman is not covered by the communications to clergyman privilege and clergyman may testify to those threats **Case # 424** (Ala. Crim. App.)

Priest-penitent privilege; person who serves as a deacon in his church and visits the county jail regularly with other members of his congregation to offer spiritual assistance to prisoners, but who does not discuss personal affairs with the inmates, does not qualify as a clergyman **Case # 425** (Miss.)

FAIR HOUSING ACTS.— See **HOUSING**

FINANCIAL ACCOUNTING TO CHURCH

MEMBERS

Neither the District of Columbia Nonprofit Corporation Act (DCNCA) in general, nor D.C. Code § 29-531 specifically, governs the financial operations of a church which has not organized under the DCNCA or has not subsequently elected to be governed by the provisions of the Act; church had organized under the Religious Societies statute, D.C. Code § 29-901, et seq., six years before the DCNCA was enacted **Case # 412** (D.C.)

FORUM ANALYSIS

Airport as nonpublic forum; plaintiff barred from erecting nativity scene in public area despite erection by county of holiday display containing Christmas tree and menorah **Case # 410** (D. Nev.)

GUN PERMIT AND LICENSE.— See **AMISH**

HOUSING

Enforcement of Alaska housing laws prohibiting apartment owners from refusing to rent to unmarried couples infringes on Christian landlords' right under the free exercise clause of the First Amendment; property was not owner-occupied; action for prospective declaratory and injunctive relief ripe for review although plaintiffs had not yet been prosecuted **Case # 407** (9th Cir.)

HYBRID-RIGHTS DOCTRINE

See **Case # 407** (9th Cir.)

INSURANCE

Coverage in Cases Arising Out of Discharge of Church Employee

Insurer of church had no duty to defend its insured against action by discharged church employee for defamation, invasion of privacy, and discrimination in employment; excluded from coverage was a suit for personal injury sustained as a result of an offense directly or indirectly related to employment **Case # 406** (1st Cir.)

Coverage in Cases Arising Out of Sexual Abuse

Diocese and church accused of negligently employing and failing to supervise priest guilty of sexual abuse were covered by insurance contract; victim suffered a "bodily injury" under the terms of the policy and the negligence of the diocese and church qualified as an "accident" and hence an insurable "occurrence" within the terms of the contract; the immediate cause of the victim's injuries, the intentional abuse by the priest, was not the only cause of the harm; the alleged negligence of the diocese and church was also a causative occurrence **Case # 418** (8th Cir.) (Minnesota law)

JEHOVAH WITNESS

Blood transfusion.— See **MEDICAL AND PROCEDURES**, "Blood Transfusion"

JURISDICTION

Property Disputes

See **Case # 414** (N.Y. App. Div.) under **PROPERTY DISPUTES**

LANDLORD-TENANT.— See **HOUSING**

MARRIAGE

Duty to Protect Plaintiff From Marrying Person Known to Have Been Accused of Sexual Abuse

See **Case # 417** (Wash. Ct. App.) under **CLERGY MALPRACTICE AND BREACH OF FIDUCIARY DUTY**

MEDICAL CARE AND PROCEDURES

Blood Transfusion

Court applied incorrect criteria in granting, over the objections of the parents and the patient, an order permitting a hospital to administer a blood transfusion to an unemancipated 17 year old Jehovah Witness in the event that a life-threatening traumatic event occurred in the course of her treatment **Case # 408** (Mass. Ct.App.)

MENORAH.— See **PUBLIC AND GOVERNMENT PROPERTY**, "Religious Symbols, Prayer, and Speech on"

METHODIST CHURCH

Liability of Annual Conference of United Methodist Church for Injury Sustained on Premises of Local Church

See **Case # 413** (N.Y. App. Div.) under **NEGLIGENCE LIABILITY**

MOON; FULL MOON GATHERING.— See **PARKING RESTRICTIONS NEAR RELIGIOUS SITE OR GATHERING**

MORMONS

See **Case # 415** (Utah) under **PROPERTY DISPUTES**
See **Case # 417** (Wash. Ct. App.) under **CLERGY MALPRACTICE AND BREACH OF FIDUCIARY DUTY**

NEGLIGENCE LIABILITY**Liability of Annual Conference of United Methodist Church for Injury Sustained on Premises of Local Church**

In action for personal injuries sustained on premises of local Methodist church, plaintiff's action against the Trustees of the regional Annual Conference of the United Methodist Church was subject to dismissal; there was no evidence of ownership, occupancy, control or special use of the property by the Trustees; fact that title to the realty could be assumed by the Trustees if the local church was discontinued or abandoned was not sufficient to establish a present ownership interest or authority on the part of the Trustees to control the property **Case # 413** (N.Y. App. Div.)

PARKING RESTRICTIONS NEAR RELIGIOUS SITE OR GATHERING

Full moon gatherings on mountain top were an essential part of plaintiffs' religious and spiritual expression and plaintiffs had standing to challenge restrictive parking regulations in the area; one of the plaintiffs received numerous parking tickets; while the other plaintiff did not have a vehicle and thus had not personally received any tickets, she had been driven to the gatherings by a friend who had received many tickets; parking restrictions, being both neutral and generally applicable, were constitutional **Case # 422** (N.D.N.Y.)

PHOTOGRAPH.— See **AMISH**

PRIEST PENITENT PRIVILEGE.—See **EVIDENCE**

PRISON INMATES**Religious Services, Prayer, Classes, Holidays, Dress, Grooming, Objects, Literature, and Rituals; Right to**

A claim of temporary denial of access to religious services incident to the administration of prison discipline is insufficient to support a finding that such discipline is atypical and of significant hardship **Case # 430** (W.D.N.Y.)

PROPERTY DISPUTES

Both an express and implied trust existed for the benefit of an Episcopal diocese with respect to the real and personal property held by a local church upon schism by the wardens and vestry members of the local church from the Protestant Episcopal Church; court had jurisdiction to resolve the property dispute even though it resulted from an ecclesiastical denial of a request by the local church officials to ordain a particular deacon to the priesthood; New York law **Case # 414** (N.Y. App. Div.)

The Priesthood Work, a Mormon movement advocating the continued practice of plural marriages, established a community located in both Utah and Arizona; members deeded title to their land to an Arizona trust managed by the Priesthood Council, the leadership of the movement; a doctrinal dispute led to a split in the movement; question whether claimants, most of whom belonged to the losing faction, had a right to continue occupying the land owned by the Trust, or whether they could be forced

to vacate without compensation; held, the claimants living in Utah may possibly have had a right to continue in occupancy under Utah's Occupying Claimants Act; in addition, both the Utah residents who did not have a remedy under the Act, and the Arizona residents, had a right to equitable relief under both Utah and Arizona law; claimants had the right to remain in occupancy during their lifetimes, or, if the Trust sought to remove them from the property, claimants were entitled compensation for the benefit the Trust received as a result of claimants' improvement of the land; the grant of equitable relief was not unconstitutional, as it satisfied a compelling state interest; the Trust was also held to be a private, not a charitable trust, and thus claimants had standing to assert claims for breach of fiduciary duty, accounting, and distribution **Case # 415** (Utah)

PROTESTANT EPISCOPAL CHURCH

Case # 414 (N.Y. App. Div.). See **PROPERTY DISPUTES**

PUBLIC AND GOVERNMENT PROPERTY

Airport.— See **Case # 410** (D. Nev.) under "Religious Symbols, Prayer, and Speech on"

Religious Symbols, Prayer, and Speech on Christmas Tree, Creche, and Menorah

Holiday display erected by city featuring menorah, creche and Christmas tree, placed in front of City Hall accompanied by sign stating that the display celebrated the city's diverse cultural and ethnic heritages was unconstitutional; modified city display containing creche, menorah, Christmas tree, figures of Santa Claus and Frosty the Snowman, a red sled, and Kwanzaa symbols on the tree, accompanied by signs stating that the display was one of a series of displays celebrating city's cultural and ethnic diversity, was constitutional **Case# 409** (3d Cir.)

Holiday displays at county airport paid for by the county included a Christmas tree, menorah, and a sign stating that the "County Department of Aviation Salutes the Freedom to Celebrate This Season as You Choose, Happy Holidays"; the display was not unconstitutional and the plaintiff was not denied free speech or equal protection when he was refused permission to privately erect a nativity scene in the airport in a public space; space qualified as nonpublic forum **Case# 410** (D. Nev.)

RELIGION DEFINED; RELIGIOUS BELIEF, SINCERETY OF

See **Case # 422** (N.D.N.Y.)

RELIGIOUS FREEDOM RESTORATION ACT (RFRA)

See **Case # 420** (S.D. Ind.) (impliedly holding that RFRA is still applicable to federal laws)

RELIGIOUS SYMBOLS ON PUBLIC PROPERTY.— See **PUBLIC AND GOVERNMENT PROPERTY**, "Religious Symbols, Prayer, and Speech on"

RIPENESS.— See **HOUSING**

SCHOOLS AND SCHOOLING

Sex Education

Human sexuality course given by county community college did not violate the Establishment Clause despite charges that it disparaged and attempted to destroy the adherence of students to traditional Jewish and Christian religious tenets; county residents had standing to bring the suit **Case # 411** (E.D.N.Y.)

SEXUAL ABUSE OR MISCONDUCT

Statutes Of Limitation.— See **STATUTES OF LIMITATION**

See also **CLERGY MALPRACTICE AND BREACH OF FIDUCIARY DUTY**

SEX EDUCATION.— See **SCHOOLS AND SCHOOLING**

SOCIAL SECURITY TAXES.— See **TAXES AND FEES**, “Income and Social Security Taxes”

STANDING

County residents had standing to challenge human sexuality course given by county community college **Case # 411** (E.D.N.Y.)

Action by Christian landlords for prospective declaratory and injunctive relief challenging enforcement of Alaska housing laws prohibiting apartment owners from refusing to rent to unmarried couples ripe for review although plaintiffs had not yet been prosecuted **Case # 407** (9th Cir.)

Full moon gatherings on mountain top were an essential part of plaintiffs’ religious and spiritual expression and plaintiffs had standing to challenge restrictive parking regulations in the area; one of the plaintiffs received numerous parking tickets; while the other plaintiff did not have a vehicle and thus had not personally received any tickets, she had been driven to the gatherings by a friend who had received many tickets **Case # 422** (N.D.N.Y.)

STATUTES OF LIMITATION

South Carolina

The discovery rule may toll the statute of limitations in a case of repressed memory of childhood sexual abuse; however, independently verifiable objective evidence of the childhood abuse is mandated in every case and expert opinion testimony is required to prove the repressed memory **Case # 416** (S.C. Ct. App.)

TAXES AND FEES

Income and Social Security Taxes

IRS sought to enter judgment against defendant Indianapolis Baptist Temple, an unincorporated society, for unpaid social security and federal income tax contributions, and to foreclose on tax liens it had against the Temple’s realty; however, the tax

assessments had not been made against the Temple in its unincorporated form, but against a not-for-profit corporation, named the Indianapolis Baptist Temple, Inc., identified by its employer I.D. number; the corporation had been dissolved and no longer existed during the time period for which the taxes were assessed; however, the congregation continued operation as an unincorporated religious society, with the corporation’s assets being transferred to the defendant unincorporated society; court addresses question whether the corporate identity could be disregarded and judgment entered against the unincorporated religious society **Case # 420** (S.D. Ind.)

Realty Taxes

Where realty is already being devoted to a religious purpose, an incidental interruption of the religious use due to fire will not destroy the entitlement to a tax exemption; church held entitled to tax exemption for property on which burned church structure stood, storage building, and parking lots **Case # 419** (Ill. App. Ct.)

TRUSTS

See **Case # 415** (Utah)

UNEMPLOYMENT INSURANCE BENEFITS

Employee at Orthodox Jewish nursing home discharged for stealing can of soda and for bringing in non-kosher food into the facility in violation of work rules entitled to unemployment insurance benefits **Case # 403** (N.Y. App. Div.)

WITNESS

Bible; Bolstering Credibility of Witness by Holding.— See **BIBLE**

ZONING AND LAND CONTROL

Charge to Jury in Case Involving Violation of Zoning Ordinance

Defendant, claiming that his religion required him to violate a zoning ordinance, was not entitled to have the jury charged with the language of the free exercise of religion clause from the state constitution; whether state action has unconstitutionally abridged defendant’s religious freedom is a question of law for the court, not the jury **Case # 426** (N.Y.)

Church and Other Houses of Worship

Church was not entitled to special use permit allowing it to operate in commercial area; city’s interest in adopting an ordinance barring churches in a commercial zone without first obtaining a special use permit was compelling and the ordinance was the least restrictive means of furthering that interest; the ordinance did not unconstitutionally burden the church’s free exercise rights **Case # 421** (Ill. App. Ct.)

Special Use Permit.— See “Church and Other Houses of Worship”

TABLE OF STATUTES

42 U.S.C. § 2000bb (Religious Freedom Restoration Act).— See Cumulative Index, **RELIGIOUS FREEDOM RESTORATION ACT (RFRA)**

42 U.S.C. § 2000e et seq. (Title 7 of the Civil Rights Act of 1964).— See cases listed in Index under **EMPLOYMENT**

Ala. Rule of Evidence 505

Defendant's threats of violence against third parties which defendant reveals to clergyman are not covered by the communications to clergyman privilege and clergyman may testify to those threats **Case # 424** (Ala. Crim. App.)

Alaska Stat. § 18.80.240; Anchorage Mun. Code § 5.20.020

Enforcement of Alaska housing laws prohibiting apartment owners from refusing to rent to unmarried couples infringes on Christian landlords' right under the free exercise clause of the First Amendment; property was not owner-occupied; action for prospective declaratory and injunctive relief ripe for review although plaintiffs had not yet been prosecuted **Case # 407** (9th Cir.)

D.C. Code Ann. § 29-501 et seq.

Neither the District of Columbia Nonprofit Corporation Act (DCNCA) in general, nor D.C. Code § 29-531 specifically, governs the financial operations of a church which has not organized under the DCNCA or has not subsequently elected to be governed by the provisions of the Act; church had organized under the Religious Societies statute, D.C. Code § 29-901, et seq., six years before the DCNCA was enacted **Case # 412** (D.C.)

35 Ill. Comp. Stat. 200/15-40 and 200/15-125

Where realty is already being devoted to a religious purpose, an incidental interruption of the religious use due to fire will not destroy the entitlement to a tax exemption; church held entitled to tax exemption for property on which burned church structure stood, storage building, and parking lots **Case # 419** (Ill. App. Ct.)

Ky. Rules of Evidence 403, 404, and 608

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Miss. Rule of Evidence 505

Priest-penitent privilege; person who serves as a deacon in his church and visits the county jail regularly with other members of his congregation to offer spiritual assistance to prisoners, but who does not discuss personal affairs with the inmates, does not qualify as a clergyman **Case # 425** (Miss.)

Nev. Rev. Stat. § 496.030

Holiday displays at county airport paid for by the county included a Christmas tree, menorah, and a sign stating that the "County Department of Aviation Salutes the Freedom to Celebrate This Season as You Choose, Happy Holidays"; the display was not unconstitutional and the plaintiff was not denied free speech or equal protection when he was refused permission to privately erect a nativity scene in a public space in the airport **Case # 410** (D. Nev.)

N.Y. Const. Art. 1, § 3

See **Case # 423** (N.Y. App. Div.)

N.Y. Penal Law § 400.00

Amish petitioner was not exempt from statutory requirement that an application for a pistol permit be accompanied by a photograph **Case # 423** (N.Y. App. Div.)

N.Y. Relig. Corp. Law Art. 3 and §12(2)

Both an express and implied trust existed for the benefit of an Episcopal diocese with respect to the real and personal property held by a local church upon schism by the wardens and vestry members of the local church from the Protestant Episcopal Church; court had jurisdiction to resolve the property dispute even though it resulted from an ecclesiastical denial of a request by the local church officials to ordain a particular deacon to the priesthood; New York law **Case # 414** (N.Y. App. Div.)

S.C. Code Ann. § 15-3-535

The discovery rule may toll the statute of limitations in a case of repressed memory of childhood sexual abuse; however, independently verifiable objective evidence of the childhood abuse is mandated in every case and expert opinion testimony is required to prove the repressed memory **Case # 416** (S.C. Ct. App.)

Utah Code Ann., §§ 57-6-1 thru 57-6-8

See **Case # 415** (Utah) under **PROPERTY DISPUTES** in the Index

CASE # 403

Employee at Orthodox Jewish nursing home discharged, inter alia, for bringing in non-kosher food into the facility in violation of work rules entitled to unemployment insurance benefits; New York law.— *In re Claim of McDuffie*, 684 N.Y.S.2d 12 (N.Y. App. Div. 1999). Dated January 14, 1999.

The court affirmed the decision of the Unemployment Insurance Appeal Board that claimant was entitled to receive unemployment insurance benefits. Claimant worked as a certified nurse's aide for an Orthodox Jewish nursing home for over 16 years. One day, while traveling to work, claimant felt faint from fasting as part of a religious observance. Claimant purchased a donut from a shop and, upon arriving at work, sat down to eat the donut and drink a can of ginger ale to alleviate her symptoms. The employer's administrator observed claimant and demanded to know where she obtained the can of soda. Claimant stated that it came from the employer's vending machine. However, the brand of soda claimant had was the kind given to nursing home residents and was not stocked in the employer's vending machines. Claimant was therefor discharged for stealing. Although the Board found that claimant had taken the employer's can of soda, it nevertheless ruled that claimant lost her employment under nondisqualifying circumstances and was entitled to unemployment benefits. The employer maintained that the Board's decision was improper because claimant was not only terminated for theft but also for bringing non-Kosher food into the facility in knowing violation of the employer's rules. However, an employee's failure to abide by workplace rules may bring about his or her discharge without rising to the level of disqualifying misconduct. Although claimant may have shown poor judgment in this instance, given claimant's explanation for her conduct and her status as a long-standing employee with a good disciplinary record, the Board's decision was not irrational and was supported by substantial evidence.

CASE # 404

Jewish employee's claim for religious discrimination and hostile environment dismissed; additional claim that the employer failed to accommodate employee's religious observance of Yom Kippur dismissed on procedural grounds; the complaint filed with the EEOC was silent with respect to defendant's alleged failure to accommodate and the failure to accommodate claim was not "like or reasonably related to" the religious discrimination claim.— *Novitsky v. American Consulting Engineers*, 1999 U.S. Dist. LEXIS 1321 (N.D. Ill. 1999), No. 97 C 8854. Dated January 28, 1999. Opinion by J. Charles P. Kocoras.

Plaintiff employee brought an action against her former employer under, inter alia, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Plaintiff, a Jewish woman aged 58, was hired as an environmental and transportation engineer. Until November 1, 1996, plaintiff's direct supervisor was Jeffrey Novotny. Thereafter, Heilstedt became plaintiff's direct supervisor. In October 1995, Novotny granted the plaintiff's oral request for a day off on Yom Kippur, the holiest day in the Jewish religion. Sometime in the summer of 1996, Heilstadt learned he was to eventually replace Novotny as plaintiff's direct supervisor. At various times in the months of September and October 1996, Novotny spent time in Florida preparing for transfer by the employer. In 1996 Yom Kippur fell on Monday, September 23. Two to three days before the holy day, plaintiff began asking Heilstadt for the day off because it was her understanding that Heilstadt was serving as her supervisor while Novotny was in Florida. Heilstadt denied the requests. The employer disputed that Heilstadt was then acting in a supervisory capacity or that Heilstadt possessed any authority to grant employees time off during that period. Defendant asserted that if Novotny was unavailable during September 1996, employees were to make any requests for time off to Richard Peck, the regional manager who hired plaintiff. Plaintiff, who never asked Peck for time off, worked on Yom Kippur in 1996. Plaintiff also claimed that in May 1996, at a meeting attended by Peck, Heilstadt, and a co-employee named Thomas Hein, Hein twice stated about one of the company's vendors "What do you want, they are Jews." Plaintiff further claimed that in January 1997, Maria Baranowski, another co-employee, told one of her co-workers that Baranowski's teenage daughter was being influenced, in a negative way, by "Russian Jewish kids." Plaintiff also claimed Baranowski made sarcastic, derogatory comments about Jewish weddings and the

traditional Jewish tradition of getting married under a Chupah, a wedding canopy. Finally, plaintiff claimed that after Heilstadt learned that plaintiff was planning to purchase a house in Buffalo Grove, Illinois, Heilstadt stated that “Buffalo Grove has many odd and different people,” which plaintiff understood to refer to Jews because Buffalo Grove was known to have a large Jewish population. Defendant terminated plaintiff’s employment in February 1997, claiming it lacked sufficient projects in the plaintiff’s area of expertise to warrant further employment. Richard Peck alone made the decision to terminate plaintiff. Plaintiff filed with the Equal Employment Opportunity Commission a charge of age and religious discrimination. Plaintiff’s charge did not specify that in 1996 defendant failed to accommodate her religious observance of Yom Kippur. Only her subsequent complaint in the Title 7 action specifically raised the charge of failure to accommodate. After granting defendant summary judgment dismissing plaintiff’s claim of age discrimination, the court granted summary judgment dismissing the claim for religious discrimination and hostile work environment, holding that plaintiff failed to rebut defendant’s legitimate nondiscriminatory reason for discharging her and failed to present direct evidence that defendant discriminated against her based upon her religion. None of the allegedly derogatory religious statements were made by Peck, the person with the ultimate authority to discharge plaintiff. Title 7 harassment includes conduct that unreasonably interferes with an individual’s work performance or creates an intimidating, hostile, or offensive work environment. Relatively isolated instances of nonsevere misconduct do not support a claim of hostile work environment. Other than Thomas Hein’s alleged comment, none of the alleged comments was explicitly derogatory in nature, rather they required an interpretation by plaintiff that her co-workers meant to offend her. Plaintiff made no allegations that any of defendant’s employees physically threatened or humiliated her. There was no indication that the alleged comments interfered with plaintiff’s ability to perform her work. With respect to Hein’s comments, they were not directed at the plaintiff but rather at one of defendant’s vendors. This singular incident was not sufficiently severe or pervasive that a reasonable person would find it hostile. As to plaintiff’s claim that defendant failed to accommodate her request to take off on Yom Kippur in 1996, it was procedurally barred. A plaintiff may pursue a Title VII claim in court not explicitly included in an EEOC complaint only if her allegations in the action are like or reasonably related to the allegations contained in the EEOC complaint. Plaintiff’s EEOC charge contained allegations relating to her allegedly hostile work environment and claims that she was terminated on the basis of her age and religion. The EEOC charge was silent with respect to

defendant’s alleged failure to accommodate. The court rejected plaintiff’s argument that her failure to accommodate claim was “like or reasonably related to” her religious discrimination claim. Other than the claimed common thread of religion, the failure to accommodate claim and the wrongful termination claim implicated entirely different circumstances and participants. The court rejected plaintiff’s claim that her EEOC Charge Questionnaire, which referenced defendant’s alleged failure to accommodate her request to celebrate Yom Kippur, saved her accommodation claim. The court did not believe that the “substantial compliance” approach enumerated in *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir. 1991) and *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132 (7th Cir. 1994) applied. Plaintiff’s final EEOC charge contained the allegation that: “I believe that I have been discriminated against on the basis of my religion, Jewish, . . . in that I was harassed, I complained to [defendant] and I was ultimately terminated. . . .” The charge contained no allegations of failure to accommodate. Unlike the *Philbin* or *Downes* cases, the court was not faced with allegations that the EEOC failed to pursue the plaintiff’s claim in a timely manner or that the EEOC negligently investigated the plaintiff’s claims. The plaintiff signed the final EEOC charge on the same day she completed the EEOC Charge Questionnaire. She was an educated woman and worked as an engineer. Plaintiff could and should have brought to the EEOC’s attention the commission’s failure to include any mention of Yom Kippur within the EEOC charge.

CASE # 405

Discharged employee did not suffer an adverse employment action in response to her request to take vacation time to attend a religious convention; plaintiff also failed to file a charge of religious discrimination with the EEOC within 300 days after the allegedly discriminatory act occurred.— *Dunn v. Old Republic Life Insurance Co.*, 1999 U.S. Dist. LEXIS 1349 (N.D. Ill. 1999), No. 97 C 4994. Dated February 4, 1999. Opinion by J. James B. Moran.

Plaintiff sued her employer for alleged religious and racial discrimination in violation of Title VII, 42 U.S.C. § 2000e et seq. The court granted defendant’s motion for summary judgment. In August 1991, plaintiff, a receptionist, requested two weeks vacation in late September and early October to attend a religious convention. Her supervisor denied the request because

receptionists were only able to take vacations of that length during the summer months. It was suggested that plaintiff consider transferring to another department that had more vacation scheduling flexibility and in August 1991 plaintiff's request to transfer to the position of mail clerk was granted. Consequently, plaintiff was allowed to attend the religious convention in 1991 and every other year in which she was employed. Plaintiff's duties as a mail clerk included opening, sorting and stamping the mail. The employer contended that in late 1996 plaintiff was given the additional duty of paying bills. Plaintiff claimed that she was assigned to pay bills only when her regular work load was low. The parties agreed, however, that a number of bills were sent to plaintiff in early 1997 and instead of paying them, or telling her supervisor she had no time to do so, plaintiff piled them in a stack and later put the stack in a box. Sometime thereafter, the supervisor discovered the unpaid bills and plaintiff was terminated. The employer was held entitled to judgment on plaintiff's religious discrimination claim for two reasons: (1) it was time-barred; and (2) plaintiff suffered no adverse employment action because of her religious beliefs. To preserve her claim, plaintiff had to file a charge of religious discrimination with the EEOC within 300 days after the allegedly discriminatory act occurred. The allegedly discriminatory act was the denial of her vacation request, which occurred in August 1991. Plaintiff did not file a charge with the EEOC until March 1997, more than five years later. Thus, the religious discrimination claim was time-barred. And even if it were timely, the employer would still be entitled to judgment on the claim. To make a prima facie case of religious discrimination, an employee must show that: (1) a bona fide religious practice conflicts with an employment requirement, (2) he or she brought the practice to the employer's attention, and (3) the religious practice was the basis for the adverse employment action. An adverse employment action is one that causes a materially adverse change in the terms or conditions of employment. It was undisputed that plaintiff did not suffer an adverse employment action in response to her request to take vacation time to attend a religious convention.

CASE # 406

Insurer of church had no duty to defend against action by discharged church employee for defamation, invasion of privacy, and discrimination in employment; excluded from coverage was a suit for personal injury sustained as a result of an offense directly or indirectly related to employment.— *Parish of Christ Church v. Church Insurance Co.*, 166 F.3d 419 (1st Cir. 1999), No. 98-1692. Dated February 3, 1999. Opinion by J. John R. Gibson.

The Parish of Christ Church brought an action for a declaration that the general liability insurance policy issued to it by the Church Insurance Company provided coverage for an action claiming defamation, invasion of privacy, and discrimination in employment brought by a former music director of the Parish. The First Circuit Court of Appeals affirmed the grant of summary judgment in favor of the insurer. Renea Waligora was the music director at the parish. After the parish's pastor dismissed Waligora from her job, Waligora filed a lawsuit in Massachusetts state court, naming the parish, the pastor and the Protestant Diocese of Massachusetts as defendants. Waligora alleged that the pastor discharged her because she suffered from Post-Traumatic Stress Disorder and Multiple Personality Disorder. The complaint alleged that: (1) Among Waligora's responsibilities as Music Director were to lead the adult and children's vocal and handbell choirs. (2) On December 26, 1993 the pastor fired Waligora. (3) In a letter dated December 29, 1993, a former parishioner and member of the Parish choir sought the intervention of the Bishop of the Diocese, but the Bishop did nothing to reverse Waligora's termination of employment. (4) Beginning in or about November, 1993, and thereafter, the pastor made and published to members of the parish statements that: (i) Waligora was very sick and disturbed and needed to be under intense medical treatment; (ii) that he (the pastor) had consulted with a psychiatrist whose advice indicated that the children should be protected from Waligora; (iii) that after consulting a psychiatrist he (the pastor) felt he could no longer trust Waligora and was afraid to leave Waligora alone with the children; (iv) that if others learned more about Multiple Personality Disorder they would understand why Waligora had to be fired. The parish removed Waligora's suit to federal court, and after counts based on the Americans with Disabilities Act were dismissed, the case was remanded to the state court where it was presently pending. The parish carried a general liability insurance policy which indemnified the parish for damages resulting from personal injury, including injury from defamation. However, the policy

excluded from coverage “personal injury sustained by any person as a result of an offense directly or indirectly related to the employment of such person by the Named Insured.” The key issue was whether Waligora’s suit was for personal injury sustained as a result of an offense directly or indirectly related to her employment. The court held that the policy exclusion applied and the insurer had no duty to defend the parish. This case was similar to three others; *Interco Inc. v. Mission Ins., Co.*, 808 F.2d 682 (8th Cir. 1987); *Frank and Freedus v. Allstate Ins. Co.*, 45 Cal. App. 4th 461, 52 Cal. Rptr. 2d 678 (1996); *Loyola Marymount Univ. v. Hartford Accident & Indemn. Co.*, 219 Cal. App. 3d 1217, 271 Cal. Rptr. 528 (1990), involving policies with similar exclusions. Defamatory statements providing an explanation for termination or directed to performance are “related to” employment. Alleged offenses occurring as part and parcel of an allegedly wrongful termination are plainly “related” to employment. Post-employment defamations can be directly or indirectly related to employment, and thus can fall within an exclusion of the sort at issue here. Because the allegations in the complaint contained statements directed to Waligora’s abilities and job performance and were explanations as to why her employment was terminated, the offenses were, at the least, indirectly related to Waligora’s employment, if not directly related.

CASE # 407

Enforcement of Alaska housing laws prohibiting apartment owners from refusing to rent to unmarried couples infringes on Christian landlords’ right under the free exercise clause of the First Amendment; property was not owner-occupied; action for prospective declaratory and injunctive relief ripe for review although plaintiffs had not yet been prosecuted.— *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999), Nos. 97-35220 and 97-35221. Dated January 14, 1999. Opinion by J. Diarmuid F. O’Scannlain. Dissenting opinion by J. Michael Daly Hawkins. Cf. **Case # 366, February 1999 Reporter.**

Kevin Thomas and Joyce Baker, owners of residential rental properties in Anchorage, Alaska, were professing Christians who believed that cohabitation between unmarried individuals constituted the sin of fornication and that facilitating cohabitation in any way was tantamount to facilitating sin. As a result, they refused to rent to unmarried persons who planned to live

together. Both the State of Alaska and the City of Anchorage had laws making it unlawful to refuse to sell, lease, or rent real property to a person because of “marital status.” Alaska Stat. § 18.80.240; Anchorage Mun. Code § 5.20.020. Under Alaska law, discrimination on the basis of “marital status” included discrimination against unmarried couples. *Foreman v. Anchorage Equal Rights Comm’n*, 779 P.2d 1199, 1202 (Alaska 1989). Seeking prospective declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201, the landlords successfully argued that enforcement of the antidiscrimination laws against them would violate their constitutional rights under the Free Exercise Clause of the First Amendment. Plaintiffs’ claim was ripe for review under 28 U.S.C. § 2201, the Declaratory Judgment Act because, although they had not yet been prosecuted, they demonstrated a reasonable threat of prosecution for conduct allegedly protected by the Constitution. Given the facts that plaintiffs were continuing to violate the antidiscrimination laws, that the laws had been, and presently were being, enforced against similarly situated landlords, that Alaska and Anchorage authorities were aware of Thomas and Baker’s persistent refusals to rent to unmarried couples, and that the state human rights commission was under an ongoing and affirmative duty to seek out and to punish offending conduct, it could not be said that plaintiffs’ fears of enforcement were imaginary or wholly speculative. Thus, their claims were justiciable.

Employment Division v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990), held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes or proscribes. The Supreme Court made clear, however, that a law failing to satisfy the requirements of neutrality and general applicability must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). The Ninth Circuit rejected plaintiffs’ contention that the Alaska statute and Anchorage ordinance were not of “general applicability” and hence were subject to strict First Amendment scrutiny. Thomas and Baker argued the lack of general applicability by pointing to the fact that the Alaska statute prohibited refusing to sell, lease, or rent real property to a person because of “marital status” while expressly allowing the sale, lease or rental of certain classes of housing to “singles” or “married couples” only. See Alaska Stat. § 18.80.240. Likewise, the Anchorage ordinance excepted from its scope landlords who rented space in “individual homes wherein the

renter or lessee would share common living areas with the owner, lessor, manager, agent or other person.” Anchorage Mun. Code § 5.20.020. Thus, according to Thomas and Baker, marital status discrimination was specifically allowed under certain circumstances, rendering the laws constitutionally suspect. In rejecting the validity of plaintiffs’ argument, the Ninth Circuit noted that the underinclusiveness at play in *Lukumi* was of a different constitutional order altogether from that at issue here. The ordinances in *Lukumi* were drafted with care to forbid few killings of animals except those occasioned by religious sacrifice in the Santaria religion. Here, in contrast, the exceptions to the ban on discrimination based on marital status – which consisted of only a single exception per challenged provision – was relatively inconsequential. In *Lukumi*, the ordinances applied essentially only to the Santeria religion; here, the challenged laws applied essentially to all landlords. In *Lukumi*, the Court observed that the pattern of exemptions present in the challenged ordinances betrayed as their object the suppression of religious practice. There was no hint that the Alaska laws were drafted with care to forbid few instances of marital status discrimination except those occasioned by religious conviction. There was no indication that Alaska lawmakers were impelled by a desire to target or suppress religious exercise. The housing laws had the purpose of preventing discrimination on the basis of marital status and any burden on religiously motivated conduct, even if substantial, was incidental.

Plaintiffs’ then proceeded to argue that the Alaska statutes should be subject to strict scrutiny under the hybrid-rights exception provided for in *Employment Division v. Smith* because the statutes implicated not only plaintiffs’ rights to free exercise, but other constitutional rights as well: (1) their right, grounded in the Fifth Amendment, to exclude others from their property, and (2) their First Amendment right to free speech. (Free speech was allegedly implicated because the Alaska and Anchorage laws made it unlawful for a landlord to “make a written or oral inquiry or record” of the marital status of a prospective lessee, or to “represent to a person that real property is not available for inspection, sale, rental, or lease” on the basis of the lessee’s marital status. The Anchorage ordinance also prohibited landlords from making, printing, or publishing any communication or statement indicating any preference or discrimination based upon marital status.) After an extensive analysis of the doctrine and the cases, the Ninth Circuit concluded that an individual claiming to be within the hybrid-rights exception may not rest upon a bald assertion that a companion right exists or the fact that a companion right is somehow “implicated” by a government policy. However, he is not required to show that the law he challenges is

invalid under a companion provision alone, without regard to the Free Exercise Clause. Rather, a plaintiff invoking the hybrid exception must make out a “colorable claim” that a companion right has been infringed. In order to trigger strict scrutiny, a hybrid-rights plaintiff must show a “fair probability” - a “likelihood” - of success on the merits of his companion claim. In so ruling, the Ninth Circuit followed *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694, 700 (10th Cir. 1998). See **Case # 57, February 1998 Reporter**. Turning to the question of whether Thomas and Baker demonstrated a “colorable claim of infringement” with respect to their so-called companion rights, the Ninth Circuit first addressed the allegation that the Takings Clause of the Fifth Amendment provides a property owner constitutional protection to exclude others from the owners’ property. The right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property. Technically speaking, however, the Takings Clause does not “provide” the right to exclude; it merely protects against that right being taken without just compensation. The relevant inquiry, therefore, was not whether Thomas and Baker possessed a right to exclude others from their rental properties. They did. The question was whether, by forbidding them from refusing to sell, lease, or rent the real property to a person because of marital status, the State (or the municipality) had “taken” the right to exclude. Insofar as they were compelled by the laws in issue to entertain the rental applications of unmarried cohabitants, Thomas and Baker were prevented from fully exercising their rights to exclude. However, not every destruction or injury to property by governmental action has been held to be a “taking” in the constitutional sense. In judging whether a government regulation of property constitutes a “regulatory taking,” three factors are particularly important in the court’s calculus: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. Under the “character-of-the-governmental action” prong, a “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the social good. The Ninth Circuit concluded that while the challenged housing laws did not rise to the level of a permanent physical occupation sufficient to trigger a per se right to compensation, the laws authorized a “physical invasion” of the landlords’ property just the same. Thus, Thomas and Baker made out a substantial or colorable claim that their rights under the Takings Clause of the Fifth Amendment had been infringed. Hence, the Fifth

Amendment served to “hybridize” their Free Exercise Clause challenge to the Alaska statute and the Anchorage ordinance. With respect to Thomas and Baker’s free speech challenge, the Ninth Circuit first determined that the speech sought to be regulated was not commercial speech, a form of speech afforded a lesser degree of protection, but rather fully protected noncommercial speech. Here, the expression forbidden by the laws was at its essence, religious speech, which enjoyed plenary First Amendment protection. Moreover, both the Alaska statute and the Anchorage ordinance purported to regulate a landlord’s speech based upon its content. Under the laws, apartment owners and lessors were permitted to make inquiries, representations, and statements regarding some subjects, such as a prospective lessee’s annual income, but not others, such as the lessee’s marital status. Government may not regulate speech based on its substantive content or the message it conveys and content-based regulations of expression are presumed invalid under the First Amendment. Thus Thomas and Baker made a colorable claim that the Alaska housing laws infringed their rights to free speech. Thus, the First Amendment also served to “hybridize” their Free Exercise challenge to both the Alaska statute and the Anchorage ordinance.

Having concluded that that plaintiffs’ successfully demonstrated hybrid-rights claims under the takings and free speech clauses and that the statutes had to be justified by a compelling government interest, the Ninth Circuit proceeded to hold that the governments of Alaska and Anchorage had placed a substantial burden on the observation of a central religious belief or practice and that a compelling governmental interest did not justify the burden. As a result, neither the Alaska statute nor the Anchorage ordinance could be enforced against landlords, like Thomas and Baker, who for religious reasons refused to rent to unmarried couples. The laws presented Thomas and Baker with a Hobson’s Choice between (1) violating their religious beliefs by renting to unmarried couples, or (2) suffering punishment for refusing to rent to unmarriages, or (3) altogether forsaking their livelihoods as apartment owners . The choices rendered the burden on their religious beliefs “substantial.” The Ninth Circuit dismissed the defendant’s reliance on the statement in *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982), that when followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in the activity. According to the Ninth Circuit, the *Lee* Court never intimated that the fact that a free exercise dispute arises in a “commercial” context in and of itself affects the substantiality of the claimed

burden. The Ninth Circuit also rejected the argument that Thomas and Baker could avoid having either to compromise their religious beliefs or to face criminal penalties by simply “cashing out,” that is, by selling their apartments and redeploying their capital in another investment. Reliance upon *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961), was misplaced. There, the Supreme Court rejected challenges to a Pennsylvania Sunday-closing law brought by Orthodox Jewish merchants. The storeowners claimed that if they wished to exercise their religious beliefs by remaining closed on Saturday, enforcement of the Sunday closing law would put them at a distinct economic disadvantage vis a vis their non-Sabbatarian competitors. The Court refused their argument, stating that a governmental regulation that merely operates so as to make the practice of an individual’s religious beliefs more expensive does not impose a sufficiently “substantial burden” to trigger Free Exercise Clause scrutiny. The burden imposed upon Thomas and Baker was qualitatively different. According to the Ninth Circuit, the Alaska housing laws de facto banished both Thomas and Baker from the Alaska rental market altogether and forced them to forsake their livelihoods as apartment owners and lessors. The laws did not effect a mere marginal reduction in business; they put Thomas and Baker out of business. Thus, the Ninth Circuit concluded that the Alaska laws substantially burdened Thomas and Baker’s religious rights. Nor did a compelling government interest justify the substantial burden. Alaska’s purported interest in preventing marital-status discrimination was simply not sufficiently “paramount” to satisfy strict scrutiny. Only twice had the Supreme Court recognized the prevention of discrimination as an interest compelling enough to justify restrictions on constitutional rights. In *Bob Jones University v. United States*, 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983), the Court concluded that there is an overriding interest in eradicating racial discrimination. In *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984), the Court acknowledged a compelling government interest in preventing discrimination based upon gender. Although the *Roberts* Court was less than clear with respect to the precise considerations that led it to conclude that the elimination of gender discrimination constituted a compelling government interest, the Court in *Bob Jones* based its decision upon what it deemed a firm national policy against race discrimination. For support, the Court adverted to examples of anti-race-discrimination measures taken by all three branches of the federal government. The Ninth Circuit observed that there was no similar “firm national policy” against marital-status discrimination. The fact that courts had not given unmarried couples any special consideration under the

Equal Protection Clause was potent circumstantial evidence that society lacked a compelling governmental interest in the eradication of discrimination based upon marital status. Although recognizing that there were a handful of federal statutes that did forbid marital-status discrimination, the Ninth Circuit concluded that a “handful” do not a “firm national policy” make. Alaska law was likewise unavailing. Alaska law alone did not suffice to demonstrate a “firm national policy.” Nor, could a single state’s law evince a compelling government interest for federal constitutional purposes. And even if it were assumed that state law could alone suffice to create a compelling governmental interest in preventing discrimination against unmarried couples, Alaska’s did not meet this constitutional test. The very laws under review contained exceptions for “married-only” housing, see Alaska Stat. § 18.80.240, and for space rented in the home of the landlord, see Anchorage Mun. Code § 5.20.020. Moreover, Alaska law expressly discriminated against unmarried couples in a number of contexts. For example, intestate succession did not benefit an unmarried partner of a decedent; workers’ compensation death benefits were available only for the surviving spouse, child, parent, grandchild, or sibling; there was no marital communication privilege between unmarried couples; and there was no insurance coverage for an unmarried partner under a family accident insurance policy. Alaska’s “underenforcement” of its purported interest in eradicating marital-status discrimination was critical, because it is established in strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest “of the highest order” when it leaves appreciable damage to that supposedly vital interest unprohibited. There was simply no support from any quarter for recognizing a compelling government interest in eradicating marital-status discrimination that would excuse what would otherwise be a violation of the Free Exercise Clause.

Finally, it was argued by defendants that exemptions granted under the Free Exercise Clause violate the Establishment Clause where the conduct sought to be protected by the Free Exercise Clause would result in direct injury to other identifiable persons, here the potential unmarried lessees. But here, the only palpable injury suffered by an unmarried tenant turned away by a Christian landlord for religious reasons was a marginal reduction in the number of apartment units available for rent. The “harm” to the rejected lessees, if any, was economic, not religious; and, as such, it was beyond the pale of the Establishment Clause. Nor, by exempting Thomas and Baker from the scope of the Alaska anti-marital-discrimination laws, did the Court “establish” or otherwise endorse Christianity as an official state religion. The Ninth Circuit said that its opinion reflected nothing more than the governmental obligation of

neutrality in the face of religious differences. Compare the arguments in the dissent.

CASE # 408

Court applied incorrect criteria in granting, over the objections of the patient and her parents, an order permitting a hospital to administer a blood transfusion to an unemancipated 17 year old Jehovah Witness in the event that a life-threatening traumatic event occurred in the course of her treatment; Massachusetts law.— *In re Rena*, 46 Mass. App. Ct. 335, 705 N.E.2d 1155 (Mass. App. Ct. 1999), No. 99-P-199. Dated February 16, 1999. Opinion by J. Porada.

When a 17 year old patient, Rena, and her parents, Jehovah’s Witnesses, refused to allow the administration of a blood transfusion to Rena, a Massachusetts Superior Court judge issued an order permitting the hospital to administer a transfusion in the event that “a life-threatening traumatic event” occurred in the course of treatment. The Appeals Court vacated the order. Rena was a junior in high school. Since she was ten years old, she had been a Jehovah’s Witness. A principal tenet of her religion was that the act of receiving blood precluded an individual from resurrection and everlasting life after death. Consistent with this belief, she periodically executed a written medical directive declaring that she would not assent to a blood transfusion. She last executed such a directive on January 12, 1999. She understood that her refusal could result in death in the event of a life-threatening event. On January 26, 1999, Rena suffered a lacerated spleen. The hospital presented medical evidence that in the event a blood clot broke loose from the spleen laceration, massive hemorrhaging requiring a blood transfusion to sustain life might result. The Superior Court judge was held to have erred in concluding that the best interests of Rena, an unemancipated minor, and the State’s interest in the protection of a minor’s welfare and life, mandated judicial authorization for administering a blood transfusion to Rena, if, in the opinion of her physicians, a life-threatening event occurred in the course of her treatment. The Appeals Court observed that the law is well settled in Massachusetts that a competent adult may refuse medical treatment even if the treatment is necessary to save her life. The law is also clear that when parents refuse medical treatment necessary for the preservation of an unemancipated child’s life, a court may authorize the treatment to be administered after weighing the child’s best interests, the parents’ interests, and the

State's interests. The best interests of a child are determined by applying the same criteria applicable in substituted judgment cases, namely considering (1) the patient's expressed preferences, if any; (2) the patient's religious convictions, if any; (3) the impact on the patient's family; (4) the probability of adverse side effects from the treatment; (5) the prognosis without treatment; and (6) the present and future incompetency of the patient in making that decision. In assessing the child's expressed preference, religious convictions, and present and future incompetency, it is appropriate for a judge to consider the maturity of the child to make an informed choice. The law provides no bright line as to when a minor reaches an age to make certain decisions in life. Although the Superior Court judge did consider Rena's wishes and her religious convictions, he made no determination as to her maturity to make an informed choice. This was error particularly in the circumstances of this case where Rena was soon to attain the age of eighteen. In addition, in assessing Rena's preferences and religious convictions, the Superior Court judge should not have relied solely on the representations made by her attorney and her parents but should have heard Rena's own testimony as she apparently had the testimonial capacity to answer questions. Only after evaluating this evidence in light of her maturity could the judge properly determine her best interests. Because the lower court had not decided that the State's interest in preserving a child's life invariably controls in every case where State intervention is sought for life-saving measures, the Appeals Court said it ordinarily would remand a case such as this to the lower court for an expedited hearing to determine the best interests of the child and to reassess the three-part balancing test of Rena's best interests, the rights of her parents, and the interests of the State. But because Rena had been discharged from the hospital, there no longer appeared to be an immediate need for the hospital's authorization or judicial intervention in the matter. The Superior Court's order was therefore vacated, not on the merits, but because it had become moot.

CASE # 409

Holiday display erected by city featuring menorah, creche and Christmas tree placed in front of City Hall accompanied by sign stating that the display celebrated the city's diverse cultural and ethnic heritages was unconstitutional; city display containing creche, menorah, Christmas tree, figures of Santa Claus and Frosty the Snowman, a red sled, and Kwanzaa symbols on the tree, accompanied by signs stating that the display was one of a series of displays celebrating city's cultural and ethnic diversity, was constitutional.— *American Civil Liberties Union of New Jersey v. Schundler*, 168 F.3d 92 (3d Cir. 1999), No. 98-5021. Dated February 16, 1999. Opinion by J. Alito. Dissenting, J. Nygaard.

This case concerned the constitutionality of two Jersey City holiday displays. The first, which featured a menorah, a creche and a Christmas tree, was annually placed in front of City Hall for several decades. In 1994, the City placed a sign adjacent to the display stating: "Through this display and others throughout the year, the City . . . is pleased to celebrate the diverse cultural and ethnic heritages of its peoples." The City maintained that the sign's reference to other events referred to, among other things, the City's annual commemoration of Ramadan, the annual parade held to celebrate the Hindu New Year, and a wide variety of cultural events related to the many diverse ethnic groups in the City. In 1995, the District Court permanently enjoined the City from continuing the practice of erecting this or any substantially similar display, and its decision was affirmed by a panel of the Third Circuit Court of Appeals (the prior panel). See *ACLU of N.J. v. Schundler*, 931 F. Supp. 1180 (D.N.J. 1995), *affirmed*, 104 F.3d 1435, 1444-50 (1997). Jersey City subsequently moved for relief from that order, contending that the Supreme Court's intervening decision in *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997), had undermined the prior panel's reasoning. The district court denied the City's motion, and a different panel of the Third Circuit Court of Appeals (the present panel) affirmed that decision. In *Agostini*, the Supreme Court modified the Establishment Clause test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), which asked (1) whether a challenged government practice had a secular purpose, (2) whether its principal or primary effect advanced or inhibited religion, and (3) whether it created an excessive entanglement of the government with religion. *Agostini* appeared to hold that entanglement, standing alone, does not render an action unconstitutional if the action

does not have the overall effect of advancing, endorsing, or disapproving of religion. While the present panel was inclined to agree with the City that the prior panel's entanglement analysis was no longer valid in the wake of *Agostini*, it held that it did not follow that relief from the prior panel's order enjoining the initial display was required. Before discussing entanglement at all, the prior panel concluded that Jersey City's original display violated the Establishment Clause because it communicated an endorsement of Christianity and Judaism. Thus, the original display was declared unconstitutional by the prior panel irrespective of the presence or absence of excessive entanglement.

After the original display was enjoined, Jersey City put up a second, modified, display containing a creche, a menorah, a Christmas tree, as before, but this time accompanied by large plastic figures of Santa Claus and Frosty the Snowman, a red sled, and Kwanzaa symbols on the tree. In addition, the display contained two signs stating that the display was one of a series of displays put up by the City throughout the year to celebrate its residents' cultural and ethnic diversity. The district court, after initially upholding this display, reached the opposite conclusion on remand by the prior panel of the Third Circuit Court of Appeals. The district court interpreted certain statements in the prior panel's opinion to mean that the prior panel viewed the modified display as constitutionally dubious. The present panel concluded, however, that the prior panel's statements on which the district court relied were merely dicta and that the prior panel did not render a decision regarding the constitutionality of the modified display. Therefore, the present panel was obligated to analyze the question anew in accordance with its own best independent judgment and was not bound to follow the dicta of the prior panel. Reversing the district court, the present panel upheld the constitutionality of the modified display, finding it to be indistinguishable in any significant respect from the displays upheld by the Supreme Court in *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984), and *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989). *Lynch v. Donnelly* upheld the constitutionality of a holiday display erected by the City of Pawtucket. Situated in a park owned by a nonprofit organization and located in the heart of the shopping district, the display consisted of, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that read "Seasons Greetings" and a creche. All components of the display were owned by the City. Writing for the Court, Chief Justice Burger held that the display had a

secular purpose and that the inclusion of the creche did not have the principal or primary effect of advancing religion. Nor did Justice Burger find any administrative entanglement with religion, observing that there was no evidence of contact with church authorities concerning the content or design of the exhibit. Justice O'Connor, who joined the opinion of the Court and cast the critical fifth vote in favor of constitutionality, wrote a concurring opinion to the effect that the central issue was whether Pawtucket had endorsed Christianity by its display of the creche. She found that the evident purpose of including the creche in the larger display was not promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols and that celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose. In *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989), two separate displays on public property in downtown Pittsburgh were in issue. The first was situated on the Grand Staircase of the Allegheny County Courthouse. This display consisted of a creche, a banner proclaiming "Gloria in Excelsis Deo!" (Glory to God in the highest!), some poinsettias, a small decorated evergreen, and a plaque stating that the display had been donated by the Holy Name Society, a Roman Catholic group. Five Justices, including Justice O'Connor, held that this display violated the Establishment Clause. Here nothing in the context of the display detracted from the creche's religious message. The creche stood alone as the single element of the display on the Grand Staircase and the presence of Santas or other Christmas decorations elsewhere in the courthouse failed to negate the endorsement effect of the creche. In a separate concurrence, Justice O'Connor held that the creche, standing alone in the county courthouse, had the unconstitutional effect of conveying a government endorsement of Christianity. A splintered majority of the Court reached a different conclusion concerning the second display, which was located in front of the City-County Building. The second display included three elements: a decorated 45-foot Christmas tree; an 18-foot menorah that was owned by a Jewish group, but was stored, erected, and removed each year by the City; and a sign stating: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of freedom." Six Justices concluded that this display was constitutional, but they set out their views in three separate opinions. Justice O'Connor concluded in a separate concurrence that the combined holiday display of a Chanukah menorah, a Christmas tree, and a sign saluting liberty did not have the effect of conveying an endorsement of religion. By accompanying its display of a Christmas tree – a secular symbol of the

Christmas holiday season – with a salute to liberty, and by adding a religious symbol from a Jewish holiday celebrated at roughly the same time of year, the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season. Justice O'Connor rejected the suggestion that the display conveyed a message that endorsed religion over nonreligion, observing that a reasonable observer would appreciate that the combined display was an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens. Justice O'Connor's opinion set out the position the present panel of the Third Circuit Court of Appeals felt itself compelled to follow. The present panel was unable to perceive any meaningful constitutional distinction between Jersey City's modified display and those displays that the Supreme Court upheld in *Lynch* and *Allegheny County*. But see the dissent, and the present panel's majority response in which it very carefully analyzed all the details in which Jersey City's modified display varied from those sustained in *Lynch* and *Allegheny County*, variations the present panel found to be without significance.

The present panel found it necessary to explain why it did not agree with some of the prior panel's dicta regarding the modified display. The central point of disagreement concerned the prior panel's suggestion that any inclusion of a creche – but not a menorah – in a display in front of a prominent government building, such as a city hall, is incompatible with the Establishment Clause. The prior panel observed:

“Government display of a creche [unlike a menorah] cannot convey a meaning separate from the very act it is meant to portray. A creche depicts the Birth of Christ, the event that lies at the foundation of Christianity. In *Allegheny County*, the Court determined that displays containing a creche as a primary focal point, which are situated at the seat of government, are constitutionally impermissible as they convey a message of government endorsement. This is consistent with *Lynch*, in which the Court permitted a creche that was part of a display in a private park depicting a ‘winter wonderland’ scene because, in context, there were no external indicia of government endorsement.”

The present panel was of the opinion that this dicta misinterpreted both *Lynch* and *Allegheny County*. First, the prior panel's distinction between a creche and a menorah necessarily rested, in the opinion of the present

panel, on the mistaken view that these two symbols differed critically with respect to the nature or degree of the religious message they conveyed. The present panel said that Justice O'Connor flatly rejected this suggestion in her pivotal *Allegheny County* opinion. Once it is recognized that a creche and a menorah are to be regarded as equivalent religious symbols for the purpose of analyzing holiday displays, the similarity between the constitutionally permissible display in front of the City-County Building in Pittsburgh and the modified display in front of Jersey City's City Hall becomes, in the opinion of the present panel, apparent. Second, the present panel could not agree with the prior panel's suggestion that in *Lynch* “the Court permitted a creche that was part of a display in a private park depicting a ‘winter wonderland’ scene because, in context, there were no external indicia of government endorsement.” In *Allegheny County*, Justice O'Connor, as well as Justice Blackmun, seems to have attributed some significance to the fact that the display in *Lynch* was situated on private property in the center of Pawtucket's commercial district. However, to go further, as the prior panel did, and say that the Pawtucket display bore “no external indicia of government endorsement” was not correct. In *Lynch*, every Justice, whether in the majority or the dissent, agreed that by means of its holiday display the city of Pawtucket was endorsing some message. The Justices differed in their interpretation of the message that the display conveyed, but they all understood that the message was linked to the City. Once these two points were recognized – that the menorah and the creche had to be viewed as equivalent religious symbols and that the display in *Lynch* indisputably involved the conveyance of a government message – the foundation of the prior panel's dicta was, in the present panel's opinion, undermined.

CASE # 410

Holiday displays at county airport paid for by the county included a Christmas tree, a menorah, and a sign stating that the “County Department of Aviation Salutes the Freedom to Celebrate This Season as You Choose, Happy Holidays”; the display was not unconstitutional and the plaintiff was not denied free speech or equal protection when he was refused permission to privately erect a nativity scene in a public space in the airport.— *Grutzmacher v. County of Clark*, 33 F. Supp. 2d 896 (D. Nev. 1999), No. CV-S-98-01487-PMP (RLH). Dated January 7, 1999. Opinion by J. Philip M. Pro.

Clark County owned and operated an Airport. Nevada law authorized a municipality to build an airport and pay for facilities needed “for any . . . use related to the operation of an aviation or air transportation business.” Nev. Rev. Stat. § 496.030(1)(d) (1997). As provided for in other provisions of the statute, the Airport contained numerous services including advertising displays, retail shops, restaurants, and other passenger services. All of the structures used for these services were owned by the county. The Airport was not financed by tax revenues, but was funded predominately through user fees. The commercial ventures located in the Airport made up approximately half of the user fees, while fees from airline sources, like landing fees, terminal charges, and gate fees, make up the other half. The airport also received 12.5% of its funds from a federal grant. The grant required the County to maximize the nonairline revenues produced by the Airport. The regulations governing airport operations prohibited placement of signs or other written material on any surface and prohibited the erection of any table, chair, mechanical device, or other structure. Although the Airport rules did not allow private parties to erect structures, in 1996 the Airport’s public area contained a display with a Christmas tree, a menorah, and a sign that stated that: “Chabad [a Jewish religious group] and Clark County Department of Aviation Wish you a Happy Chanukah.” In 1997, the Director of the Clark County Department of Aviation decided to allow the menorah, but not the sign. However, during the 1997 holiday season, the Airport employees put up the same display as in 1996, neglecting to remove the Chabad sign. However, the Chabad sign was removed once the Airport supervisory employees discovered the error. In 1998, the two holiday displays at the Airport each included a Christmas tree, a menorah, and a sign stating that: “Clark County Department of Aviation Salutes the Freedom to Celebrate This Season as You Choose, Happy Holidays.” Plaintiff raised two distinct

constitutional issues: (1) that the Airport’s 1998 holiday display was unconstitutional by favoring Judaism over Christianity and (2) that the Airport acted unconstitutionally by refusing permission allowing him to display a nativity scene. The court granted summary judgment in favor of defendants and against plaintiff. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989), six justices found that a city’s holiday display consisting of a menorah, a Christmas tree, and a sign saluting liberty – a display almost exactly the same as the display in issue – did not violate the Establishment Clause. Turning to plaintiff’s contention that by refusing to allow him to display a nativity scene, the County violated his right to free speech, the court noted that the extent to which the government can limit access to government property for speech purposes depends on the nature of the government property. The government can only exclude speakers from traditional public forums when exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Similarly, the government cannot deny access to a designated public forum without a compelling interest. However, the government can deny access to a nonpublic forum, which is what the Airport was, if its grounds for doing so are reasonable and do not discriminate based on a particular viewpoint. Airports are not traditional public fora. *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992). The County did not create a designated public forum by opening the Airport to commercial activities. Nor did the County’s own speech in the public areas of the Airport open the Airport to private speech and create a designated public forum. The County’s practice of leasing space at the Airport to commercial enterprises, without more, did not evidence an intent by the County to open the Airport to public discourse. The court rejected plaintiff’s argument that by erecting a holiday display, the County opened the Airport to all private holiday displays. Erecting its own display, while simultaneously prohibiting private displays, did not suggest an intent by the county to open the Airport to private speech. As stated, the government can limit access to a nonpublic forum as long as the limits are reasonable in light of the purpose served by the forum. The limits can be based on speaker identity and on subject matter, as long as the limits are viewpoint neutral. In addition, the limits do not need to be the most reasonable limits. Here, the County limited access to the Airport by not permitting any private structures. The purpose of the Airport was the efficient, safe, and comfortable transportation of air passengers. To achieve this purpose, the County needed to keep the Airport’s public corridors relatively free from obstructions so passengers could move quickly and

safely to and from their airplanes. The prohibition of private structures was reasonable because it allowed the County to retain control over the number and size of all displays. Although this limit might not have been the most reasonable method for controlling Airport obstructions, the limit was reasonable in this case. The Airport contained limited space. Requiring that the County own all structures provided a viewpoint neutral way for the County to effectively control potential obstructions. Additionally, in keeping with the Airport's purpose to promote travel, the County had an interest in making air travel as inexpensive as possible. The County had to maximize commercial revenues to obtain federal grant money. The more nonairline revenues the Airport received, the less airline revenues it needed. Travel was thus cheaper for travelers because airlines would likely pass higher airport fees on to the travelers. Limiting public speech to leased spaces was a reasonable way for the County to help keep air travel less expensive for the traveler. Thus, the regulation prohibiting private structures at the Airport was reasonable. Finally, the County, by refusing to allow plaintiff to display a creche at the Airport, did not deny him equal protection by displaying a menorah. Again, the Airport was not a public forum and the County's regulation prohibiting private structures, but allowing public structures, did not violate the Equal Protection Clause because it was rationally related to the legitimate government purpose of keeping the Airport free from congestion and possible obstructions.

CASE # 411

Human sexuality course at county community college did not violate the Establishment Clause despite charges that it disparaged and attempted to destroy the adherence of students to traditional Jewish and Christian religious tenets; county residents had standing to bring suit.— *Gheta v. Nassau County Community College*, 33 F. Supp. 2d 179 (E.D.N.Y. 1999), No. 95 CV 1849. Dated January 21, 1999. Opinion by J. Nina Gershon.

Plaintiffs, three Nassau County residents and one non-resident, challenged the constitutionality of a Nassau Community College (NCC) course entitled "Family Living and Human Sexuality." The court granted summary judgment in favor of the defendants. NCC was part of the State University of New York. The average age of NCC students was over 25. The course was one of five elective courses that full-time students could take to fulfill NCC's two-credit health requirement. The students were required to read at least one of two

textbooks on human sexuality, *Our Sexuality*, by Robert Crooks and Karla Baur, and *Sexuality Today: The Human Perspective*, by Gary F. Kelly. Students were also required to read handouts, complete homework assignments and, on occasion, to watch films during class. The materials addressed a wide variety of topics related to human sexuality, including anatomy and the functioning of the reproductive systems, childbirth, abortion, birth control, sexually transmitted diseases, the variety of forms of sexual behavior, including homosexuality and masturbation, and sexual behavior at various life stages, including pre-marital sex. The materials also discuss historical, religious, social and cross-cultural perspectives on sexuality and sexual behavior. The texts contained various references to religion, including sections on religious history, comparisons between Eastern and Western religious traditions and their approaches toward human sexuality, and explanations of the ways in which certain religious groups have modified their attitudes toward human sexuality over time. For example, *Sexuality Today* stated: "Eastern sexual and spiritual traditions can help Westerners break out of the prevailing reduction of sexuality to genital activity." Both textbooks expressly supported the gay rights movement. One text stated, citing references, that "it has been widely reported by a variety of therapist researchers that severe religious orthodoxy equating sex with sin is common to the backgrounds of many sexually troubled people." The course materials acknowledged that students' religious beliefs may have an impact on their sexual attitudes. *Sexuality Today*, for example, advised students to "examine your feelings about religion and find out what your religion has to say about sexual matters." Some professors invited students to record their thoughts in course-related journals, and others required students to "try something new" such as attend a gay rights meeting, interview a clergy person, or get an HIV test or gynecological exam. One handout stated that "nothing is absolute" and that "when you take the absolute out of something you begin seeing it not necessarily as bad or good, or wrong, or right, but different" In addition to the textbooks and handouts, plaintiffs relied on affidavits from four students who were enrolled in the course at different times between 1979 and 1995. Ray Mincone, who took the course in 1995, asserted that his professor led the students in an exercise to "identify the 'inhibitions' we have acquired from our religious upbringing, our families, cultures and personal feelings." Mincone stated that students in one section were required to complete a survey containing questions of a sexual nature, and that students in another were threatened with a 20-point grade reduction for failure to be "interactive" after a classmate refused to discuss his sexual fantasies with the rest of the class. Plaintiff Gheta, who took the course in 1988 or 1989, stated that

she was forced to recite synonyms for the words fuck, cunt and penis and was told by the professor that female students should masturbate while watching themselves in a mirror. Madeline Basler, who took the course in 1979, asserted that her grade was reduced because she refused to watch a movie about homosexuality. Kathleen Dilg, who took the course in 1977, stated that the Catholic Church and its ideology were attacked and belittled during class. A Catholic priest, asserted that the course materials stood in absolute contradiction to the entire moral teaching of the Church and that a Catholic would be bound in conscience to avoid the course as a proximate occasion of sin. Edward Eichel, who held a masters degree from the Human Sexuality Program at New York University asserted that in “reprogramming courses of this type, the student is rewarded for changing his views to ‘new’ views and penalized for holding fast to his ‘old’ views, even though this is never explicitly stated.” Mr. Eichel further stated that the “course materials and exercises are...designed to put students on the defensive over their traditional morality in a coercive classroom setting where the instructor is in control, and to break down the students’ sexual ‘inhibitions’ and ‘outmoded’ beliefs . . . by coercing them to engage in activities . . . which they might otherwise abhor.”

The court first addressed the issue of plaintiffs’ standing. Plaintiffs asserted standing as municipal taxpayers. A municipal taxpayer’s relationship to the municipality is presumed to be direct and immediate, and the taxpayer is thought to suffer a concrete injury whenever the challenged activity involves a measurable appropriation or loss of revenue. Plaintiff Barbara Ghetta did not have standing because she was no longer either a student at the college or a resident of Nassau County. The three other plaintiffs satisfied the residency requirement. There was evidence that one fourth of NCC’s annual budget came from Nassau County taxes and that \$2,356,539 of the budget was allocated to the department whose faculty members taught the course. Defendants argued that plaintiffs failed to establish that the course was funded by a measurable appropriation of Nassau County’s revenue because municipal funds were intermingled with funds from other sources before being allocated among NCC’s academic departments and plaintiffs had no evidence that the inclusion of the alleged anti-religious subject matter actually increased the cost of offering the course. Defendants also contended that plaintiffs’ ideological disagreement with the course was insufficient to establish an injury because plaintiffs were neither students nor parents of students in the course. The court rejected defendants’ argument. Despite the intermingling of funds, one fourth of NCC’s budget came from Nassau County taxes and it was reasonable to infer that some

measurable amount of municipal revenue was used to fund the challenged portions of the course. Thus, the three residents of the county had standing.

The court then applied the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), as refined by Justice O’Conner in *Lynch v. Donnelly*, 465 U.S. 668, 688-693, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984). *Lemon* required a challenged government practice (1) to have a secular purpose, (2) to have a primary effect that neither advanced nor inhibited religion, and (3) not to foster excessive state entanglement with religion. Under Justice O’Connor’s analysis, the challenged conduct impermissibly endorses religion if it has either the purpose or effect of “communicating a message of government endorsement or disapproval of religion.” In considering the conduct’s effect, the question of endorsement is evaluated from the perspective of a “reasonable observer.” Although not disputing that the course had the secular purpose of teaching students about human sexuality as an academic subject, plaintiffs argued that the course involved an excessive entanglement between government and religion. In rejecting plaintiffs’ argument the court noted that there was no evidence that the NCC curriculum committee, in selecting the curriculum for the course, had any dealings with, connections to or involvement with any religious or anti-religious organizations, or that the textbooks were published by companies with religious or anti-religious affiliations. The crux of plaintiff’s Establishment Clause claim was that the course had the effect of disparaging the Judeo-Christian sexual ethic while promoting “sexual pluralism.” The analytical difficulty with plaintiffs’ approach was that it tended to divide the universe of value-laden thought into only two categories – the religious and the anti-religious. If the establishment clause is to have any meaning, distinctions must be drawn to recognize not simply “religious” and “anti-religious,” but “non-religious” governmental activity as well. If it were unconstitutional to require students to read books in which concepts coinciding with their religious beliefs came under question, then thousands of college courses throughout the country would be invalidated, including courses on philosophy, history, religion, literature, and biology. The dispositive issue was not whether the course materials contained statements that conflicted with the beliefs of certain religious groups, but whether the inclusion of such statements communicated a message of government endorsement or disparagement of religion. In determining whether the materials communicate such a message, the materials had to be examined as a whole. As a whole, the materials in question were designed to teach students about human sexuality as an academic subject, and not about religion. The references to religion had the effect of providing an

historical and social context for the discussion on human sexuality and did not either indoctrinate students in a particular religion or disparage a particular religion or all religions. The distinctions between acknowledging differing religious views and supporting a particular religious view, between expounding views based upon secular considerations and expounding religious beliefs, were bound to be understood by a reasonable student taking courses at NCC. True, the professors encouraged students to explore their attitudes and values. However, plaintiffs' contention that this communicated a disparagement of religion because students who did not express the right, i.e., "secular," views were downgraded was without merit. The materials as a whole did not discredit religion as a source of morals or values or as a system of belief. Plaintiffs did not provide any evidence from which it could be reasonably inferred that the professors forced students to adopt particular religious or anti-religious views. The same professor who encouraged students to record changes in their perceptions and attitudes during the course, also encouraged students to interview others, including a member of the clergy. And the professor who graded students in part on their "growth" during the course also wrote that "students will be asked to explore their own personal attitudes and feelings in a non-judgmental way." In *Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 684 (11th Cir. 1987), the court held that home economics, history and social studies books which instill values such as independent thought, tolerance of diverse views and decision-making have a religiously neutral effect on students and do not promote "secular humanism" at the expense of theistic religion. Undoubtedly, the very idea of discussing, much less treating as viable options, some of the sexual behaviors that were included in the course, contradicted the religious beliefs of the plaintiffs. But that did not make the discussions an establishment of religion.

The opinions of plaintiffs' experts did not raise issues of fact requiring trial and precluding summary judgment. The experts confirmed plaintiffs' position that the views expressed both by the professors and the materials were antithetical to their religious beliefs. But, as stated above, it was not unconstitutional to criticize principles that happened to coincide with the religious teachings of certain groups. The mere existence of uncontroverted affidavits, therefore, did not raise a genuine issue of material fact. In addition, since plaintiffs, who were not students in the course, sought only prospective relief, the outdated student affidavits were of little or no value to plaintiffs' case. The most recent affidavit was by a former student who took the course in 1995. Even if treated as current, it was insufficient to raise an issue of fact as to whether the course, taken as a whole, currently

endorsed or disparaged religion. That the exercises one former student complained of were distasteful to him did not make them a violation of the Establishment Clause. The student affidavits did contain allegations which, if true, indicated the use of bizarre teaching techniques. However, the appropriateness of the professors' behavior and/or the course materials was not at issue. Schools have wide discretion to select their curricula and courts are not permitted to inject themselves into controversies regarding the daily operations of schools unless fundamental constitutional rights are directly and sharply implicated.

Plaintiffs' reliance on the coercion standard applied in *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992), was misplaced. The students in that case were high school seniors, and the prayer ceremony at issue took place on graduation day. The Court's holding that the ceremony violated the Establishment Clause was based on its findings that high school students are impressionable and that attending one's high school graduation is not a voluntary activity. NCC students, however, were adults whose average age was over 25, and the course was elective, i.e., voluntary. The students who chose to take the course were not obliged to participate in any religious rituals, but simply to read materials and engage in conversations in which religion was mentioned and values and morals were discussed. In *Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373 (9th Cir. 1994), a teaching curriculum which asked elementary school children to discuss witches, pretend that they were witches or sorcerers, and/or to create poetic chants was found not to violate the Establishment Clause because it did not require children to practice the Wicca religion, but merely to read, discuss and/or contemplate witches. Similarly, the reasonable NCC student understood that to pose questions was not to impose answers, and that one may read a book or participate in a class discussion in which certain views are questioned without having to compromise one's religious beliefs. The relief sought by the plaintiffs would itself result in a violation of the Establishment Clause. Allowing religious groups to dictate the curriculum of a public college would have the direct and obvious effect of endorsing those groups' religious views. In addition, assuming that only those materials expressly found objectionable by plaintiffs were to be considered, the school would become involved in deciding which statements were offensive to plaintiffs' religious views and which they approved.

CASE # 412

Neither the District of Columbia Nonprofit Corporation Act (DCNCA) in general, nor D.C. Code § 29-531 specifically, governs the financial operations of a church which has not organized under the DCNCA or has not subsequently elected to be governed by the provisions of the Act; church had organized under the Religious Societies statute, D.C. Code § 29-901, et seq., six years before the DCNCA was enacted.— *Kelsey v. Ray*, 723 A.2d 1215 (D.C. 1999), *denying petition for rehearing of* 719 A.2d 1248 (D.C. 1998). No. 97-CV-1133. Dated February 11, 1999. Opinion by J. Farrell.

In an earlier opinion, **Case # 337, January 1999 Reporter**, the court held that absent principles universally applicable to every organized church, a church must adopt clear, objective accounting and reporting standards before a court will entertain a dispute over its financial management. Plaintiffs, claiming that the church membership had approved loans to its pastor without being given sufficient financial data, were denied judgment declaring that defendant deacons and trustees breached their fiduciary duty. Under the facts of the case, the church members were held not to have a right to financial information and documents of the Church, nor did they have the right to have the Church's finances audited by an outside CPA. Plaintiffs had contended that defendants (the pastor and the deacons and trustees of the Church) could be held accountable under the neutral principles of the District of Columbia Nonprofit Corporation Act (DCNCA), D.C. Code § 29-501 et seq. (1996). That claim failed because plaintiffs pled no facts demonstrating that the Church was either "organized" under the DCNCA or had since "elected to accept the provisions of" the Act. See D.C. Code § 29-503 (a). The Church was in fact incorporated in 1956 under the Religious Societies statute, D.C. Code § 29-901, et seq., six years before the DCNCA was enacted, and remained so.

In their petition for rehearing, which was denied, plaintiffs unsuccessfully made two arguments for why the DCNCA governed the operations of the Church. First, they argued that D.C. Code § 29-503(c), when read together with D.C. Code § 49-303, combined to make the defendants accountable under those provisions of the DCNCA that were "inconsistent with" provisions of the Religious Societies statute under which the Church had been organized, specifically section 29-528, prohibiting loans by a corporation to its directors or officers. The court found this argument unpersuasive. See the court's technical analysis of the pertinent

statutes. The court said that plaintiffs had a facially more plausible argument when they pointed to D.C. Code § 29-531(a)(1), which provided in relevant part that: "Notwithstanding any provision to the contrary in the governing instrument or under any law applicable to the District of Columbia . . . , the governing instrument of any corporation organized under the laws of the District of Columbia . . . , which is treated during a particular year as a private foundation described in § 509 of the Internal Revenue Code of 1954 shall be deemed during such particular year to contain the following provisions: (A) The Corporation shall not engage in any act of self-dealing which is taxable under § 4941 of the Code" The plaintiffs argued that this statute afforded the necessary objective standard by which a court could determine whether the loan to the pastor breached a duty to the church members. But the court held that section 29-531 had no application to the Church. 26 U.S.C. § 508(e) (1994), added by the Tax Reform Act of 1969, required that "private foundations" as defined in section 509 of the Internal Revenue Code incorporate "certain limitations on their activities" into their governing documents, such as provisions forbidding acts of self-dealing taxable under 26 U.S.C. § 4941 and forbidding taxable expenditures that would subject the organization to tax under 26 U.S.C. § 4945. In response to the enactment of section 508, the present D.C. Code § 29-531 was enacted in 1971. The purpose of the enactment was to facilitate the amendment of the governing instruments of certain charitable trusts which were treated as "private foundations" for Federal tax purposes, in order to conform to the requirements of Sec. 508 of the Federal Internal Revenue Code. Thus, section 29-531 did for certain charitable organizations what the organizations would have had to do on their own: it incorporated the tax rules into the governing documents of the organization to protect its tax exempt status. If section 29-531 applied to churches, the tax rules would have constituted part of the constitution and by-laws of the Church and the members of the Church would arguably have been able to enforce those rules against the trustees in a breach of fiduciary duty action. D.C. Code § 29-531, however, does not apply to churches. 26 U.S.C. § 509(a) excludes a convention or association of churches from the definition of private foundations. Churches are exempted from the strictures of 26 U.S.C. § 508 and consequently D.C. Code § 29-531. (The phrase "convention or association of churches" was intended to refer to non-hierarchical churches such as the Baptists which are associations of virtually autonomous local congregations.) In sum, neither the DCNCA in general, nor section 29-531 specifically, governed the financial operations of the Church.

CASE # 413

In action for personal injuries sustained on premises of local Methodist church, plaintiff's action against the Trustees of the regional Annual Conference of the United Methodist Church was subject to dismissal; there was no evidence of ownership, occupancy, control or special use of the property by the Trustees; fact that title to the realty could be assumed by the Trustees if the local church was discontinued or abandoned was not sufficient to establish a present ownership interest or authority on the part of the Trustees to control the property.— *O'Brien v. Trustees of Troy Annual Conference of United Methodist Church*, 684 N.Y.S.2d 328 (N.Y. App. Div. 1999). Dated January 28, 1999. Opinion by J. Spain.

Plaintiff was injured when she fell through an allegedly rotted and deteriorated porch on property owned by defendant First United Methodist Church of Rensselaer. Plaintiff commenced actions against First United and the Trustees of the Troy Annual Conference of the United Methodist Church. The lower court granted the Trustees summary judgment dismissing the complaint on the grounds that it neither owned the premises where the accident occurred nor was responsible for maintaining the premises. Plaintiff admitted that First United was the record title holder of the premises but argued that the Trustees exercised sufficient control over the property to impose liability upon it. However, the lower court found that plaintiff failed to establish a question of fact as to whether the Trustees exercised sufficient control over the property to impose liability. The Appellate Division affirmed. Liability for a dangerous condition on property is predicated upon ownership, occupancy, control or special use of the property. Where none of these elements is present, a party cannot be held liable for injuries caused by the dangerous or defective condition. Here, it was undisputed that First United was the sole record title owner of the premises where the accident occurred. The fact that the Trustees could possibly obtain title to the premises upon the abandonment or discontinuance of First United was not sufficient to establish a present ownership interest, or authority in defendant to control the property. (Pursuant to The Book of Discipline of the United Methodist Church, which governed the Trustees and local churches, where a local church is discontinued or abandoned the real property may be assumed by the Trustees and treated as its own property.) Significantly, the record revealed that if First United sold the premises the proceeds of the sale would be transferred to the members of First United, not to the Trustees. And even

if plaintiff established that the Trustees maintained sufficient control over the premises, the record was devoid of any evidence that the Trustees either created or had actual or constructive notice of the condition of the premises. Therefore, no liability could be imposed upon the Trustees.

CASE # 414

Both an express and implied trust existed for the benefit of the diocese with respect to the real and personal property held by a local church upon schism by the wardens and vestry members of the local church from the Protestant Episcopal Church; court had jurisdiction to resolve the property dispute even though it resulted from an ecclesiastical denial of a request by the local church officials to ordain a particular deacon to the priesthood; New York law.— *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 250 A.D.2d 282, 684 N.Y.S.2d 76 (N.Y. App. Div. 1999). Dated January 21, 1999. Opinion by J. Spain.

The Protestant Episcopal Church is a hierarchical form of church government in which local parishes are subject to the constitution, canons, rules and decisions of their dioceses which, in turn, are presided over by a bishop who receives advice and counsel from a diocesan standing committee. Trinity Episcopal Church was incorporated under the N.Y. Religious Corporations Law in accordance with the canons and constitution of the Protestant Episcopal Church. Trinity stood on a parcel of land deeded since 1884, prior to construction of the church edifice, to the Trustees of the Albany Diocese. The edifice was surrounded by three additional parcels which had been deeded to Trinity, or a predecessor local church, upon the consent and approval of the Bishop and the Standing Committee. In August 1990, a schism occurred over the refusal of the Diocese, including its Bishop and Trustees (the plaintiffs), to ordain the then deacon-in-charge of Trinity to the priesthood of the Protestant Episcopal Church. This dispute eventually terminated the parish's relationship with the Diocese when members of Trinity voted to disaffiliate themselves from the Protestant Episcopal Church and to become affiliated with the schismatic Anglican Episcopal Diocese South. In response, plaintiffs requested that title to the real and personal property in the possession and control of Trinity Episcopal Church be conveyed to the Albany Diocese. The wardens and vestry members of Trinity refused to comply. Plaintiffs commenced an action for declaratory

and injunctive relief seeking, inter alia, to impress an express and constructive trust on the real and personal property of Trinity and an accounting and return of all personal and real property. The lower court granted plaintiffs summary judgment and the Appellate Division affirmed. The appellate court rejected defendants' contention that this case presented a nonjusticiable religious dispute which could not be resolved without interfering in church doctrine or polity. Civil courts may resolve property disputes so long as the underlying controversy does not involve determining religious doctrines or ecclesiastical issues. New York applies the "neutral principles of law" analysis, whereby church property disputes are resolved by focusing on the language of deeds, the terms of the local church charter, the State statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property. The courts take special care to examine each of these documents in secular terms so as not to rely on religious precepts to determine whether the parties intended a particular result. Although the controversy was the result of a schism between church officials arising from the ecclesiastical denial of a request to ordain a deacon to the priesthood of the Protestant Episcopal Church, resolution of the property dispute could be achieved through neutral principles of law without resort to judicial intrusion into matters of religious doctrine. The issue in the instant case was not whether the local church had the right to terminate its relationship with plaintiffs. It is settled law that even though members of a local church belong to a hierarchical church, they may withdraw from the church and claim title to real and personal property held in the name of the local church, provided they have not previously ceded property to the denominational church. Title to the parcel on which the church edifice stood was and remained in the name of the plaintiff Diocese. The court therefore focused on the reasons why the Diocese was entitled to the three remaining parcels. True, the deeds concerning the three parcels of land did not indicate that Trinity Episcopal Church or its predecessors acquired the property with the intention to hold it in trust for plaintiffs. Moreover, none of the three deeds included a trust restriction or forfeiture clause in favor of the plaintiffs. As to its local charter, despite the fact that its certificate of incorporation expressly acknowledged Trinity Episcopal Church's affiliation with the Protestant Episcopal Church and the Diocese, nothing in its certificate of incorporation indicated how church property was to be owned. However, Title I, canon 7 of the national canons of the Protestant Episcopal Church were amended in 1979 to declare that all real and personal property held by local parishes was to be held in trust for the benefit of the national Protestant Episcopal Church and the diocese in which

the parish was located. This amendment was adopted in response to the U.S. Supreme Court's decision in *Jones v Wolf*, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979), which held that the constitution of a hierarchical church can be crafted to recite an express trust in its favor concerning the ownership and control of local church property. Although this express trust provision was absent from the national canons at the time Trinity Episcopal Church acquired the three parcels of land, the Appellate Division found that the 1979 amendment expressly codified a trust relationship which had implicitly existed between the local parishes and their dioceses throughout the history of the Protestant Episcopal Church. By accepting the principles of the Protestant Episcopal Church and the Diocese, defendants were subject to their canons, rules and practices. Defendants, for example, had to obtain approval of the Bishop and the Standing Committee prior to alienating or encumbering real property as required by canon 7, sections 2 and 3. See, N.Y. Religious Corporations Law § 12(2). These provisions not only indicated that local church property was to be held for the benefit of the Protestant Episcopal Church and its dioceses, but they demonstrated the established customs of said church. Likewise, the fact that Trinity Episcopal Church was incorporated pursuant to N.Y. Religious Corporations Law article 3 confirmed that it was an integral member of the Protestant Episcopal Church and that it adopted and was subject to the national church's constitution and canons. Throughout Trinity Episcopal Church's existence, the wardens and vestry of Trinity not only sought permission of the Bishop and the Standing Committee to convey property held by the parish and for debt refinancing, but the members of Trinity actively participated in numerous Church activities, such as presenting annual reports to the Diocese regarding its financial condition and attending the annual convention of the Diocese. Although the mere fact of association with the Protestant Episcopal Church and its dioceses did not by itself support a finding that an implied trust was created, the record showed that throughout Trinity's existence the parish conducted its affairs in accordance with the constitution and canons of the Protestant Episcopal Church and was an integral member of its polity. There was thus sufficient evidence of an intent to create an implied trust to hold church property in favor of the Protestant Episcopal Church and its dioceses. Accordingly, an express trust and an implied trust existed for the benefit of plaintiffs with respect to the real and personal property held by defendants and, upon defendants schism from the Protestant Episcopal Church and the Diocese, defendants forfeited the property in their possession to plaintiffs.

CASE # 415

The Priesthood Work, a Mormon movement advocating the continued practice of plural marriages, established a community located in both Utah and Arizona; members deeded title to their land to an Arizona trust managed by the Priesthood Council, the leadership of the movement; a doctrinal dispute led to a split in the movement; question whether claimants, most of whom belonged to the losing faction in the struggle to control the Priesthood Council, and hence the Trust, had a right to continue occupying the land owned by the Trust, or whether they could be forced to vacate without compensation; held, the claimants living in Utah may possibly have had a right to continue in occupancy under Utah's Occupying Claimants Act; in addition, both the Utah residents who did not have a remedy under the Act, and the Arizona residents, had a right to equitable relief under both Utah and Arizona law; claimants had the right to remain in occupancy during their life times, or, if the Trust sought to remove them from the property, claimants were entitled compensation for the benefits the Trust received as a result of claimants' improvement of the land; the grant of equitable relief was not unconstitutional, as it satisfied a compelling state interest; the Trust was also held to be a private, not a charitable trust, and thus claimants had standing to assert claims for breach of fiduciary duty, accounting, and distribution.— *Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998), No. 960454. Dated September 1, 1998. Opinion by J. Zimmerman. Dissenting, J. Stewart.

Sometime in the late nineteenth century, some members of the Church of Jesus Christ of Latter-Day Saints organized a movement called the Priesthood Work (The Work) to continue the practice of plural marriage outside that church. In the early part of this century, The Work's leadership – the Priesthood Council – decided to settle its membership in an isolated area to avoid interference with their religious practices. In the 1930s, The Work selected an area in Hildale, Utah, and Colorado City, Arizona. The Priesthood Council secured a large tract of land in this area, and adherents of The Work began to settle there. The Work continued to secure additional land in the area. Commonly, its adherents bought land and deeded it to The Work. Eventually, the leadership of The Work formed a trust to hold title to the land. This trust failed, and, for the

most part, the land was deeded back to those who contributed it. In 1942, the Priesthood Council signed and recorded in Mohave County, Arizona, a Declaration of Trust for the United Effort Plan (UEP). After the Priesthood Council formed the UEP, adherents deeded most of the land that had been held by the first trust to the UEP. Over the years, the UEP acquired more land as adherents obtained and deeded it to the trust. The UEP currently owned all the land occupied by the claimants. From its inception, the UEP invited members to build their homes on assigned lots on UEP land. Through this system, the UEP intended to localize control over all local real property and to have the religious leaders manage it. Members who built on the trust land were aware that they could not sell or mortgage the land and that they would forfeit their improvements if they left the land. However, the UEP did encourage its members to improve the lots assigned to them and represented to its members that they could live on the land permanently, by using such phrases as “forever” or “as long as you wanted.” The leaders also told members that having a home on UEP land was better than having a deed because creditors could not foreclose upon the land for members' debts. Sometime during the late 1960's or early 1970's, dissension over a doctrinal issue arose among adherents of The Work, causing a split in the Priesthood Council. The dissension broke into the open in 1984 when adherents of The Work split into two groups: one group, led by Rulon T. Jeffs, acquired control of the UEP. A second group, led by J. Marion Hammon and Alma Timpson, included most of the claimants in the present case. Claimants claimed that they were entitled to their lots under the Utah Occupying Claimants Act, Utah Code Ann. §§ 57-6-1 to 57-6-8, and, alternatively, that the UEP had been unjustly enriched by claimants' improvements to the land. The trial judge granted claimants relief only on their unjust enrichment claim, finding as a matter of statutory interpretation that claimants were not covered by the Utah Occupying Claimants Act. On appeal, the Utah Supreme Court upheld the trial court's equitable ruling allowing claimants to remain on the land for their lifetimes or requiring the UEP to compensate the claimants for the benefit it received if the UEP sought to remove claimants. However, the Supreme Court found that the trial court erred in its interpretation of the Utah Occupying Claimants Act. Section 57-6-1 of the Act provided: “Where an occupant of real estate has color of title thereto, and in good faith has made valuable improvements thereon, and is afterwards in proper action found not to be the owner, no execution shall issue to put owner in possession of the same after the filing of a complaint as hereinafter provided, until the provisions of this chapter have been complied with.” The district court found that the claimants had made valuable improvements. However, it did not determine

whether claimants had color of title because it had first concluded that the claimants did not make the improvements in “good faith” as required by the statute. On color of title, see Section 57-6-4 of the Act. In defining the statutory term, “good faith,” the trial court relied on case law stating that the good faith of an occupying claimant must be premised upon a reasonable and honest “belief of ownership.” However, the trial court appeared to have assumed that “ownership” meant possession of a fee simple interest. But ownership encompasses interests less than that of absolute ownership, such as a life tenancy and a good faith belief in a life interest in land satisfies the good faith requirement of the Act. The Utah Supreme Court thus remanded the matter for additional specific findings as to claimants’ good faith belief of a life estate interest. This did not end the matter, however. Those claimants occupying land in Arizona had no remedy under the Utah Occupying Claimants Act. Therefore, the Utah Supreme Court still had to determine whether the trial court properly granted the Arizona claimants an equitable remedy for unjust enrichment under Arizona law. Similarly, if on remand, the trial court determined that some or all of the Utah claimants did not have a good faith belief in a life estate, the Utah Supreme Court had to determine if the trial court properly granted the Utah claimants an equitable remedy for unjust enrichment under Utah law. The UEP first argued that the religious context of the case prohibited a court from applying unjust enrichment principles, that balancing the equities between the UEP and claimants was tantamount to judging the fairness of the UEP’s religious practices and was prohibited. In rejecting UEP’s argument, the Utah Supreme Court observed that under both Arizona and Utah law, courts have broad authority to grant equitable relief as needed. Nothing in the general rules of equity applicable in both Arizona and Utah prevented a civil court from hearing an ordinary equity case between religious entities or factions, or between a religious entity and a private litigant. Nor did federal constitutional law impose such a limitation. Civil courts do not inhibit the free exercise of religion merely by opening their doors to disputes involving church property, so long as they do not resolve underlying controversies over religious doctrine. No question of church doctrine was central to this case. Both Arizona and Utah recognized the equitable remedy of unjust enrichment and generally provided that a person who has been unjustly enriched at the expense of another is required to make restitution to the other. The trial court correctly concluded that claimants proved their case for unjust enrichment under both Arizona and Utah law. See Court’s extensive analysis. The Court also rejected UEP’s argument that the trial court’s particular equitable remedy violated both the Utah Constitution and the First Amendment to the U.S.

Constitution. UEP argued that article I, section 4 of the Utah Constitution provided greater protection for religious institutions than the federal constitution. It asked the Court to hold that any law that in any way burdened the free exercise of religion violated the state constitution unless the proponent of the law showed that it was supported by a compelling state interest and was the least restrictive means of accomplishing that end. In rejecting UEP’s argument, the Court noted that the U.S. Supreme Court’s most recent cases decided under the Free Exercise Clause stated that the compelling interest test is not the prevailing federal constitutional test. Rather, a state law that incidentally burdens the exercise of religion is not unconstitutional so long as the law is not intended to burden free exercise, is of general applicability, and is otherwise valid. See *Employment Div. Dept. of Human Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes). The Utah Supreme Court noted that it had never determined whether the free exercise clause of article I, section 4 of the Utah Constitution provides protection over and above that provided by the First Amendment to the U.S. Constitution. Nor was it deciding the issue in the present case, for even if it assumed, *arguendo*, that the compelling interest test applied, the UEP could not prevail on the facts of the case. Because the UEP’s state constitutional claim failed under the more rigorous compelling state interest test (which was applied only for the sake of argument), the Court did not consider the UEP’s federal First Amendment claim because it was governed by the less rigorous test articulated in *Smith*. Turning, for the sake of argument, to application of the compelling state interest test, the Utah Supreme Court held that the trial court’s equitable remedy was the least restrictive means of accomplishing a compelling state interest. A compelling state interest is a paramount interest, one of the highest order. Here the state had a compelling interest in ensuring that all parties were able to resolve legal disputes before a neutral tribunal. Utah Const. art. I, § 11 ensures that courts are to be accessible to all for the resolution of their disputes and makes clear that this right to come into court is a fundamental value. In addition, the refusal to grant a remedy to claimants because the case involved a conflict between religious factions might constitute an action violative of the state or federal Establishment and Free Exercise Clauses. Courts must treat property disputes between religious factions in the same manner they treat disputes among other voluntary associations. In the present case, by resolving the dispute between the UEP and claimants, the trial court furthered the compelling state interest in

keeping the courts open. The trial court's award was carefully crafted to be the least restrictive means available to further the state's compelling interest. The court's ruling allowed the UEP to force the claimants off the UEP land at any time. The UEP needed only to compensate claimants first for the benefits it received for improvements to the land.

The Utah Supreme Court also held that the trial court erred in ruling that the UEP trust was a charitable trust and not a private trust. The trial court's conclusion that the UEP trust was charitable resulted in its denying claimants standing to assert claims for breach of fiduciary duty, accounting, and distribution. A private trust is devoted to the use of specified persons who are designated as beneficiaries of the trust. A charitable trust has as a beneficiary a definite class and indefinite beneficiaries within the definite class. In order to qualify as a charitable trust, the trust instrument must indicate that "the persons who are to benefit are . . . of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust." Restatement (Second) of Trusts § 375. In a charitable trust, "the beneficial interest is not given to individual beneficiaries, but the property is devoted to the accomplishment of purposes beneficial to the community." *Id.* § 364 cmt. a. Thus, if a trust only names specific beneficiaries, the trust is not charitable even if it has a charitable purpose such as relieving the named beneficiaries from poverty, providing them education, or promoting their religious welfare. *Cf. id.* § 375 cmt. b; *id.* § 371 cmt. f. The UEP trust document stated that the signers of the instrument became trust members and associated "for purposes of being cestui que trustents of the trust." Cestui que trustee are the beneficiaries of a trust. Thus, from its inception, the trust benefited specific individuals. Therefore, the trial court erred in concluding that the trust had no specific beneficiaries and was charitable. The trial court had relied on several factors in concluding that the trust was charitable. These factors were that (i) the members received nothing for their consecrations, (ii) the document stated that the trust was charitable, and (iii) the trust granted the trustees sole discretion to distribute benefits. As a matter of law, none of these factors made the trust charitable. First, it was not true that members' consecrations bought them nothing. The UEP trust gave a beneficial interest to named individuals – the members. To become a member, an individual had to consecrate property to the trust. Under the circumstances, the consecration requirement was not indicative of a charitable trust. Second, the trust's declaration was non-determinative under the circumstances. Even though the settlors called the trust charitable, they structured the trust so that it would benefit specific individuals. Nor did the grant to the

trustees of sole discretion to distribute benefits render the trust a charitable trust, because nothing prohibits a settlor from giving the trustee of a private trust discretionary power over distributions. The UEP trust was private, not charitable.

CASE # 416

The discovery rule may toll the statute of limitations in a case of repressed memory of childhood sexual abuse; however, independently verifiable objective evidence of the childhood abuse is mandated in every case and expert opinion testimony is required to prove the repressed memory; South Carolina law.—*Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 511 S.E.2d 699 (S.C. Ct. App. 1999), No. 2928. Dated January 18, 1999. Opinion by J. Anderson. Concurring in part and dissenting in part, J. Howell.

From August 1973 to May 1976, between the ages 2 and 5, plaintiff attended Kiddie Kollege, a day care center sponsored by a church where she was allegedly sexually abused. Plaintiff allegedly repressed the memory of the abuse and only recovered memory of the abuse in 1995, when she was 24. See court's opinion as to how the repressed memory was allegedly triggered into consciousness. Plaintiff filed an action against the church in November 1995, within three years of when she had reason to believe she had been the victim of sexual abuse. Plaintiff alleged causes of action for negligent infliction of severe emotional distress, invasion of privacy, negligent supervision, and breach of warranty. The trial court granted summary judgment to the Church, ruling that plaintiff was required to bring her action within one year of her reaching her majority. The Court of Appeals reversed. It concluded that repressed memories of childhood sexual abuse can exist and can be triggered and recovered, although it recognized that such memories can be inaccurate, may be implanted, and may be attributable to poorly trained therapists or use of improper therapeutic techniques. The Court of Appeals held that the repressed memory syndrome (Dissociative Amnesia) is recognized as a valid theory in South Carolina and that the discovery rule may toll the statute of limitations in a case of repressed memory of childhood sexual abuse. However, independently verifiable objective evidence of the childhood abuse is mandated in every case and expert opinion testimony is required to prove the repressed memory. The element of "objective verifiability" may be satisfied by corroborating evidence, for example by: admission by the abuser; a criminal conviction;

documented medical history of childhood sexual abuse; contemporaneous records or written statements of the abuser, such as diaries or letters; photographs or recordings of the abuse; an objective eyewitness's account; evidence the abuser had sexually abused others; or proof of a chain of facts and circumstances having sufficient probative force to produce a reasonable and probable conclusion that sexual abuse occurred.

Generally, a cause of action accrues at the time of the injury. However, South Carolina modified this rule by adopting the discovery rule. With respect to injuries to the person, the discovery rule, S.C. Code Ann. § 15-3-535 (Supp. 1997) provides that: "Except as to actions initiated under Section 15-3-545 [actions for medical malpractice], all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." The exercise of reasonable diligence means that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery is developed. *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (S.C. 1994). The focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer. Because it involved the alleged repression of memory of childhood sexual abuse, the instant case was distinguishable from *Doe v. R.D.*, 308 S.C. 139, 417 S.E.2d 541 (1992), where the plaintiff was aware that as a child he had been sexually abused by his father for a number of years. He reached the age of majority in 1973. However, it was not until he was diagnosed with Delayed Stress Syndrome in 1990 that plaintiff Doe learned the extent of his injuries. He filed an action in January of 1991. The South Carolina Supreme Court held that pursuant to S.C. Code Ann. Section 15-3-40(1) (Supp. 1991), the limitations period expired one year after Doe reached his majority. In *Doe* the son did not claim a disability prevented him from timely filing suit nor that he only recently discovered he was sexually abused by his father. *Doe* did not involve allegations of repressed memory. **Note:** The court's opinion provides a useful survey of the law in other jurisdictions.

CASE # 417

After being accused of sexual contact with teenage boys, X, a member of defendant Mormon bishop's ward, pled guilty to misdemeanor assault and was sentenced to community service; the bishop, who arranged for X to help M build a home, undertook to monitor X's community service; having met M's daughter D while performing his community service, X married D for "time and eternity" in a Mormon temple after the bishop and another church official certified that the couple were worthy for a temple marriage; thereafter, X and D moved to Montana, followed by M and her son S; two years later, X was arrested in Montana for sexual contact with a teenage boy, following which S revealed that he too had been sexually abused by X in Montana; action by S against bishop for breach of duty to protect him from actions of fellow church member dismissed; the bishop did not have a special relationship with X, nor did he take charge of X, so as to impose on the bishop a duty to control X from inflicting harm on others; and even if there were a breach of duty on the part of the bishop, such breach was not the proximate cause of S's injuries which were inflicted at least one year after the termination of the bishop's supervision of X's community service; action by D against bishop for breach of duty to protect her from marrying X for "time and eternity" also dismissed.— *Flanigan v. McCrae*, 1999 Wash. App. LEXIS 215 (Wash. Ct. App. 1999), No. 41345-7-I. Dated February 8, 1999. Opinion by J. Ronald E. Cox.

Vernon McCrae served as a bishop in the Church of Jesus Christ of Latter Day Saints, i.e., the Mormon Church. Darrell Howe, a member of Bishop McCrae's parish or "ward," sought his advice in the spring of 1989. Howe told the bishop that he had recently been in a fight with two teenage boys and that they had falsely accused him of inappropriate touching. Bishop McCrae advised Howe to be honest with the authorities and to seek the help of an attorney if criminal charges were filed. Several months later, Howe met with Bishop McCrae again, telling him that he had pleaded guilty to a misdemeanor assault. At Howe's request, Bishop McCrae agreed to help him find community service opportunities, as well as to monitor his progress in completing the required community service hours. Bishop McCrae then arranged for Howe to help another ward member, Debbie Pearson, build a log house. Howe

worked diligently on the Pearson home. After several months, the Bishop informed the court that Howe had completed his community service hours, and the court entered an order terminating his community supervision. While Howe worked on the Pearson property, he became friends with Ms. Pearson and her family and began dating Pearson's 17-year-old daughter, Kimberlee Flanigan. Several months later, on Flanigan's 18th birthday, they got engaged. The couple hoped to be married in the temple. A "temple marriage" is a sacred ceremony that would allow their marriage to continue not just for the duration of their lives, but for "time and eternity." According to Mormon doctrine, Howe and Flanigan had to be deemed worthy by both the ward bishop and another church official to qualify for a temple marriage. During this temple-recommend process, Howe and Flanigan met with Bishop McRae, both individually and as a couple. At Bishop McRae's prompting, Howe revealed to Flanigan that a young man had falsely accused him of sexual assault. Howe told her that it was this accusation that led to his pleading guilty to misdemeanor assault. Flanigan believed Howe when he said that he had not sexually assaulted or abused his accuser. Within two and one-half months of their engagement, Howe and Flanigan received their temple-recommends and were married in the temple. Shortly after their wedding, they moved to Montana. Debbie Pearson and her son, Jeffrey Pearson, later moved to Montana as well. About two years after moving to Montana, Howe was arrested for sexual contact with a teenage boy. Following Howe's arrest, Jeffrey Pearson disclosed that Howe sexually abused him while their family was living in Montana. Thereafter, Flanigan and Jeffrey Pearson commenced an action against Bishop McRae and others. Jeffrey Pearson argued that Bishop McRae, the church, and other church officials had a duty to protect him from the actions of fellow church member Darrell Howe. He claimed that this duty arose from Bishop McRae's agreement to monitor Howe's performance of his community service hours. It was alleged that Bishop McRae breached this duty when he failed to fully investigate the nature of the charges against Howe. According to Pearson, an investigation would have revealed Howe's predatory nature, which would have alerted the bishop of the danger of placing Howe in proximity to young boys. The court noted that the State of Washington recognized a limited duty to control the actions of a third person to prevent harm to others. However, this duty only applies when warranted by the existence of a "special relation": The relationship between the defendant and the third party must be definite, established and continuing. One who "takes charge" of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such

harm. This type of relationship has been found in several circumstances. For example, it exists between a state psychiatrist and the patients the doctor treats as well as between a parole or probation officer and the parolees or probationers the officer supervises. When one "takes charge" a custodial or continuous relationship is not required for a duty to exist. In addition, it is not necessary that the person controlling the third party be able to take direct enforcement measures. For example, the only enforcement means available to a state psychiatrist in one case was petitioning the court for commitment. Here, it was undisputed that Bishop McRae volunteered to supervise Howe's community service performance. The issue, though, was whether Bishop McRae "took charge" of Howe by virtue of that supervision. The record indicated that Bishop McRae had none of the responsibilities or functions identified by *Taggart v. State*, 118 Wash. 2d 195, 822 P.2d 243 (1992), as indicia of control. First, unlike a parole officer who enforces the terms of parole, Bishop McRae was responsible only for monitoring Howe's performance of his community service. Given that Bishop McRae was not informed of any other conditions of Howe's suspended sentence, it cannot be said that he was charged with enforcing or supervising them. Second, when Bishop McRae agreed to report the hours that Howe completed, he indicated that he would not physically supervise Howe's work. Finally, had Howe failed to perform his required community service, Bishop McRae's only recourse would simply have been to report that Howe had not completed his hours. Nothing in the record indicated that Bishop McRae could have compelled Howe's performance. Nor was there anything to indicate that Howe's failure to perform would have triggered other duties or responsibilities for Bishop McRae, such as petitioning the court to reinstate Howe's sentence. The facts of this case did not indicate that Bishop McRae "took charge" of Howe. Absent evidence that Bishop McRae took charge of Howe, no special relationship could be said to exist between them. And absent a special relationship, Bishop McRae had no duty, as a matter of law, to control Howe to prevent him from harming others. Having failed to establish a duty, Pearson could not sustain a negligence claim against Bishop McRae. But even assuming a duty did exist, Pearson's negligence claim failed. In addition to a duty and a breach of that duty, Pearson had to establish that the breach proximately caused his injuries. Because the abuse occurred at least one full year after Howe's community supervision was terminated by court order, it was simply too remote in time to have been proximately caused by Bishop McRae's allegedly negligent supervision.

Kimberlee Flanigan claimed that Bishop McRae had a duty to protect her from other ward members such as Howe by virtue of their special relationship as bishop and ward member. The injury of which Flanigan complained was her temple marriage to Howe. Flanigan maintained that had Bishop McRae not granted the temple recommend, she and Howe would not be married “for time and eternity.” Flanigan relied on *Funkhouser v. Wilson*, 89 Wash. App. 644, 950 P.2d 501 (Wash. Ct. App. 1998), where the court stated that it believed that churches and the adult church workers who assume responsibility for the spiritual well being of children of the congregation, whether as paid clergy or as volunteers, have a special relationship with those children that gives rise to a duty to protect them from a reasonably foreseeable risk of harm from those members of the congregation whom the church places in positions of responsibility and authority over them. See **Case # 60, February 1998 Reporter**. But the *Funkhouser* case was inapposite. Flanigan was not harmed by another member of the congregation whom the church had placed in a position of responsibility over her. Rather, she alleged that she was harmed by her marriage to Howe, another member of the ward who turned out to be an undesirable spouse. Flanigan claimed that but for Bishop McRae’s “blessing” of their marriage in the form of the temple recommend she would not have married Howe. But contrary to Flanigan’s assertion, *Funkhouser* does not stand for the broad proposition that a church official owes its members a duty to protect them from every harmful interaction they may have with other church members. Because Flanigan failed to establish that Bishop McRae had a duty to protect her from marrying Howe, the trial court’s summary dismissal of her negligence claim was proper. Bishop McRae had argued that imposing a duty of protection on him would violate the First Amendment’s guaranty of religious freedom. But because the court found that no duty existed toward Flanigan, the court did not reach this issue. The Court of Appeals also did not address Flanigan’s claims for pastoral and counselor malpractice and outrage and her claim under 42 U.S.C. § 1983 because she failed to raise or argue those issues in her brief.

CASE # 418

Diocese and church accused of negligently employing and failing to supervise priest guilty of sexual abuse were covered by insurance contract; victim suffered a “bodily injury” under the terms of the policy and the negligence of the diocese and church qualified as an “accident” and hence an insurable “occurrence” within the terms of the contract; Minnesota law.— *American Employers Insurance Co. v. Doe*, 165 F.3d 1209 (8th Cir. 1999), No. 98-1509MN. Dated February 1, 1999. Opinion by J. Richard S. Arnold.

The issue on appeal was whether the American Employers Insurance Co. (AEIC) had a duty to indemnify its insureds, a Diocese and Church, in an action for the negligent employment and supervision of a priest who was alleged to have sexually molested John Doe over an extended period of time. AEIC claimed that the policies did not provide coverage, because Doe’s alleged injuries were not caused by an “occurrence,” as that term was defined in the policies. The District Court, relying upon on *Allstate Ins. Co. v. Steele*, 74 F.3d 878 (8th Cir. 1996), agreed, and granted AEIC’s motion for summary judgment. After the District Court’s ruling, the Minnesota Court of Appeals filed a decision in *Mork Clinic v. Fireman’s Fund Ins. Co.*, 575 N.W.2d 598 (Minn. Ct. App. 1998). Because *Mork* was a persuasive statement of Minnesota law, the Eighth Circuit Court of Appeals reversed and remanded. The policies in issue provided that AEIC would “pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence . . .” “Occurrence” was defined as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” In addition, the policies provided that the insurance “applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the company’s liability.” Doe alleged that between the ages of six and nineteen he had been regularly and repeatedly sexually molested by a priest who had been employed by the Diocese. According to the complaint, the Diocese knew or should reasonably have known of the priest’s dangerous and exploitive propensities as a child sexual abuser, and, despite such knowledge, the Diocese negligently employed and failed to supervise the priest properly, and failed to provide adequate warning to Doe and his family. The District Court held that the physical pain suffered by Doe during certain instances of the

alleged sexual abuse did, in fact, constitute “bodily injury” under the terms of the policy. The District Court agreed with AEIC, however, that, under Minnesota law, the intentional acts of the priest, not the negligence of the Diocese, resulted in Doe’s injury, and that it therefore could not be said that “an accident” caused Doe’s injury, as required by the policies’ definition of “occurrence.” In addition, the District Court held that the policies’ separability clause did not create coverage, because that clause merely required that the acts of the Diocese be viewed independently of the acts of its employee and that, under Minnesota law, it is the intentional tort, not the alleged negligent supervision, that causes an injury.

In *Mork Clinic v. Fireman’s Fund Ins. Co.*, 575 N.W.2d 598 (Minn. Ct. App. 1998), which the Eighth Circuit now found to be persuasive as to Minnesota law, a physician was accused of having sexually abused several patients during medical examinations. The patients sued the physician, the clinic, and the clinic’s general liability carrier, Fireman’s Fund Ins. Co. The insurance policy provided coverage for claims of bodily injuries “caused by” an “occurrence,” which was defined as “an accident, including continuous or harmful repeated exposure to substantially the same harmful condition.” Fireman’s Fund argued that the injuries sustained by the patients were caused by the physician’s intentional sexual abuse, which, it said, was not a covered “accident” or “occurrence.” That claim was rejected by the appellate court. The Court held that the *immediate* cause of the victims’ injuries was not the only *cause*, and the victims had a legitimate cause of action against the employer if they could establish that the clinic was negligent in the hiring, supervision, or retention of their employee, since the injuries would not have occurred if the clinic had not hired the employee. Further, in *Mork*, as in the instant case, the policy contained a separability clause, and the Court held that the clause supported the conclusion that the employer’s negligence was a “causative occurrence.” Accordingly, in the instant case, the Eighth Circuit held that under Minnesota law the Diocese was entitled to indemnification under the AEIC policies.

CASE # 419

Where realty is already being devoted to a religious purpose, an incidental interruption of the religious use due to fire will not destroy the entitlement to a tax exemption; church held entitled to tax exemption for (1) property on which burned church structure stood; (2) storage building; (3) parking lots; Illinois law.— *Mount Calvary Baptist Church, Inc., V. Zehnder*, 302 Ill. App. 3d 661, 236 Ill. Dec. 134, 706 N.E.2d 1008 (Ill. App. Ct. 1998), No. 1-97-3831. Dated December 31, 1998. Opinion by J. Theis.

35 ILCS 200/15-40 (West 1996), provided that “all property used exclusively for religious purposes, or used exclusively for school and religious purposes, or for orphanages and not leased or otherwise used with a view to profit” were exempt from taxation. In addition, 35 ILCS 200/15-125 (West 1996), exempted from taxation “parking areas, not leased or used for profit, when used as a part of a use for which an exemption is provided hereinbefore and owned by any school district, non-profit hospital or school, or religious or charitable institution which meets the qualifications for exemption.” *Mount Calvary Baptist Church, Inc.*, sought a religious-use property tax exemption for the 1991 tax year for a burned-out church building, a storage building, and several parking lots. The church building was damaged by a fire in September 1989. The fire resulted in the relocation of worship services and other church activities to the Mount Calvary Christian Academy, a school located directly east of the burned church. In 1991, the burned structure remained standing, but had not been rebuilt. Immediately after the fire, the Church filed a claim with its insurance carrier, and the claim was denied for lack of coverage. In September 1989, the Church filed for protection under the United States Bankruptcy Code. Subsequently, the Church obtained a declaratory judgment that it was entitled to insurance coverage. A settlement was reached in March of 1998 in the amount of \$2,000,000. While the Church did not actually use the burned church building for religious services, people would sometimes go there and pray. There was testimony that the insurance coverage litigation, ongoing in 1991, prevented the church from being rebuilt, although a building fund had been established. No business was conducted for profit in 1991 in the burned church building or in any of the parking lots, although the parking lots were used by parishioners attending church services. In 1991, access to the storage building was restricted because the building needed repair. The building was used just for storage and in 1991 people did go into the building, not for any church activities, but to get things in and out.

The Church stored desks, chairs, and air conditioners in the storage building. The administrative law judge (ALJ) recommend that exemption be granted for the 1991 tax year for those parcels of property on which the academy building and its adjacent parking lots were located. However, he recommended that the request for exemption be denied for the parcels of property on which the burned church, the storage building, and the remaining parking areas were located. The ALJ concluded that the applicant did not actually use its church building throughout the entire 1991 tax year and the church's burned out condition prohibited the applicant from using it for religious purposes for the time period in question. The ALJ then concluded that because the church building was not in exempt use during 1991, the parking lot adjacent to it was similarly nonexempt. The ALJ also concluded that the Church failed to show how the storage facility furthered its exempt purpose and concluded that the storage building was not reasonably necessary to further the Church's exempt operations during the tax year 1991. He found that parking lots adjacent to the storage building were likewise non-exempt. The Circuit Court affirmed the determination of the ALJ. The Appellate Court reversed. Statutes granting tax exemptions must be strictly construed in favor of taxation, and the party claiming exemption must prove clearly that its property falls within both the constitutional authorization and the terms of the exempting statute. Mount Calvary sustained its burden as to proof of ownership and absence of lease or use with a view to profit. Thus, the Church's purported failure to sustain its burden of proof as to actual use exclusively for a religious purpose was the central issue. The Appellate Court held that the ALJ erred in concluding that the facts in the instant case were analogous to those in *Antioch Missionary Baptist Church v. Rosewell*, 119 Ill. App. 3d 981, 5 Ill. Dec. 506, 457 N.E.2d 500 (App. Ct. 1983). In *Antioch*, a congregation purchased, in May 1976, a parcel of real estate, abutting its existing church property, which remained boarded up for approximately one year. Antioch later applied to the City for funds to rehabilitate the property, a process which took about two more years. In 1980, a contractor began work on the property that continued until the spring of 1981, during which time the property remained vacant. In denying Antioch an exemption from the date the property was acquired through December 1980, the court found that the property was not used for any purpose but in fact was boarded up and vacant during that period. Consequently, the court concluded that Antioch had failed to meet its burden of showing that the property was actually used for an exempt purpose during the years at issue. *Antioch* was distinguishable from the instant case. First, and foremost, the property on which Mount Calvary's burned church sat in 1991 was not

newly "acquired" property. The property was the site of an existing church, which, but for the 1989 fire, presumably would have continued to be used, as it had been used for years, as a place of worship. In addition, to the extent that the burned church was used in 1991, it was used exclusively for a religious purpose. It was explained that sometimes, people would go there to pray. Thus, unlike the newly acquired, vacant property at issue in *Antioch*, evidence in the record indicated that the burned church was actually used for a religious purpose in 1991. The facts of this case more closely resembled those of *Our Savior Lutheran Church v. Department of Revenue*, 204 Ill. App. 3d 1055, 150 Ill. Dec. 395, 562 N.E.2d 1198 (App. Ct. 1990), holding that "where the property consists of a single building which has been used for an exempt purpose for 40 years, but of which a portion becomes temporarily vacant due to the retirement of the church's pastor but is not used for a nonexempt purpose, we find denial of the tax exemption for that portion to be unreasonable and improper as a matter of law." In the instant case, the Appellate Court acknowledged that, unlike *Our Savior*, the case did not involve property consisting of a unified structure; however, the court did not find that distinction determinative. Instead, it found greater similarity in each structure's established, but interrupted, use for a religious purpose. Consequently, the Appellate Court concluded that where a property already is devoted to a religious purpose as the site of a place of worship, and has been so devoted for numerous years, an incidental interruption of its actual use for that religious purpose due to fire will not destroy the exemption. In addition, the court noted that exemptions have been allowed where property is in the actual process of development and adaptation for exempt use. *People ex rel. Pearsall v. Catholic Bishop of Chicago*, 311 Ill. 11, 142 N.E. 520 (1924); *Weslin Properties, Inc. v. Department of Revenue*, 157 Ill. App. 3d 580, 109 Ill. Dec. 696, 510 N.E.2d 564 (App. Ct. 1987). The ALJ did not address Mount Calvary's redevelopment efforts, although the record revealed that Mount Calvary had established a building fund dedicated to the purpose of rebuilding the burned church and was actively pursuing a legal remedy with respect to insurance coverage following the fire. For all of these reasons, it was error to deny exemption status to the burned church building for the 1991 tax year. It was also error to deny exemption to all of Mount Calvary's parking areas, other than the lots adjacent to the parcels on which the academy was located. The legislature did not make the exemption of parking areas contingent upon location or proximity to exempt property. The Code only required that an applicant seeking an exemption for its parking area demonstrate (1) ownership of the parking area by an exempt institution; (2) the fact that the parking area was not leased or used for profit; and (3) the fact that it was used

as part of a use for which an exemption is provided for by the Code. All the parking lots met this test. The ALJ determined that Mount Calvary used the main and other adjacent parking lots “most of the time” when conducting its various activities and used the main parking lots to congregate for field trips held at various times during the 1991 tax year. The church buses remained parked there when not in use. The parking lots for which an exemption was denied were actually used as part of a use for which an exemption was provided by the Code and were entitled to exemption. Finally, it was error to deny exemption status to the storage building. The ALJ found that Mount Calvary had failed to show how the storage facility furthered its exempt purpose. The ALJ’s conclusion as to the storage building was found by the Appellate Court to be against the weight of the evidence. Though access to the building was limited, the building was used for storage, with certain persons going in and out to store and to retrieve items. Mount Calvary used the storage building during the 1991 tax year for the purpose of storing desks, chairs, and air conditioners. So used, the storage building facilitated the congregation’s efforts to keep its church services, activities, and community outreach programs ongoing after the fire. Mount Calvary established that the storage building was primarily used for purposes reasonably necessary for the accomplishment and fulfillment of the congregation’s aims of worship and religious instruction, or the efficient administration of Mount Calvary Baptist Church, during the 1991 tax year.

CASE # 420

IRS sought to enter judgment against defendant Indianapolis Baptist Temple, an unincorporated society, for unpaid social security and federal income tax contributions, and to foreclose on tax liens it had against the Temple’s realty; however, the tax assessments had not been made against the Temple in its unincorporated form, but against a not-for-profit corporation, named the Indianapolis Baptist Temple, Inc., identified by its employer I.D. number; the corporation had been dissolved and no longer existed during the time period for which the taxes were assessed; however, the congregation continued operation as an unincorporated religious society, with the corporation’s assets being transferred to the defendant unincorporated society; court addressed question whether the corporate identity could be disregarded and judgment entered against

the unincorporated religious society— *United States of America v. Indianapolis Baptist Temple*, 1999 U.S. Dist. LEXIS 1308 (S.D. Ind. 1999), No. IP 98-0498-C-B/S. Dated January 19, 1999. Opinion by J. Sarah Evans Barker.

The Indianapolis Baptist Temple was incorporated as a not-for-profit corporation in 1950. The Temple claimed tax exempt status and obtained a federal employer identification number. Thereafter, in 1983, the church membership decided to manage the church’s affairs as an unincorporated religious society, rather than as a corporation. As part of the transition, the corporation’s assets were transferred to the unincorporated religious society and the articles of incorporation were amended to limit the corporation’s purpose to continuing any existing litigation and any future litigation and to continue such financial obligations and legal responsibilities that had not been assumed by the unincorporated religious society. The next year, the articles of incorporation were again amended to change the name of the corporation from Indianapolis Baptist Temple, Inc. to “Not a Church, Inc.” Two years later, in July 1989, Not a Church, Inc. was administratively dissolved by Indiana’s Secretary of State. Meanwhile, in May 1987, the unincorporated religious society, known as the Indianapolis Baptist Temple, transferred all of its assets to Gregory Jerome Dixon, the church’s pastor, as trustee. In February 1994, the Internal Revenue Service made an assessment of tax, interest, and penalties against “Indianapolis Baptist Temple” for unpaid social security and federal income tax withholding, including interest, delinquency penalties, failure to deposit penalties, and failure to pay penalties for the years spanning 1987 through 1992. The IRS identified the assessed entity with the federal employer identification number issued to the Temple while it was a not-for-profit corporation. The Temple contended it was not liable because (1) the First Amendment barred application of federal tax laws to the Temple, and (2) the tax assessments were not made against it, an unincorporated religious society, but against a not-for-profit corporation that had long been dissolved. The court rejected defendant’s First Amendment defense. In *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982), an Amish employer refused, on religious grounds, to withhold social security taxes from his employees’ pay or to pay the employer’s share of the tax. The Court ruled that imposition of the social security tax was constitutional. After noting the importance of, and strong similarity between, the income tax and social security tax systems, the Supreme Court concluded that the broad public interest in the maintenance of these systems was of such a high order that religious belief in conflict with the payment of the respective taxes provided no constitutional basis for

resisting them. Being bound by the holding in *Lee*, the district court denied the Temple's motion for summary judgment on Free Exercise grounds. The district court noted that in *Employment Division, Depart. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), the Supreme Court abandoned the balancing test employed by *Lee* and announced the less strenuous rule that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Under *Smith*, the Temple's Free Exercise Clause argument was even less compelling than under *Lee*. However, the district court went on to say that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, passed in 1994, superseded *Smith* by requiring both federal and state laws to comply with the balancing test, as set forth in *Lee*. Hence *Lee* was the standard which the district court had to follow. The district court did not take note of *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), holding RFRA unconstitutional, at least as applied to state statutes. The implication of the district court's opinion was that the holding in *City of Boerne v. Flores* was limited to state statutes and that RFRA continued to apply to federal statutes, a position held by some courts. However, the district court did not directly address the issue. The district court also held that the Temple's Establishment Clause challenge also failed because the tax system had a secular legislative purpose, its primary purpose neither advancing nor inhibiting religion, and it did not foster an excessive entanglement with religion.

Defendant Temple also contended that the tax assessments were not made against it, an unincorporated religious society. Instead, the IRS identified the assessed entity with the federal employer identification number originally obtained by the not-for-profit corporation called Indianapolis Baptist Temple, which later changed its name to Not a Church, Inc. and, ultimately, was administratively dissolved in 1987. Indeed, the corporation was no longer in being during the time period for which the taxes were assessed, 1987 to 1994. The court observed that the tax assessments at issue probably were intended to be made against the current managing entity of the church, i.e. defendant unincorporated religious society. The government, however, glossed over the issue by simply arguing that defendant and the assessed taxpayer constituted the same entity because they used the same name at one time. The court concluded that it was left with a slim factual record and no explanation by the government for using the corporation's identification number in identifying the assessed taxpayer. The court declined to rule on the issue under these circumstances. The court

concluded its decision by stating that although defendant may not have been the same entity assessed by the IRS, defendant nonetheless could ultimately be held liable for the assessed taxes. Under Indiana law, a corporate entity generally is considered distinct, except when its separateness is abused and yields a result contrary to the aim of the law. In such a case, the court may disregard the corporate entity and assess liability appropriately. Some courts have found the inability of the government to satisfy a delinquent income tax obligation to form a basis for disregarding a corporate entity. See *G.M. Leasing Corp. v. United States*, 514 F.2d 935 (10th Cir. 1975), *rev'd in part on other grounds*, 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977). The facts of this case could ultimately justify such action. The corporation and society appeared to have many similarities, including the same people, facilities and assets. However, the court concluded that it was without sufficient facts to rule on the issue, and thus, invited the parties to address it in a supplemental briefing.

CASE # 421

Church was not entitled to special use permit allowing it to operate in commercial area; city's interest in adopting an ordinance barring churches in a commercial zone without first obtaining a special use permit was compelling and the ordinance was the least restrictive means of furthering that interest; the ordinance did not unconstitutionally burden the church's free exercise rights.— *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 302 Ill. App. 3d 564, 236 Ill. Dec. 208, 707 N.E.2d 53 (Ill. App. Ct. 1999), Nos. 1-97-4627 and 1-98-0929. Dated December 16, 1998 and modified on denial of rehearing February 3, 1999. Opinion by J. Cahill.

Plaintiff, the City of Chicago Heights, sued to enjoin defendant from violating an ordinance that prohibited religious organizations from locating a house of worship in a part of the city zoned B-2, commercial, without first obtaining a special use permit. Defendant Church bought a former Masonic temple located in a B-2 zone. The Church had made the securing of a special use permit a condition precedent in the original contract to buy the temple, but the condition was omitted in the final contract. The Church took possession of the building and thereafter first applied for a special use permit. To obtain a special use permit, an applicant had to establish that the special use would not (1) be

unreasonably detrimental to or endanger the public, health, safety, morals, comfort or general welfare; (2) be injurious to the use and enjoyment of other property in the immediate vicinity or substantially diminish and impair property values in the neighborhood; or (3) impede the normal and orderly development and improvement of surrounding property for permitted uses. The applicant also had to show that there was adequate ingress and egress, utilities, access roads and drainage facilities and that the use otherwise conformed to the district regulations. The city council denied the application because the property was located in a commercial corridor the city had “targeted” for economic development. Despite the lack of a permit, the Church continued church-related activities on the property. The city filed an action to enjoin the Church’s use of the property. The trial court, *inter alia*, denied the city’s request for injunctive relief and found that the city improperly denied the special use permit. The Appellate Court reversed and remanded with directions to grant the injunctive relief sought by the city. The Appellate Court noted that zoning ordinances are presumptively valid. Generally, the challenger must prove by clear and convincing evidence that the zoning ordinance as applied to its property is arbitrary and unreasonable and not related to the public health, safety and morals. However, different presumptions arise when zoning ordinances implicate constitutional guarantees of freedom of religion. Under these circumstances, the ordinance does not enjoy presumptive validity and the burden of proof shifts to the city. The Church brought to the Appellate Court’s attention House Bill 2370, the Religious Freedom Restoration Act (the Act) (Pub. Act 90-806, eff. December 02, 1998. This act, signed by the governor on December 4, 1998, applied retroactively and adopted the compelling interest test set out in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). The Church contended that since the Church’s right to free exercise of religion was burdened by the ordinance, the Act required that the city meet the *Yoder* burden of proof: that the city’s interest in adopting the ordinance was compelling and that the ordinance was the least restrictive means of furthering that interest. The Appellate Court agreed, but, applying the compelling state interest test, concluded that the city met its burden. The city submitted evidence that its zoning plan was designed to invigorate the commercial corridor, to regenerate declining revenues, and create a strong tax base. Even a substantial burden on the free exercise of religion was justified by the broad public interest in maintaining a sound tax system. The public health, safety and morals were served by the ordinance. Reserving areas for commercial activity both protected residential areas from commercial intrusion and fostered economic stability and growth. The ordinance was also the least restrictive means of furthering the city’s

interest. The record showed that approximately 60% of Chicago Heights was zoned for noncommercial use. Under the zoning ordinance, churches could locate anywhere in these zones without a special permit. The ordinance only affected 40% of the city. Because the Church had free access to a majority of the city, the least restrictive means were used to further the city’s interest.

CASE # 422

Full moon gatherings on mountain top were an essential part of plaintiffs’ religious and spiritual expression and plaintiffs had standing to challenge restrictive parking regulations in the area; one of the plaintiffs received numerous parking tickets; while the other plaintiff did not have a vehicle and thus had not personally received any tickets, she had been driven to the gatherings by a friend who had received many tickets; however, the parking restrictions, being both neutral and generally applicable, were constitutional.— *Storm v. Town of Woodstock*, 32 F. Supp. 2d 520 (N.D.N.Y. 1998), Civ. No. 95-CV-785. Dated February 20, 1998. Opinion by J. Ralph W. Smith, Jr.

Plaintiffs were long time participants, extending over many years, in nighttime outdoor events, known as “full moon gatherings”, typically held in the Town of Woodstock five to six times a year, weather permitting, on full moon nights. The full moon gatherings were in Meads Meadow, a pasture on Meads Mountain. Most participants arrived around sundown and, throughout the evening, engaged in a variety of activities including singing, dancing, and playing musical instruments. While participants strongly discouraged alcohol use during these rituals, many smoked marijuana. At some point during the evening, they circled around a bonfire and engaged in individual and group prayer, chanting, meditation and reflection, after which they resumed singing, dancing and playing music often into the early morning hours. Meads Meadow had been owned by the Woodstock Guild of Craftsmen since the 1970’s and had traditionally been open to the public for recreational and spiritual enjoyment. Historically, it had been a prime spot for picnicking, hiking and sunbathing and, on occasion, had been the site of daytime weddings and other festivities. With the exception of smaller random gatherings, however, full moon gatherings were the only large nighttime events regularly held at the Meadow. Visitors could access the Meadow either by Meads Mountain Road from the southeast or MacDaniel Road

from the northwest. In reality, both roads constituted one physical roadway which passed by the entrance to the Meadow. The road leading to the Meadow was unilluminated, hilly and winding, with one lane allocated for travel in each direction. However, starting at the entrance to the Meadow, and extending west for approximately a half-mile, it became a straightaway (the MacDaniel Straightaway). Since it opened to the public, the Meadow had not included a designated parking area. There was a small state parking lot a half-mile east on Meads Mountain Road, but it was intended for the convenience of people utilizing the State Forest Preserve trails. With the exception of a few unmarked parking spaces adjacent to the entrance, the majority of Meadow visitors, including those attending full moon gatherings, parked their vehicles along the north side of the MacDaniel Straightaway. While there were some areas along the straightaway where vehicles could be completely pulled off the travel surface of the road, there were many areas where brush and trees near the road make such parking impossible. During more crowded times at the Meadow, almost always at night, it was common for many vehicles to be parked along the straightaway, partially jutting out into the roadway. In 1989 the Guild board members and neighboring property owners expressed concerns about vehicles parked along the straightaway blocking residential driveways and interfering with traffic on the roadway, as well as about loud noise and overcrowding in and around the Meadow area. Consequently, those who attended the full moon gatherings agreed to park their vehicles with all four tires off the road and clear of residential driveways, to stop playing drums after 11:00 p.m. and to not advertise their events. Despite this informal agreement, and due in part to nighttime activities in the Meadow unrelated to full moon gatherings, parking and noise problems persisted and incidents of crime increased in and around the Meadow area. Neighboring property owners increasingly complained to Guild board members, the police and the Town Board and requested that action be taken. In 1993, fearful of the safety and legal ramifications of vehicles parked along the MacDaniel Straightaway at night and in an effort to mollify neighboring property owners, the Guild posted signs prohibiting use of the Meadow from dusk to dawn. Despite their intent, the signs failed to deter people from entering and using the Meadow at night and the Guild never took steps to enforce the posted ban. In March 1995 the Town Board enacted a Local law restricting parking near the entrance of the Meadow and along the MacDaniel Straightaway. The law barred parking at all times along certain sections of the road, and banned parking from sunset to sunrise at other points. The court held that the Local Law did not violate plaintiffs' First Amendment right to exercise their religious beliefs. One of the plaintiffs

received numerous parking tickets. While the other plaintiff did not have a vehicle, and thus had not personally received any tickets, she had been driven to the full moon gatherings by a friend who had received many tickets.

Under *Employment Div., Department of Human Resources of Or. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), a law which incidentally burdens religious expression is constitutional, whether or not it is based on a compelling public interest, as long as it is both neutral and generally applicable. However, a law failing to satisfy both requirements of neutrality and general applicability must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. Only beliefs and practices rooted in religion are protected by the Free Exercise Clause of the First Amendment. Accordingly, the initial burden was on plaintiffs to show that full moon gatherings were an essential part of their religious and spiritual expression. Even those religious beliefs or practices that appear unacceptable, illogical or eccentric merit First Amendment protection. In determining whether a religious belief or practice is involved, emphasis is placed on plaintiffs' inward attitudes towards the particular belief system and great weight is accorded to their claims that the beliefs and actions in question are an essential part of their religious faith. The sincerity of plaintiffs' religious claims is evaluated by considering all the evidence presented at trial and appraising plaintiffs' demeanor during direct and cross-examination. Here, the court found that plaintiffs adequately demonstrated that their participation in full moon gatherings was to them religious and spiritual in nature. The Court accorded great weight to plaintiffs' "forthright" testimony at trial. One of the plaintiffs testified that she was a born-again Christian and that she took advantage of full moon gatherings to "encourage people to go to the Lord". In addition, while she testified that every aspect of full moon rituals was spiritual for her, she also stated that her participation in the "circle" and universal "om" chant was a time when she spiritually connected with her fellow gatherers and drew closer to God. The other plaintiff testified that he viewed full moon gatherings as a harmonious union among man, nature and the spirit. Both underscored the religious and spiritual significance of communing at the Meadow in view of its beauty, its location on a mountain top and its former use as a Native American ceremonial ground. The court found the sincerity of plaintiffs' testimony bolstered by their faithful attendance at full moon gatherings over the years and by their demonstrated commitment to ensuring that they continued unimpeded in the future. Having found plaintiffs' participation in full moon gatherings to be

motivated by their spiritual and religious beliefs, the court proceeded to find that the Local Law was both neutral and generally applicable. A reading of the Local Law showed that there was no reference whatsoever to any religious practice. Nor did the evidence establish that the object of the local law was to suppress or otherwise adversely impact upon the plaintiffs' religious proceedings and practices at the Meadow. While the problems addressed by the local law, namely, parking congestion, loud noise and increased criminal activity in and around the Meadow area, resulted primarily from the activities of those who used the Meadow at night, the town, in passing the legislation, was addressing legitimate governmental interests and public concerns. Turning to the issue of the general applicability of the legislation, the court observed that inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation. Here, the Town proved that the legislation advanced two interests, public safety and the peaceful enjoyment of their property by neighboring landowners. While adversely impacting upon those who gathered five or six times each year for the full moon rituals, the local law and "No Parking From Sunset To Sunrise" signs employed as notice thereof, applied generally to anyone visiting the Meadow at night for whatever purpose. Thus, the local law could not be said to impose a prohibition solely upon the full moon gatherers. The court thus found that the local law, by satisfying the tests of neutrality and general applicability, did not offend the Free Exercise Clause or any other constitutional principle.

CASE # 423

Amish petitioner was not exempt from statutory requirement that an application for a pistol permit be accompanied by a photograph; New York law.— *In re Miller*, 252 A.D.2d 156, 684 N.Y.S.2d 368 (N.Y. App. Div. 1998). Dated December 31, 1998. Opinion by J. Balio.

Petitioner, a member of the Amish faith, applied for a pistol permit. He sought an order directing the Sheriff to exempt him from the statutory requirement that he submit a photograph with his application on the ground that the photograph requirement violated his constitutional rights to the free exercise of religious beliefs. The County Court determined that petitioner was entitled to an exemption on religious grounds. The Appellate Division reversed. In analyzing whether a statutory requirement violates an individual's

constitutional right to the free exercise of religion under the U.S. Constitution, the Appellate Division noted that courts historically applied a balancing test to determine whether a requirement that substantially burdens a religious practice is justified by a compelling governmental interest. That balancing test has been rejected, however, where the requirement is set forth in a neutral law of general applicability. Thus, a generally applicable and otherwise valid enactment, which is not intended to regulate religious conduct or beliefs but which may incidentally burden the free exercise of religion, is not deemed to violate the First Amendment. N.Y. Penal Law § 400.00, insofar as it required each applicant for a pistol permit or license to submit a photograph with the application and required each licensee to produce that photograph upon demand, was a law of general application. The requirement of a photograph served a legitimate public safety function by providing law enforcement officials with an immediate means of ascertaining whether a person in possession of a pistol or revolver had the lawful right to possess it. The requirement was not designed, facially or otherwise, to discriminate against certain applicants in the exercise of their religion. Thus, although the requirement of a photograph may have incidentally affected the exercise of religious beliefs by members of the Amish faith, it did not violate the Free Exercise Clause of the U.S. Constitution. The same conclusion was reached by the court under the free exercise provision of N.Y. Const. art I, § 3. The N.Y. Court of Appeals had not definitively stated whether the scope of that provision was coextensive with the Free Exercise Clause of the First Amendment, nor had it decided whether the analytical approach adopted by the Supreme Court in *Employment Div., Ore. Dept. of Human Resources v Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), should be applied in resolving claims under the N.Y. Constitution. But even applying the traditional balancing test, which provides greater protection to an individual's free exercise of religion than the facially neutral and generally applicable standard set forth in *Employment Div., Ore. Dept. of Human Resources v Smith*, the photograph requirement of Penal Law § 400.00 did not unconstitutionally infringe upon petitioner's free exercise rights under the N.Y. Constitution. The traditional balancing test involves a two step analysis: (1) whether the party claiming the free exercise right has established a sincerely held religious belief that is burdened by the statutory requirement; and (2) whether the State has demonstrated that the statutory requirement nonetheless serves a compelling governmental purpose, and that an exemption would substantially impede fulfillment of that goal. The State did not challenge the sincerity of petitioner's religious belief, it being an Amish belief that submission to a

photograph violates the Second Commandment by creating a likeness of God's creation. However, under the circumstances of this case, the photograph requirement did not substantially burden the free exercise of petitioner's religious belief. The sole reason plaintiff sought a pistol permit was to hunt deer. He acknowledged that he could hunt deer by other means that would not require a license or the submission of a photograph but preferred the use of a pistol or revolver. Deer hunting did not implicate a tenet of the Amish faith, and the availability of other options reduced significantly the burden imposed upon petitioner's exercise of religious beliefs. Although the governmental interest in requiring photographs on a driver's license for identification purposes is not compelling enough to justify the burden placed on the driver's exercise of religious beliefs – See *Quaring v Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd sub nom.*, *Jensen v Quaring*, 472 U.S. 478, 105 S. Ct. 3492, 86 L. Ed. 2d 383 (1985); *Bureau of Motor Vehicles v Pentecostal House of Prayer*, 269 Ind. 361, 380 N.E.2d 1225 (1978); cf. *Dennis v Charnes*, 805 F.2d 339 (10th Cir. 1984) – the compelling governmental interest in enforcing criminal laws that involve both the possession and use of firearms and public safety by immediate photographic identification justified the burden placed upon petitioner's exercise of religious belief. The availability of the photograph on the license enables law enforcement officials to determine immediately whether the person possessing the handgun is the same person identified on the license and thus whether possession of the handgun is lawful. The County Court's direction that petitioner provide the Sheriff with an alternative means of immediate identification in addition to the statutory requirement of fingerprinting did not justify an exemption from the statutory requirement of a photograph. There was no evidence that petitioner could provide an alternative means of immediate identification. For example, there was no evidence that petitioner had unique physical characteristics or marks that by verbal description would ensure an immediate and accurate identification.

CASE # 424

A defendant's threats of violence against a third party made in the presence of a clergyman is not covered by the communications to clergyman privilege and the clergyman may testify to those threats; Alabama law—
Tankersley v. State, 724 So. 2d 557 (Ala. Crim. App. 1998), CR-96-2117. Dated April 3, 1998. Reh. den. May 29, 1998. Opinion by J. McMillan.

Defendant was convicted of murdering Lillie Mae Moore and sentenced to life imprisonment. On appeal, the judgment was affirmed. Defendant contended, inter alia, that the trial court committed reversible error by allowing the admission into evidence of testimony that was allegedly covered by the communications-to-clergy privilege. Pastor Frankie Henderson, pastor at a church the defendant attended sporadically during the few years before the murder, testified that defendant telephoned her on three consecutive nights before Moore's murder. On the first night, defendant revealed that he was upset because the woman he had been seeing had broken off their relationship. Defendant was more agitated and very upset the second night, telling the Pastor that he knew where his former girlfriend lived and that he would watch her. Furthermore, he told Pastor Henderson that if his girlfriend did not come back to him, he would kill her. Pastor Henderson tried to dissuade the defendant from carrying out such plan and tried to get defendant to reveal the former girlfriend's name so that she could warn her, but the defendant refused to give the name. On the third night, the night before Moore was killed, the defendant again told Pastor Henderson that he was watching his girlfriend. Pastor Henderson again tried to discourage him from committing any violence. At the trial, Pastor Henderson stated that she believed that the defendant did not contact her because she was a pastor, but rather because he was upset and he "just knew that I loved him as a person." Earlier in the year defendant had telephoned the Pastor because he, the defendant, "got upset over Social Security things." The Pastor asserted that there was a difference between "talking" and "confidence." The Pastor testified that at no time did the defendant say, "I am talking to you as a pastor or this is a confidential conversation."

Although former § 12-21-166 of the Alabama Code limited the clergyman privilege to communications that were either confessional or marital in nature, it had been superceded by Rule 505 of the Alabama Rules of Evidence which explicitly broadened the scope of the

privilege to include all conferences where the clergyman is consulted in the professional capacity of spiritual advisor in the broadest sense. Thus the fact that the defendant was not penitent during his conversations with Pastor Henderson did not disqualify the conversations from the privilege. In addition, the record clearly indicated that the defendant intended to contact Henderson in her capacity as a pastor. Defendant had always called on Pastor Henderson's spiritual guidance during times of distress. The fact that a preacher also acts as defendant's friend does not mean that she is not also acting as defendant's spiritual advisor. See *State v. Boling*, 806 S.W.2d 202 (Tenn. Cr. App. 1990). But see *Burger v. State*, 238 Ga. 171, 231 S.E.2d 769 (Ga. 1977), holding that that the defendant's revelations to a Reverend Spurling that he intended to kill his wife and her lover were not privileged because they were not made to Spurling in his capacity as a minister, but in his capacity as a friend and frequent companion, someone the defendant conversed with on a regular basis. Under *Burger*, if statements are "conversational" in that they were made to the other person as a friend regardless of that person's status as clergy, then the statements are not subject to privilege. In this case, however, Pastor Henderson could not be construed as the defendant's "frequent companion." Pastor Henderson's status as a pastor influenced the defendant's decision to telephone her. Pastor Henderson was acting in her professional capacity of spiritual advisor in the broadest sense. The confidentiality of the conversations was suspect, not because of the nature of Pastor Henderson's role, but rather because of the nature of the defendant's disclosure that he intended to kill his former girlfriend if she did not return to him. Pastor Henderson, believing that the defendant might carry out his threats, understandably tried to get the defendant to give her his former girlfriend's name in order to warn her. Although she failed to learn the former girlfriend's name, Pastor Henderson obviously valued protecting the woman's life over and above keeping the threats confidential. Rule 505 does not contain any specific provision addressing the confidentiality of threats of violence. However, the Advisory Committee's Notes drew a parallel with the attorney-client privilege, stating that "Communications to the clergyman in furtherance of a crime or fraud would not qualify as seeking spiritual advice and therefore would not fall within the protection of the privilege." Agreeing, the Alabama Court of Criminal Appeals held that threats of violence toward third parties that are revealed to clergy are not covered by the communications to clergyman privilege and that clergy may testify to those threats. Although the defendant would not disclose to Pastor Henderson his former girlfriend's name, the defendant had no reasonable expectation that Pastor Henderson would keep such a revelation confidential. The policy of

preventing violence from occurring strongly outweighed the value of confidentiality. Therefore, the trial court's admission of Pastor Henderson's testimony regarding the defendant's threats to kill his former girlfriend was not error. Although the parts of the conversations testified to by Pastor Henderson that did not touch on the threat to kill the defendant's former girlfriend were covered by the privilege, any error in allowing this testimony was harmless. The statement that he would kill his former girlfriend was overwhelmingly the most incriminating statement the defendant made to Pastor Henderson and any statements that did not relate to that threat would have no effect on jury deliberations.

CASE # 425

Priest-penitent privilege; person who served as a deacon in his church and visited the county jail regularly with other members of his congregation to offer spiritual assistance to prisoners, but who did not discuss personal affairs with the inmates, did not qualify as a clergyman; Mississippi law.— *Banks v. State of Mississippi*, 725 So. 2d 711 (Miss. 1997), No. 95-KA-00215-SCT. Dated December 8, 1997. Opinion by J. Banks. Opinion concurring in part and dissenting in part by J. Smith.

Defendant's conviction of murder was reversed because the Mississippi Supreme Court concluded that the admission of an item of physical evidence that alone tied defendant to the crime, and which neither defendant nor his expert were able to examine, rendered his trial fundamentally unfair. After reaching such conclusion, the Court felt compelled to discuss certain issues which were likely to recur should the case be retried. One of the issues concerned the priest-penitent privilege. The defendant argued that the trial court erred because it admitted certain testimony from Homer Ivy, a witness who visited defendant in jail prior to trial. Ivy, a deacon in his church, went to the jail, as he did regularly, with his pastor and other members of his church, to spiritually assist inmates at the county jail. Ivy was called over by defendant, who apparently asked Ivy whether one had to forgive someone who had killed his mother or father. Ivy stated his belief that one could not decline to forgive another for anything and still claim to serve God. At the close of their conversation, defendant shook Ivy's hand and stated, "You have got to forgive all." Defendant objected to the admission of this statement on the ground that it was a privileged communication to a clergyman pursuant to Mississippi Rule of Evidence (M.R.E.) 505. During voir dire of the

witness, Ivy testified that he served as a deacon in his church and visited the jail regularly with other members of his congregation. He did not discuss personal affairs with the inmates, but would leave that to the pastor or the elders of the church. The trial court had ruled that Ivy was not a clergyman for purposes of M.R.E. 505. Defendant argued that this was erroneous, and additionally argued that admission of his statement to Ivy violated his Sixth Amendment right to have an attorney present while being questioned. His argument was based on the fact that the jail allowed Ivy to visit defendant even though Ivy was, at the time, known to be a friend of the victim and a witness for the prosecution. (Ivy testified to a number of the victim's habits and to having seen her on the day that she was killed). Defendant alleged, without support, that Ivy went to see defendant, with the consent of county law enforcement officials, in order to obtain a confession from him. The Supreme Court said that neither of defendant's arguments had merit. Rule 505 defined a "clergyman" as a "minister, priest, rabbi or other similar functionary of a church, religious organization, or religious denomination." Ivy was not a minister and did not purport to be one, even though he did discuss spiritual issues in the abstract with people as a part of the exercise of his faith. Anyone from his church, not just deacons, could go and provide the same type of consolation to inmates. He did not discuss personal problems with the inmates as part of his spiritual tutoring. Thus, Ivy was not acting in the role of minister within the plain meaning of the rule. Defendant's second argument was unavailing for two reasons. First, the argument was not raised below at any point and was therefore procedurally barred. Second, no proof was offered that Ivy was operating as an agent of the State, such as to invoke the rule that the State may not contact a defendant who is not represented by counsel.

CASE # 426

Defendant, claiming that his religion required him to violate a zoning ordinance, was not entitled to have the jury charged with the language of the free exercise of religion clause from the state constitution; whether state action has unconstitutionally abridged defendant's religious freedom is a question of law for the court, not the jury.— *People v. Gavin*, 92 N.Y.2d 963, 683 N.Y.S.2d 750, 706 N.E.2d 738 (1998). Dated November 20, 1998. Memorandum opinion.

To further his claim that his religion required him to violate a zoning ordinance, defendant requested that the Town Court include in its jury charge the language of the Free Exercise of Religion clause from the New York Constitution, art I, § 3. The Town Court refused to give such instruction to the jury and defendant was convicted of the zoning violation. The County Court reversed and ordered a new trial, concluding that defendant had presented a sufficient evidentiary basis for the jury instruction. The New York Court of Appeals held that the County Court was in error, reversed, and remitted to County Court for a determination of the facts. The essential role of the jury in our system of justice is to resolve disputes of fact by assessing and weighing the evidence at trial, and to determine the credibility of witnesses. Defendant's proposed instruction, however, would have asked jurors to determine whether state action had unconstitutionally abridged his religious freedom. That determination was a question of law for resolution by the court. Accordingly, the Town Court appropriately refused to give the requested instruction.

CASE # 427

Evidence of good character cannot be introduced until after the witness' character has been attacked; the act of a key witness giving testimony while holding a Bible served to impermissibly bolster his credibility with the jury prior to any attempt by defendant's trial counsel to impeach his character.— *Brown v. Commonwealth of Kentucky*, 983 S.W.2d 513 (Ky. 1999), No. 96-SC-1137-MR. Dated January 21, 1999 and amended January 27, 1999. Opinion by J. Grant M. Helman. Dissenting opinion by J. Wintersheimer.

Defendant was convicted of the intentional murder of his former wife, Cynthia Brown, and the attempted murder of her fiancée, Greg Barker. The case was

reversed by the Kentucky Supreme Court and remanded for further proceedings. The Commonwealth asserted at trial that the defendant intentionally murdered Ms. Brown to prevent her from testifying at his then upcoming trial for flagrant non-support. Ms. Brown and Mr. Barker had come by car to defendant's home on the date of the crime. Defendant testified that when he leaned into Ms. Brown's automobile he saw two guns, one in Ms. Brown's lap and one in Mr. Barker's right hand and that he acted in self-defense. The Commonwealth contended that neither Ms. Brown nor Mr. Barker had any firearms in the car. Barker, called as a witness by the Commonwealth, testified that neither he nor Ms. Brown were armed. The testimony of the defendant and Barker were diametrically opposed and the jury could believe only one of the witnesses. The viability of the defendant's defense of self-protection had the potential to be determined based on which witness the jury believed. Over defense counsel objections, Barker was permitted to testify while holding his personal Bible. The question before the Court was whether the presence of the Bible impermissibly bolstered the credibility of Barker. The Supreme Court held that it did. Discussing the provisions of KRE 404 and 608 the Court noted that evidence of good character cannot be introduced until after the witness' character has been attacked. The effect of Barker's testimony while holding a Bible likely served to bolster his credibility with the jury and it did so prior to any attempt by defendant's trial counsel to impeach. Additionally, KRE 403 contemplates bolstering the credibility of a witness in the form of opinion or reputation; holding a Bible while testifying is not contemplated by the rule as a means of bolstering credibility. Without reaching a finding in regard to whether the Commonwealth or the witness actually intended to bolster Barker's credibility, the Supreme Court was of the opinion that permitting Barker to testify while holding a Bible was reversible error, because it carried such a probability of prejudice.

CASE # 428

Jurors who had religious bias against homosexuals were properly dismissed for cause in criminal action where the victim was gay; jurors were not improperly dismissed because of their Christian faith.— *State of West Virginia v. Salmons*, 509 S.E.2d 842 (W. Va. 1998), No. 24967. Dated November 4, 1998. Opinion by J. Davis.

Defendant was convicted and sentenced for the crimes of kidnapping and aggravated robbery. Defendant

sought a new trial on the ground, inter alia, that the trial court improperly struck for cause two jurors who indicated a bias toward homosexuals, the victim of the crime being a homosexual. The Court noted that notwithstanding the deference generally accorded a trial court's disqualification of a juror because of bias, the appellate court gives strict scrutiny to cases involving the alleged wrongful injection of race, gender, or religion in criminal cases. The true test to be applied with regard to qualifications of a juror is whether a juror can, without bias or prejudice, return a verdict based on the evidence and the court's instructions and disregard any prior opinions he may have had. Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed. A juror's protestation of impartiality should not be credited if other facts in the record indicate to the contrary. During jury selection in the instant proceeding, the trial court informed the jury panel that evidence might be presented in the case concerning homosexuality. Two jurors indicated they held prejudices towards homosexuals. Both witnesses made remarks indicating that their bias was a product of their religion. The trial court struck both jurors for cause. Defendant argued that the jurors were struck because of their Christian faith. The appellate court disagreed and affirmed. The trial judge went to great lengths to place on the record that the two jurors were not being struck because of their religion, but because of their admitted prejudices against homosexuals. The trial court, which was not convinced by statements from both jurors that they would be able to put aside their biases, was in the best position to determine the sincerity of the jurors' pledge to abide by the court's instructions and his assessment is entitled to great deference. There was no abuse of discretion.

CASE # 429

Defendant's right to be present during a critical stage of a criminal trial is not violated when, in his absence, but in the presence of his attorney and the prosecuting attorney, the court asks the jury foreperson when she needs to leave so as to observe the Sabbath.— *People v. Rodriguez*, 683 N.Y.S.2d 277 (N.Y. App. Div. 1998). Dated December 16, 1998. The defendant's right to be present during a critical stage of a criminal trial was not violated when, in his absence, but in the presence of his attorney and the prosecuting attorney, the court briefly asked the jury foreperson when she would need to leave in observance of the Sabbath. While a defendant has a statutory right

to be present when the jury is given instructions or information by the court, not every communication with a deliberating jury requires the presence of the defendant. Here, the court gave no instruction or information pertinent to the trial which would require the defendant's presence. The inquiry was merely ministerial, wholly unrelated to the substantive issues.

CASE # 430

A claim of temporary denial of access to religious services incident to the administration of prison discipline is insufficient to support a finding that such discipline is atypical and of significant hardship.— *Wright v. Coughlin*, 31 F. Supp. 2d 301 (W.D.N.Y. 1998), No. 93-CV-601S(F). Dated December 17, 1998. Opinion by J. Leslie G. Foschio.

Plaintiff prisoner alleged that his disciplinary confinement following a prison disturbance was atypical and of significant hardship. Plaintiff was sentenced to and served 168 days in the disciplinary Special Housing Unit (SHU) and 120 days in keeplock, for a total of 288 days in restrictive confinement. Plaintiff claimed, inter alia, that his right to due process, as guaranteed under the Fourteenth Amendment, was violated during the disciplinary hearings which led to his confinement. To state a 42 U.S.C. § 1983 claim, plaintiff had the burden to demonstrate that he possessed a protected liberty or property interest, and that he was deprived of that interest without due process. If plaintiff failed to establish such a protected liberty interest, his cause of action had to be dismissed regardless of whether defendants failed to act in accordance with federally required procedures. According to *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995), in the administration of prison discipline, a liberty interest protected under the Due Process Clause will generally arise only where, as a punishment for alleged misconduct, a prisoner is involuntarily placed in confinement “qualitatively different” from the punishment characteristically suffered by a person

convicted of a crime. For a liberty interest to arise under state law sufficient to invoke the protections of the Due Process Clause, a prisoner must establish both that the confinement or restraint creates an “atypical and significant hardship” as established in *Sandin* and that the state has granted its inmates, by regulation or by statute, a protected liberty interest in remaining free from that confinement or restraint. In the present case, the state regulations which governed plaintiff's disciplinary hearings restricted defendants' right to impose a disciplinary sentence on plaintiff, as such a sentence could only be imposed upon an adverse disposition at a hearing conducted in accordance with the regulations. Accordingly, because they circumscribed defendants' discretion to impose punishment, the regulations created a protected liberty interest in remaining free from disciplinary confinement. However, to attach the protections of the Due Process Clause to this interest, *Sandin* also required an evaluation of whether the conditions of the plaintiff's disciplinary SHU and long-term keeplock unit confinement imposed “atypical and significant hardship” on plaintiff in relation to the ordinary incidents of prison life. Among the several factors to be used in determining whether the particular restrictions imposed on the inmate are atypical and significant is consideration of the extent to which the conditions at issue differ from other routine prison conditions. In this case, plaintiff asserted that he suffered the requisite degree of atypicality because of (1) inadequate food, recreation, and daily living conditions in the SHU cells, (2) loss of telephone, commissary, and programming privileges, (3) denial of education and access to religious services, and (4) inadequate library resources and legal assistance. The court found that none of these alleged differences were sufficient as a matter of law. The court held, inter alia, that plaintiff's claim of atypicality, based on a denial of access to religious services, was not a sufficient basis upon which to raise a genuine issue of material fact. A claim of temporary denial of access to religious services incident to the administration of prison discipline has been held insufficient to support a finding of atypicality. *Arce v. Walker*, 139 F.3d 329, 333 (2d Cir. 1998).

SUBSEQUENT HISTORY OF PREVIOUSLY REPORTED CASES

(See also Vol. 1, No. 12, December 1998)

- Case # 7** Ward v. Hengle, 1997 Ohio App. LEXIS 5472 (Ohio Ct. App. 1997). Now cite as Ward v. Hengle, 124 Ohio App.3d 396, 706 N.E.2d 392 (Ohio Ct. App. 1997), *appeal not allowed*, 81 Ohio St. 3d 1510, 692 N.E.2d 617 (1998)
- Case # 123** State v. Johnson, 706 So. 2d 468 (La. Ct. App. 1998), *cert. den.* 119 S. Ct. 1054 (1999)
- Case # 149** Pilgrim Rest Baptist Church, Inc. v. Property Tax Administrator, 1998 Colo. App. LEXIS 98 (Colo. Ct. App. 1998). Now cite to 971 P.2d 270 (Colo. Ct. App. 1998)
- Case # 169** Doe v. Madison School District No. 321, 147 F.3d 832 (9th Cir. 1998), *opinion withdrawn and case ordered to be reheard by en banc court*, 1999 U.S. App. LEXIS 5051 (9th Cir. 1999)
- Case # 183** Browne v. United States, 1998 U.S. Dist. LEXIS 8224 (D. Vt. 1998). Now cite to 22 F. Supp.2d 309 (D. Vt. 1998)
- Case # 204** Weber v. Leaseway Dedicated Logistics, Inc., 5 F. Supp. 2d 1219 (D. Kan. 1998), *affirmed*, 166 F.3d 1223 (10th Cir. 1999)
- Case # 222** State v. Pattno, 254 Neb. 733, 579 N.W.2d 503 (Neb. 1998), *cert. den.* 119 S. Ct. 796 (1999)
- Case # 239** Clay v. Kuhl, 297 Ill. App.3d 15, 231 Ill. Dec. 674, 696 N.E.2d 1245 (Ill. App. Ct. 1998). See Ferrer v. Kuhl, 301 Ill. App. 3d 694, 235 Ill. Dec. 302, 704 N.E.2d 875 (Ill. App. Ct. 1998) **Case # 393**
- Case # 260** Edwards v. California University of Pennsylvania, 156 F.3d 488 (3d Cir. 1998), *cert den.*, 119 S. Ct. 1036 (1999)
- Case # 263** Iskcon Miami, Inc. v. Metropolitan Dade County, Florida, 147 F.3d 1282 (11th Cir. 1998), *cert den.*, 119 S. Ct. 1032 (1999)
- Case # 270** State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (S.C. 1998), *cert. den.* 119 S. Ct. 816 (1999)
- Case # 304** In the Interest of Jonathan S., a person under the age of 18: Dane County Department of Human Services v. Thomas B. M., 1998 Wisc. App. LEXIS 1238 (Wis. Ct. App. 1998). Now cite to 222 Wis.2d 625, 587 N.W.2d 457, 1998 Wisc. App. LEXIS 1238 (Wis. Ct. App. 1998).
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- Case # 337** Kelsey v. Ray, 719 A.2d 1248 (D.C. 1998), *petition for rehearing denied*, 723 A.2d 1215 (D.C. 1999). See **Case # 412**

TABLE OF CASES

American Civil Liberties Union of New Jersey v. Schundler, 168 F.3d 92 (3d Cir. 1999) **Case # 409**
American Employers Insurance Co. v. Doe, 165 F.3d 1209 (8th Cir. 1999) **Case # 418**
Banks v. State of Mississippi, 725 So. 2d 711 (Miss. 1997) **Case # 425**
Brown v. Commonwealth of Kentucky, 983 S.W.2d 513 (Ky. 1999) **Case # 427**
City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc., 302 Ill. App. 3d 564, 236 Ill. Dec. 208, 707 N.E.2d 53 (Ill. App. Ct. 1999) **Case # 421**
Dunn v. Old Republic Life Insurance Co., 1999 U.S. Dist. LEXIS 1349 (N.D. Ill. 1999) **Case # 405**
Flanigan v. McCrae, 1999 Wash. App. LEXIS 215 (Wash. Ct. App. 1999) **Case # 417**
Gheta v. Nassau County Community College, 33 F. Supp. 2d 179 (E.D.N.Y. 1999) **Case # 411**
Grutzmacher v. County of Clark, 33 F. Supp. 2d 896 (D. Nev. 1999) **Case # 410**
In re Claim of McDuffie, 684 N.Y.S.2d 12 (N.Y. App. Div. 1999) **Case # 403**
In re Miller, 252 A.D.2d 156, 684 N.Y.S.2d 368 (N.Y. App. Div. 1998) **Case # 423**
In re Rena, 46 Mass. App. Ct. 335, 705 N.E.2d 1155 (Mass. App. Ct. 1999) **Case # 408**
Jeffs v. Stubbs, 970 P.2d 1234 (Utah 1998) **Case # 415**
Kelsey v. Ray, 723 A.2d 1215 (D.C. 1999), *denying petition for rehearing* of 719 A.2d 1248 (D.C. 1998) **Case # 412**
Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 511 S.E.2d 699 (S.C. Ct. App. 1999) **Case # 416**
Mount Calvary Baptist Church, Inc., V. Zehnder, 302 Ill. App. 3d 661, 236 Ill. Dec. 134, 706 N.E.2d 1008 (Ill. App. Ct. 1998) **Case # 419**
Novitsky v. American Consulting Engineers, 1999 U.S. Dist. LEXIS 1321 (N.D. Ill. 1999) **Case # 404**
O'Brien v. Trustees of Troy Annual Conference of United Methodist Church, 684 N.Y.S.2d 328 (N.Y. App. Div. 1999) **Case # 413**
Parish of Christ Church v. Church Insurance Co., 166 F.3d 419 (1st Cir. 1999) **Case # 406**
People v. Gavin, 92 N.Y.2d 963, 683 N.Y.S.2d 750, 706 N.E.2d 738 (1998) **Case # 426**
People v. Rodriguez, 683 N.Y.S.2d 277 (N.Y. App. Div. 1998) **Case # 429**
State of West Virginia v. Salmons, 509 S.E.2d 842 (W. Va. 1998) **Case # 428**
Storm v. Town of Woodstock, 32 F. Supp. 2d 520 (N.D.N.Y. 1998) **Case # 422**
Tankersley v. State, 724 So. 2d 557 (Ala. Crim. App. 1998) **Case # 424**
Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692 (9th Cir. 1999) **Case # 407**
Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville, 250 A.D.2d 282, 684 N.Y.S.2d 76 (N.Y. App. Div. 1999) **Case # 414**
United States of America v. Indianapolis Baptist Temple, 1999 U.S. Dist. LEXIS 1308 (S.D. Ind. 1999) **Case # 420**
Wright v. Coughlin, 31 F. Supp. 2d 301 (W.D.N.Y. 1998) **Case # 430**