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IRR NEWS REPORT

AMERICAN BAR ASSOCIATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

A Message from Neal Sonnett, IRR Section Chair

I'm honored to serve you this year as Chair of the ABA Section of Individual Rights and Responsibilities and to build upon the outstanding work done by last year's Chair, Robyn Shapiro, who deserves our thanks and admiration for her leadership and dedication.

For more than 40 years, the Section has provided outstanding leadership to the ABA and the legal profession in protecting and advancing human rights, civil liberties, equal justice, and the Rule of Law. However, our mission is even more relevant and critical this year.

Since 9/11, there has been a steady erosion of basic civil liberties and core constitutional rights in the name of fighting the so-called "war against terrorism" and there have



never been greater threats to our civil liberties than at this moment in our history.

However, with a new Administration and a new Congress, we have a unique opportunity to help restore fundamental rights that are the cornerstone of our democracy. For that reason, there has never been a more important

time to be a lawyer and a member of the Section of Individual Rights and Responsibilities.

I'm honored to work with outstanding Officers, all of whom are respected leaders of the ABA. Space does not allow mention of all their many accomplishments, but to name just a few:

Chair-Elect **Dick Podell** is a former Chair of the Family Law Section, current Finance Officer of the Senior Lawyers Division, the Wisconsin State Delegate to the House of Delegates, a member of the ABA Nominating Committee, and a former member of the Board of Governors;

Vice-Chair **Elisia Frazier**, who represented IRR with distinction in the House of Delegates and on the

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ABA Approves IRR Amicus Brief in *Fitzgerald v. Barnstable Schools Committee*

by Kristen Galles

The ABA executive and amicus committees recently approved the filing of an IRR-sponsored amicus brief in the case of *Fitzgerald v. Barnstable Schools Committee*. The filing followed a whirlwind two weeks of writing and lobbying during and after the ABA Annual Meeting in New York by IRR Committee on the Rights of Women co-chair Kristen Galles with the help of IRR leaders Robyn Shapiro, Neal Sonnett, and Penny Wakefield. ABA amicus committee chair Jeffrey Bleich and ABA deputy general counsel Patricia Larson helped shepherd the brief through the ABA's complicated amicus approval process. Richard Zuckerman from the New York office of Sonnenschein Nath & Rosenthal, served as pro bono counsel and primary author of the brief.

The plaintiff in the case, Jacqueline Fitzgerald, was a female kindergarten student who was repeatedly sexually harassed by a male third grader on the school bus. When the Fitzgeralds asked the school to discipline the boy and to remove him from the bus, the school refused and instead offered to put Jacqueline on another bus. The school also refused to assign an adult to ride on the bus to monitor behavior or to interview students. It instead concluded, based upon limited interviews of some students, that the claims could not be substantiated. The parents began to drive their daughter to school to avoid the harassment, but when Jacqueline encountered the boy at school, she became increasingly upset and missed several days of school. The family sued the school

district and the superintendent, claiming that the school's inadequate response to the sexual harassment constituted sex discrimination in violation of Title IX and the Equal Protection Clause.

The defendants filed a motion to dismiss that asserted, among other things, that Title IX completely occupies the field of sex discrimination in education and thus supplants any other claims, including constitutional claims enforced through Section 1983. The U.S. District Court for the District of Massachusetts agreed and dismissed the constitutional claim. Discovery proceeded on the Title IX claim. Defendants then filed a motion for summary judgment in which they asserted that, although they had actual notice of the sexual

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Legislative Update

Amid an economic crisis and a heated Presidential race, Congress began in its fall session to address core issues relating to the scope of executive power. The ABA has made Presidential power an area of interest, previously calling on Congress to establish grounds for judicial review of signing statements, and passing a section-sponsored resolution supporting procedures and standards designed to prevent dismissal of federal civil cases based solely on the state secrets privilege. Three notable pieces of legislation recently advanced in Congress pertaining to these issues.

On Sept. 18, the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the House Judiciary Committee approved as amended the State Secret Protection Act of 2008 (H.R. 5607), introduced by Rep. Nadler (D-NY). The bill sets firm rules as to when the government may invoke the state secrets privilege to refuse to give or prevent an individual from giving evidence in a civil case before federal or state courts. It also provides for court-ordered presentation of substitutes for privileged evidence.

Senator Feingold (D-WI) has introduced two bills addressing the use of executive power to alter laws. On Sept. 18, the Senate Judiciary Committee began consideration of S. 3405, the Executive Order Integrity Act of 2008. The bill would require the President to notify Congress whenever an Executive Order, Presidential proclamation, or Presidential directive is altered or revoked. On Sept. 16, Feingold introduced a complimentary bill, S. 3501 ("OLC Reporting Act of 2008"), requiring the Department of Justice to notify Congress when it determines that the executive branch is not bound by a statute. Both bills provide for the secure notification of Congress when such information is classified.

Other legislation of particular interest to the Section is described on the following pages.

AIDS/HIV

On July 30, the President signed into law H.R. 5501, the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, which includes language to repeal a ban on HIV-positive visitors to the United States. Introduced by Rep. Berman (D-CA) on Feb. 27, the law was passed by the House on Apr. 2 and by the Senate on July 16. On July 15, the ABA sent a letter to the Senate supporting this language.

Children/Families

On Aug. 1, Rep. Kuhl (R-NY) introduced H.R. 6788, the SCHIP Full Funding Extension Act of 2008, to amend Title XXI of the Social Security Act to extend through fiscal year 2012 funding under the State Children's Health Insurance Program. The bill was referred to the House Committee on Energy and Commerce.

Civil Rights/Constitutional Law

On Sept. 17, the House passed H.R. 6842, to require the District of Columbia to revise its laws regarding the use and possession of firearms as necessary to comply with the requirements of the decision of the Supreme Court in the case of *District of Columbia v. Heller*. The bill, introduced by Del. Norton (D-DC), will now be referred to the Senate for consideration.

On Sept. 17, Rep. Maloney (D-NY) introduced H.R. 6927, to protect the civil rights of victims of gender-motivated violence and to create employer liability for negligent conduct that results in an individual's committing a gender-motivated crime of violence against another individual on premises controlled by the employer. The bill was referred to the House Committee on Education and Labor. On Sept. 16, the ABA sent a letter to House and Senate leaders in support of this bill.

On July 31, the House passed, by a 247-178 vote, HR 1338, to amend the Fair Labor

Standards Act of 1938 to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex. The bill was sent to the Senate, where it was referred to the Committee on Health, Education, Labor, and Pensions.

On Sept. 17, Rep. Nadler (D-NY) introduced H.R. 6932, to amend the Fair Housing Act to prevent discrimination relating to the display of religious symbols. The bill was referred to the Senate Judiciary Committee.

On Sept. 11, the Senate Judiciary Committee approved S. 2052, to allow for certiorari review of certain cases denied relief or review by the United States Court of Appeals for the Armed Forces.

On Sept. 8, the House of Representatives passed S. 2450, to amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine. The bill, introduced by Sen. Leahy (D-VT), was passed with unanimous consent by the Senate on Feb. 27. The bill has been sent to the President to be signed into law.

Criminal Law

On Sept. 18, the Senate Judiciary Committee will mark up H.R. 3971, to encourage states to report to the attorney general certain information regarding the deaths of individuals in the custody of law enforcement agencies, and for other purposes. Introduced originally by Rep. Scott (D-VA), the bill was passed by the House of Representatives on Jan. 23.

On Sept. 16, the Senate passed HR 5551, to amend Title 11, District of Columbia Official Code, to implement the increase provided under the District of Columbia Appropriations Act, 2008, in the amount of funds made available for the compensation of attorneys representing indigent defendants in the District of Columbia courts, clearing the measure for the President. The bill was introduced by Rep. Davis (D-IL) and passed by the House of Representatives on Apr. 1.

Legislative Update

On Sept. 11, Rep. Kucinich (D-OH) introduced H.R. 6875, to abolish the death penalty under federal law; to Judiciary.

On Sep. 8, the Senate scheduled for debate S. 3061, to authorize appropriations for the Trafficking Victims Protection Act of 2000. The bill was introduced by Sen. Biden (D-DE) on May 22.

On Aug. 1, Rep. Jackson Lee (D-TX) introduced H.R. 6776, to prevent hate crimes and to provide support services for victims of hate crimes. The bill was referred to the House Judiciary Committee.

Disability Law

On Sept. 17, the House passed S. 3406, the ADA Amendments Act of 2008, to restore the intent and protections of the Americans with Disabilities Act of 1990. The bill, introduced by Sen. Harkin (D-IA) on July 31, was passed by the Senate on Sept. 11. Before the bill is submitted to the President, a conference committee will be held to work out differences in the two versions approved by either chamber.

Education

On Sept. 17, the Senate passed H.R. 6889, to extend the authority of the Secretary of Education to purchase guaranteed student loans for an additional year. Introduced by Rep. Miller (D-CA), the bill was passed by the House of Representatives on Sept. 15. It has been submitted to the President to be signed into law.

On Aug. 14, the president signed H.R. 4137, the Higher Education Opportunity Act. Introduced by Rep. Miller (D-CA), it was passed by the House on Feb. 7 and by the Senate on July 9.

Election Law

On Sept. 17, the House of Representatives passed H. Con. Res 388, to express the sense of Congress that the Department of Defense and the Federal Voting Assistance

Program should take certain additional and timely measures to ensure that members of the Armed Forces and their dependents are provided with reasonable information on how to register to vote and vote in the 2008 general elections. The resolution, introduced by Rep. Blunt (R-MO), will be sent to the Senate for consideration.

On Aug. 1, Rep. Jackson Lee (D-TX) introduced H.R. 6778, to secure federal voting rights of certain qualified ex-offenders who have served their sentences. The bill was referred to the House Committee on the Judiciary.

On July 31, Sen. Durbin (D-IL) introduced S. 3390, to amend the National Voter Registration Act of 1993 to provide for the treatment of institutions of higher education as voter registration agencies. The bill was referred to the Senate Committee on Rules and Administration. At the same time, Rep. Schakowsky (D-IL) introduced an identical bill, H.R. 6704, in the House of Representatives.

Health Law

On Sept. 15, Rep. Lee (D-CA) introduced H. Con. Res. 413, expressing the sense of Congress on the need for a national AIDS strategy. The bill was referred to the House Committee on Energy and Commerce. At the same time, Sen. Clinton (D-NY) introduced an identical resolution, S. Con. Res. 98, to the Senate. The Senate resolution was referred to the Senate Committee on Health, Education, Labor and Pensions.

On Sept. 11, Sen. Hagel (R-NE) introduced S. 3476, to amend the Public Health Service Act to improve the nation's surveillance and reporting for diseases and conditions, and for other purposes. The bill was referred to the Senate Committee on Health, Education, Labor and Pensions.

Immigration Law

On Sept. 17, the House passed H.R. 2608, the SSI Extension for Elderly and Disabled Refugees Act, to amend Section 402 of the

Personal Responsibility and Work Opportunity Reconciliation Act of 1996 to provide extensions to supplemental security income for refugees, asylees, and certain other humanitarian immigrants. The bill has been submitted to the President to be signed into law.

On Sept. 8, Sen. Menendez (D-NJ) introduced S. 3453, to authorize the adjustment of status for immediate family members of aliens who served honorably in the Armed Forces of the United States during the Afghanistan and Iraq conflicts. The bill was referred to the Senate Judiciary Committee.

International Law

On Sept. 8, the House passed S. 2135, the Child Soldiers Accountability Act of 2008. Introduced by Sen. Durbin (D-IL), the bill was passed by the Senate on Dec. 19, 2007. The bill has been sent to the President to be signed into law.

On Sept. 17, Rep. McGovern (D-MA) introduced H. Res. 1451, to establish the Tom Lantos Human Rights Commission in the House of Representatives. The bill was referred to the House Committee on Foreign Affairs.

On Sept. 10, Sen. Schumer (D-NY) introduced S. 3462, to ensure that the courts of the United States may provide an impartial forum for claims brought by US citizens and others against any railroad organized as a separate legal entity, arising from the deportation of US citizens and others to Nazi concentration camps on trains owned or operated by such railroad, and by heirs and survivors of such persons. The bill was referred to the Senate Judiciary Committee.

On Sept. 9, Sen. Feingold (D-WI) introduced S. 3457, to reaffirm United States objectives in Ethiopia and encourage critical democratic and humanitarian principles and practices, and for other purposes. The bill was referred to the Senate Committee on Foreign Relations.

2008 ABA Annual Meeting Convenes in New York

In August, the ABA held its Annual Meeting in New York City. More than 9,000 attorneys from the U.S., Canada, and around the world gathered for week of policy meetings, CLE programming, and awards. As always, the Thurgood Marshall Award Dinner and Reception highlighted Section programming during the meeting, which also included seven programs covering important human and civil rights issues. The ABA House of Delegates approved a Section-sponsored Report with Recommendation that “[u]rges Congress to support quality and accessible justice by ensuring adequate, stable, long-term funding for tribal justice system s.”

The Section also held its annual meeting, during which new Council members and officers were elected for the coming year. Richard Podell was selected to serve as Chair-Elect, C. Elisia Frazier as Vice Chair, Kay Hodge as Secretary, James Silkenat as Financial Officer, and Mark Agrast as Section Delegate. Richard Foltin, Shelley Hayes, William Kaneko and Jodi Levine were elected to three-year Council positions. Roy Hammer was chosen to fill a one-year unexpired term on Council, and Jerome Reide was elected for a two-year unexpired term. Neal Sonnet formally took over the office of Chair, as Robyn Shapiro stepped down.

Thurgood Marshall Award Dinner

On August 9, the Section presented Judge Nancy Gertner with the 2008 Thurgood Marshall Award in recognition of her courageous and pioneering work as a lawyer and judge to protect the rights of women, minorities and the poor.

Judge Gertner, who serves on the U.S. District Court for the District of Massachusetts, has for over four decades been an outspoken advocate of womens' rights, capital justice standards, school integration and education rights, and the prevention of wrongful convictions.

John Payton, Director-Counsel and President of the NAACP Legal Defense and Education Fund, delivered a keynote speech addressing the still-great racial inequalities in education, an area in which Judge Gertner has written crucial decisions. IRR Council member Drucilla Ramey, Director of the National Association of Women Judges and a friend of Judge Gertner since law school,

delivered a personal reflection. Immediate Past Chair Robyn Shapiro served as emcee of the event. Section Chair Neal Sonnett presented the award.

Section-sponsored Programming

Along with the ABA Center for Human Rights, the Section presented a Showcase CLE program entitled "The Universal Declaration of Human Rights at 60: Advancing Human Rights in a Dangerous World," which provided a review of the turbulent history surrounding the Declaration; examined its role in establishing and sustaining the rule of law, particularly in post-conflict societies; and challenged individuals, lawyers, and governments to help realize the Declaration's promise. Justice Rosemary Abella of the Supreme Court of Canada delivered a moving keynote address that moved some attendees to tears and brought the entire room to its feet in standing ovation.

Just as well-received and notable was the program, "After *Boumediene v. Bush*: Habeas, Detainees, and Military Commissions." Moderated by new Section Chair Neal Sonnett, the distinguished panel discussed the impact of the U.S. Supreme Court's decision in the case that restored the writ of habeas corpus to Guantanamo detainees. A free video of the program is viewable via the Section website.

Three more CLE program offerings addressed current topics of interest to the Section. "Concerns of Tribes in New York," brought together an expert panel to discuss local tribal issues including land claims, cross-border rights between New York and Canada, and current needs of New York tribes pertaining to economic development and healthcare. "Heaven Can't Wait: Issues in Religious Accommodation" addressed religious accommodation laws in the workplace, and the conflicts arising between those laws and other individual and civil rights. "The Last Thing Hanging in the Closet: Legal Assistance for Lesbian, Gay, Bisexual and Transgender Domestic Violence Victims" addressed domestic violence in LGBT relationships and communities, specifically focusing on the unique legal needs of these victims as underserved populations. The program was

presented by the ABA Enterprise Fund Project on Legal Assistance and Education for LGBT Victims of Domestic Violence, a joint effort between IRR, the Criminal Justice Section, the Commission on Domestic Violence, and the Commission on Sexual Orientation and the Youth at Risk Commission.

In addition to the CLE programs at the Annual Meeting, IRR held two other panel discussions that were open to the public. "Enforcing Immigrants' Rights in Detention," hosted by Fried Frank at the firm's midtown conference center, addressed recent litigation and legislation to protect

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Section Welcomes Back Sarah Turberville

Sarah Turberville returned to the Section staff in September as the new Director of the Death Penalty Moratorium Implementation Project, a position previously held by Deborah Fleischaker. Formerly a Staff Attorney with the Project, Sarah was working as a public defender in Maryland before her return to the ABA. A native of Alabama, she received her J.D. from Tulane Law School in 2006.

AIDS Committee to Hold Fall Meeting

The ABA AIDS Coordinating Committee, chaired by Shelley D. Hayes of Washington, DC, will have its fall meeting in DC on Nov. 21-22, 2008. Agenda items will include, among others, recent data from the Centers for Disease Control and Prevention indicating a much higher annual HIV infection rate than previously believed; criminalization of HIV transmission; the DC HIV Legal Check-up Project; possible collaboration with other ABA entities to address HIV/AIDS in Africa; and the International AIDS Conference in Mexico City, to which Hayes was an ABA delegate.

For more information about the meeting and the Committee's work, visit www.abanet.org/AIDS.

A Message from Neal Sonnett

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ABA Nominating Committee, has served on the ABA Board of Governors and as Secretary of the ABA Museum of Law, and was just elected as a Delegate-at-Large;

Secretary **Kay Hodge**, the Immediate Past President of the National Conference of Bar Presidents and the Massachusetts State Delegate, served as Chair of the Commission on Racial and Ethnic Diversity in the Profession and on the Board of Governors, and is on the Council of the Tort Trial & Insurance Practice Section;

Finance Officer **Jim Silkenat**, a former Chair of the International Law Section and the Section Officers Conference, is the New York State Delegate, Chair of the Steering Committee of the Nominating Committee, and Chair of the Commission On The World Justice Project;

Section Delegate **Mark Agrast**, a distinguished former Chair of this Section and member of the Board of Governors, now chairs the Commission on Immigration, chaired the Commission on the Renaissance of Idealism in the Profession, and is a member of the World Justice Commission;

Delegate **Richard Macias** ably represents us in the House of Delegates, served as Chair of the House Minority Caucus, and is a former Chair of the Individual Rights Section of the Los Angeles County Bar Association.

The IRR Council is comprised of equally outstanding lawyers who have donated their time and talents to further the mission of

the Section. If you attend a Council meeting—and I hope you will—you will be as impressed as I have been with the expertise and dedication that they bring to the work of our Section.

We are particularly proud of the work of more than **20 Committees** through which IRR has educated the public, developed important ABA policies on critical issues, produced cutting edge CLE programs, and provided an opportunity for lawyers who share a commitment to human rights, civil liberties, and social justice. You can learn more about the work of our Committees and join up to three right on our website. We have an extraordinary professional staff, led by Section Director **Tanya Terrell**, who will be happy to assist you in becoming more active in the important work of our Section.

I hope you will also enjoy and benefit from our award winning magazine, Human Rights, as well as our quarterly IRR News Report and our IRR E-Newsletter. This year, you will be receiving periodic communications from me to keep you even better informed about important issues and the work of our Section to advance the Rule of Law.

No matter what your area of law practice, or to what other ABA Sections or organizations you belong, I hope you will join with leaders from every corner of the ABA who know that the Section of Individual Rights and Responsibilities is the heart, the soul, and the conscience of the ABA.

ABA Day in Washington 2009

April 21-23, 2009

Hyatt Regency Washington
on Capitol Hill
Washington, D.C.

Join 2008/2009 ABA President H. Thomas Wells, Jr. and your fellow ABA, state, local and specialty bar leaders for this annual "lobby day." A new Administration and the 111th Congress will be considering legislation that directly impacts you, your bar entity, your clients, the legal profession and the administration of justice. Your active participation is vital to our successfully educating the Administration and Congress on issues of importance to lawyers.

For more information including meeting schedule, registration, and hotel information, visit the Governmental Affairs ABA Day 2009 webpage at:

<http://www.abanet.org/poladv/abaday09>

ABA Approves IRR Amicus Brief

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harassment, they did not respond with deliberate indifference – the standard for Title IX liability set in *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274 (1998). The District Court dismissed the case, holding that, because there was no more harassment after the school received notice, defendants could not have been indifferent. The *Fitzgeralds* appealed.

The First Circuit rejected the District Court's reasoning and held that schools can be liable not just for failing to stop sexual harassment but also for failing to take appropriate measures after the harassment has already occurred – whether or not it continues. However, the First Circuit then upheld the dismissal of the case because it believed that the school's response was not

manifestly unreasonable. The Court also affirmed the dismissal of the constitutional claim. The U.S. Supreme Court granted cert in June.

The case is important because it addresses whether victims of sex discrimination in public education can bring claims under both Title IX of the Education Amendments of 1972 and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution or whether Congress' passage of Title IX superceded enforcement of constitutional rights through 42 U.S.C. §1983. The same question applies to Title VI (race discrimination), the Rehabilitation Act (disability discrimination), and other statutes. The case is troubling because it could set precedent that a mere federal

statute can supplant a constitutional right or that the modern civil rights laws somehow repeal longstanding Section 1983 claims by implication.

The ABA brief addresses the unique and important history of the Fourteenth Amendment – and the passage of Section 1983 for the express purpose of its enforcement. It also examines the history and purpose of Title IX and how it differs from equal protection. The brief is available on the ABA's website at www.abanet.org. The Supreme Court will hear oral argument in the case on December 2, 2008.

Kristen Galles, co-chair of the Committee on the Rights of Women, is a civil rights litigator in Alexandria, Virginia.

Supreme Court Update

U.S. Supreme Court recently issued opinions in three cases impacting areas of interest to the Section.

In **Rothgery v. Gillespie County, Texas**, No. 07-440, the Court considered whether the Fifth Circuit Court of Appeals correctly held that petitioner's Sixth Amendment right to counsel had not attached even though petitioner was arrested and brought before a magistrate judge who informed him of the accusation against him, found probable cause that he had committed the offense, and sent him to jail pending trial or the posting of bail – because no prosecutor was involved in petitioner's arrest or appearance before the magistrate judge. The Court held 8-1 (opinion by Souter; dissenting opinion by Thomas) that a criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. Attachment does not also require that a prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct. The ABA filed a brief of amicus curiae in support of the petitioner.

In **District of Columbia et al. v. Heller**, No. 07-290, Heller had applied to register a handgun he wished to keep at home, but the District denied his application consistent with its ban on handguns. Heller filed suit seeking, on Second Amendment grounds, to enjoin the city from enforcing the ban on handgun registration and related restrictions. The U.S. District Court for the District of Columbia dismissed the suit based on the District ban, but the U.S. Court of Appeals for the District of Columbia Circuit reversed, holding that the Second Amendment protects an individual's right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right. The ABA filed an amicus brief in support of the District, arguing that the Court of Appeals' decision undermined the rule of law by

failing to provide special justifications for abandoning consistent and longstanding precedent upon which legislators, regulators, and the public have relied to ensure public safety and to fight crime. The Court held 5-4 (opinion by Scalia; dissenting opinion by Stevens) that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. While the right is not unlimited, the District's total ban on handgun possession in the home amounts to a prohibition on an entire class of "arms" that Americans overwhelmingly choose for the lawful purpose of self-defense. Similarly, the District's requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional.

Since the Supreme Court decision, Congress has been considering a bill to "restore" Second Amendment rights in the District of Columbia. In the meantime, the D.C. Council introduced temporary emergency legislation designed to address the concerns of Congress and has plans of implementing a more permanent measure.

In **Kennedy v. Louisiana**, No. 07-343, the Court held 5-4 (opinion by Kennedy; dissenting opinion by Alito) that imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death violates the Eighth Amendment.

Petitioner was charged with the aggravated rape of his eight-year-old stepdaughter. He was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12. The Louisiana Supreme Court affirmed, rejecting petitioner's reliance on *Coker v. Georgia*, 433 U.S. 584, which barred the use of the death penalty as punishment for the rape of an adult woman but left open the question whether any other non-homicide crimes can be punished by death consistent with the Eighth Amendment. Reasoning that children are a class in need of special protection, the state court held child rape to be unique in terms of the

harm it inflicts upon the victim and society and concluded that, short of first-degree murder, there is no crime more deserving of death. The State court acknowledged that Kennedy would be the first person executed since the state law was amended to authorize the death penalty for child rape in 1995, and that Louisiana is in the minority of jurisdictions authorizing death for that crime. However, emphasizing that four more states had capitalized child rape since 1995 and at least eight others had authorized death for other non-homicide crimes, the court found that it is the direction of change, rather than the numerical count, that is significant, and held the petitioner's death sentence to be constitutional.

The Supreme Court explained that the Eighth Amendment's Cruel and Unusual Punishment Clause draws its limits from the concept that punishment is to be graduated and proportioned to the crime and reflect society's standards. The Court found the death penalty disproportionate to the crime itself where the crime did not result, or was not intended to result, in the victim's death. See, e.g., *Coker*, supra; *Enmund v. Florida*, 458 U.S. 782. In making its determination, the Court said it was guided by society's standards as expressed in legislative enactments and state practice with respect to executions. Society's views alone are not dispositive, however, and precedent must be considered.

The U.S. Supreme Court has heard or soon will hear a number of cases that could limit key statutory and constitutional antidiscrimination protections:

In **Fitzgerald v. Barnstable School Committee**, No. 07-1125, the Court will decide whether Title IX precludes Section 1983 constitutional claims to remedy sex discrimination in educational settings. The ABA filed an amicus brief in this case arguing that: a) Congress enacted Section 1983 as remedial legislation to provide for private enforcement of Fourteenth Amendment rights; and b) Congress enacted Title IX to expand – and not to limit – the rights and remedies available to redress sex discrimination by federally-funded education institutions. (for more information, see article on page 1).

Supreme Court Update

In **Crawford v. Nashville and Davidson County, TN**, 06-1595, the Court will determine whether the anti-retaliation provision of Title VII of the Civil Rights Act applies to employees fired for participating in an internal investigation of sexual harassment.

In **AT&T Corp. v. Hulteen**, No. 07-543, the Court will decide whether a company violates the Pregnancy Discrimination Act of 1978 (PDA) and Title VII of the Civil Rights Act of 1964 by denying retirement benefits to women who took temporary disability leave while pregnant before the PDA was enacted but retired after the PDA took effect.

The court also has or soon will consider several other cases addressing issues relevant to the work of the Section:

In **Bartlett v. Strickland**, No. 07-689, the Court will decide whether a North Carolina redistricting plan in a county lacking a numerical majority of minority citizens is required by the Voting Rights Act of 1965 and, therefore, exempt from complying with the conditions of the North Carolina Constitution.

In **Winter v. Natural Resources Defense Counsel, Inc.**, No. 07-1239, the Court will decide under what conditions the Navy can conduct exercises without an Environmental Impact Statement as

required by the National Environmental Policy Act.

In **Pearson v. Callahan**, No. 07-751, the Court will decide whether applying the "consent once removed" doctrine (in which an undercover officer may summon backup officers into a home after that officer has been invited with consent) to a police informant summoning officers into the home violates the defendant's Fourth Amendment protection against unreasonable search and seizure.

In **Oregon v. Ice**, No. 07-901, the Court will decide whether consecutive sentences imposed upon a criminal defendant based on factual findings made by a judge, rather than jury, violate the Sixth Amendment.

In **Wyeth v. Levine**, No. 06-1249, the Court will decide whether federal law preempts state law in a personal injury action against a drug manufacturer for failing to include an appropriate warning label where the drug in question met the labeling requirements of the Food and Drug Administration.

In **Ysursa v. Pocatello Education Assn.**, No. 07-869, the Court will decide whether provisions of Idaho's Voluntary Contributions Act prohibiting payroll deductions for "political activities" violate the free speech protections of the First Amendment when applied to private and local government employees.

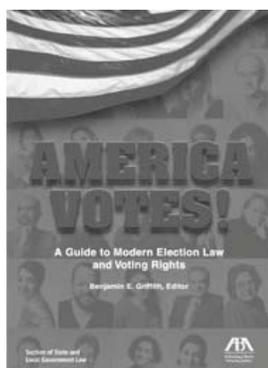
In **Carcieri v. Kempthorne**, No. 07-869, the Court will decide whether the federal government has the ability to take land into trust for American Indian tribes recognized after the Indian Reorganization Act of 1934.

In **Van De Kamp v. Goldstein**, No. 07-854, the Court will decide whether federal prosecutors are entitled to absolute immunity against charges that they failed to satisfactorily share information regarding the testimony of a jailhouse informant during the course of the trial in a suit brought by a plaintiff alleging that he was wrongfully convicted of murder.

In **14 Penn Plaza LLC v. Pyett**, No. 07-581, the Court will decide whether arbitration clauses in employment contracts – waiving an employee's right to bring statutory claims in federal court – are enforceable.

In **Ashcroft v. Iqbal**, No. 07-1015, the Court will determine whether governmental officers acting in their official capacities are protected by the defense of qualified immunity in a claim brought by a former prison inmate, arrested in the immediate aftermath of September 11, alleging gross treatment and violations of his constitutional rights while confined.

America Votes! - A Comprehensive Guide to Election Law



Lawyers, law school professors, election officials, state and local government personnel involved in election administration, election workers and poll workers alike will benefit from this book, which provides a snapshot of America's voting and electoral practices, problems, and most current issues. Edited and written by widely knowledgeable practitioners, the book explores a variety of fundamental areas concerning election law such as: lessons learned from the 2000 and 2004 presidential elections; the Help America Vote Act of 2002; voter equality; language assistance provisions of the Voting Rights Act; the role of election officials; legal aspects of voting technology; and demographic and statistical experts in election litigation.

America Votes! is available for purchase on the ABA Web Store. Those interested may also order a copy by calling the ABA Service Center at 1-800-285-2221.

Annual Meeting

(Continued from page 4)

immigrant detainees' rights and improve their living conditions. "Crisis in the Federal Death Penalty," a joint program with the New York City Bar Association, discussed the causes of and problems associated with the recent rise in federal death penalty prosecutions. Both programs were offered free of charge.

The materials for each program are available on the Section website at <http://www.abanet.org/irr/>. For more information on upcoming Section-sponsored CLE and public educational programs, see upcoming installments of the IRR E-Newsletter and check the Section website for updates.

Upcoming Events

- **National Training Institute on Civil Legal Remedies for Victims of Human Trafficking:** Oct. 2-3, 2008, Washington, D.C.
- **Executive Committee Meeting:** Oct. 23, 2008, Washington, D.C.
- **Fall Council Meeting:** Oct. 24-25, 2008, Washington, D.C.
- **AIDS Coordinating Committee Fall Meeting:** Nov. 21-22, 2008, Washington, D.C.
- **ABA Midyear Meeting:** Feb. 11-17, 2009, Boston, Mass.
- **ABA Day:** Apr. 22-23, 2009, Washington, D.C.
- **IRR Spring Council Meeting:** Apr. 2009, Miami, Fl.
- **ABA Annual Meeting:** July 30 - Aug. 4, 2009, Chicago, Ill.

Volunteers Needed for Election Protection 2008

Election Protection is the nation's largest non-partisan voter protection coalition. It guides voters through the voting process, helping to ensure all eligible American citizens have the opportunity to cast a meaningful ballot and have that vote counted.

The ABA has been a cosponsor of Election Protection since its inception in 2004, providing support to the legal effort led by the Lawyers' Committee for Civil Rights Under Law. Election Protection seeks the pro bono assistance of lawyers, law firms, bar associations, and corporate legal departments with the many aspects of Election Protection 2008. Assistance is needed with local Legal Committees; staffing and hosting the national voter hotline; and preparing materials. Individual law firms and corporate legal departments may volunteer for one or all of the above.

To volunteer, visit <http://www.abanet.org/2008election> and complete an online contact form. For additional information regarding Election Protection, please contact Rachel Patrick, Director of the ABA Council on Racial and Ethnic Justice via email at PatrickR@staff.abanet.org or by phone at 312/988-5408.

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