*** - new case**
† - closed

LEGAL DOCKET (July 2004 – July 2006)

FREEDOM OF SPEECH, PRESS, ASSEMBLY AND ASSOCIATION ACCESS TO INFORMATION

Asher v. Bowman a/k/a Yusuf Mohammad After an African-American charter school principal was arrested while having an insulin reaction in a parked car, Minister Mohammad of Nation of Islam Mosque No. 13 denounced the arresting officer for racism and police brutality. The police officer, Asher, filed suit against the principal in Hamden Superior Court, accusing him of defamation for statements in a mosque newsletter, a press release and in statements to the media. The criminal charges against the principal were dismissed and the principal filed a civil rights lawsuit against the police officer which is pending. Meanwhile, the community was outraged by the incident, in part because of a history of problems with the conduct of the police officer who previously had been suspended for six months for on-duty conduct. The Superior Court allowed Mohammed's Special Motion to Dismiss the police officer's defamation lawsuit against him, using the state Anti-SLAPP Statute (Strategic Lawsuit Against Public Participation). Asher has filed a Notice of Appeal. ACLUM is representing Minister Mohammed on the appeal. Attorney: Bill Newman.*

Change the Climate Inc. v. MBTA In a victory for free speech, the U.S. Court of Appeals for the First Circuit ruled that a local transit authority violated the First Amendment rights of Change the Climate, a drug reform policy group, by refusing to display on subway advertising space ads questioning government policies on marijuana. The appellate court reversed an earlier ruling by the U.S. District Court and held that the rejection of the ads was impermissible because it was based on disapproval by the Massachusetts Bay Transportation Authority (MBTA) of the views expressed in the ads. The transit authority regularly displayed ads promoting the approved government "anti-drug" message but rejected three ads from Change the Climate, allegedly on the grounds that the ads promoted the use of marijuana in "subtle" ways. Because of our victory in achieving a ruling that will allow the ads to be displayed, we and our cooperating attorneys were awarded attorneys' fees of over four hundred thousand dollars for five years of litigation. Attorneys: Harvey Schwartz, Laurie Frankl (Rodgers, Powers & Schwartz) and Sarah Wunsch (ACLUM). †

Commonwealth v. Abramms Responding to an anti-war demonstration in Northampton, police invoked the "riot act," G.L. c. 269, section 1 and order the demonstrators to disperse. Abramms and several others refused and were arrested. The statute allows police to order the dispersal of any group of 10 or more persons which is "unlawfully, riotously or tumultuously assembled" and has been used frequently in Massachusetts to break up political demonstrations. The defendant argued at trial that he and the others should be acquitted because they were not rioters and because the statute was vague and overbroad. The trial judge, however, denied the motion to dismiss, and the defendants were convicted. Abramms appealed. On appeal, the Massachusetts Appeals Court affirmed the conviction, holding that the statute could constitutionally be applied to "unlawful" assembly where there was "the intent to commit violence." A request for

rehearing and a petition for further appellate review are pending. Attorneys: Harry Miles (Green, Miles, Lipton and Fitz-Gibbon), John Reinstein (ACLUM).*

Commonwealth v. Bernstein The defendant in this case received a letter soliciting a campaign contribution to Bush/Cheney '04. Enclosed with the letter was a postage-paid return envelope. He attached the letter to a box and wrote on the box "DISSENT ≠ TREASON." Because it was too large to place in the mailbox, he left it beside a mailbox outside the Somerville Post Office. He later saw a large number of police officers and firefighters outside the post office, and identified himself as the person who placed the package there. He was then charged with creating a "hoax device," which is a felony under Massachusetts law. Bernstein was found not guilty at a bench trial in Cambridge District Court. Attorneys: Robert Ullman, Sarah Walters (Nutter, McLennen & Fish).*†

Commonwealth v. Dharmarajah If you are stopped by a state trooper for a traffic violation and are overheard talking about the ACLU while asking for the trooper's name and badge number, you might end up getting arrested. That's what happened to Yaju Dharmarajah. The union organizer was cited by a trooper on the Mass Pike for having an unsecured load. After receiving the citation, Dharmarajah told the trooper that he had behaved unprofessionally and requested his name and badge number. The trooper became enraged and announced he was going to tow Dharmarajah's vehicle. At that point, Dharmarajah spoke on his cell phone to a friend and the trooper overheard him asking the friend to please call Bill Newman at the ACLU. The trooper became even more furious, threw Yaju against his car, flung the cell phone to the ground, and arrested him for disorderly conduct. After we filed a motion to dismiss the charges, the District Attorney agreed to pretrial probation and the ultimate dismissal of the charges. Yaju is now attending law school. Attorneys: Hector Piñeiro and Robin Scott; Sarah Wunsch (ACLUM).*†

Commonwealth v. Gibbs ACLUM assisted a high school student threatened with prosecution for making threats because he had composed a rap song that was available on the Internet and contained violent sounding statements. With the intervention of our cooperating attorney, the District Attorney agreed to drop the charges. Attorneys: Joseph Shea (Nutter) and Sarah Wunsch (ACLUM).*†

Commonwealth v. Schiel In June of 2005, the City of Cambridge, in cooperation with the U.S. Department of the Army, held what was billed as a commemoration of the anniversary of George Washington taking command of the Continental Army on the Cambridge Common in the summer of 1775. The event, however, was a thinly disguised military recruitment effort (with helicopters, humvees and free baseball tickets for enlistees), and drew a large number of anti-war protestors. An announced plan to relegate anyone wishing to question the event or U.S. policy in Iraq to a small "free speech area" at a far corner of the Cambridge Common was abandoned following objections by ACLUM. Protestors at the event, however, were shunted to one side of the common behind a police line or barred from the event altogether. Seven people were ultimately arrested for failing to comply with these restrictions. Following a short period of unsupervised "pre-trial probation," all charges are to be dismissed. Attorneys: Liza Lunt (Zalkind, Rodriguez, Lunt & Duncan), John Reinstein (ACLUM).*†

Curley v. NAMBLA This case raises important questions under the First Amendment. The plaintiffs are seeking money damages from members of the North American Man Boy Love Association (NAMBLA), a controversial group organized to bring about change in public opinion and the laws governing the age of consent for sexual relations. The suit, an action for wrongful death and for civil rights violations, claims that the defendants are responsible for the kidnapping, rape and murder of a 10 year old boy because NAMBLA publications and the material which appeared on its internet site, by advocating permissive norms of consensual sex, allegedly "urged the general public to illegally rape male children." The plaintiffs claim that one of the convicted murderers had become a member of NAMBLA approximately one year prior to the murder and that, as a result of reading its publications and the material on its web site, he changed his sexual orientation and "became obsessed with having sex with and raping young male children" and ultimately tortured, murdered and mutilated their son. What sets the plaintiffs' claims in this case so fundamentally in opposition to the guarantees of the First Amendment is their insistence that they are entitled to recover damages based on the environment, or climate, created by the defendants' publications; in other words, they are seeking damages for the expression of ideas. ACLUM's motion to dismiss the suit on the grounds that the claims were barred by the First Amendment was denied by the court, which noted that the complaint could be read to suggest that the defendants did more than make available the material contained in their publications and on their website. ACLUM has filed a motion for summary judgment based on affidavits showing that the murderer's only contact with the organization was through publicly available information. The plaintiffs' lawyers, who have publicly acknowledged that the purpose of the suit is to destroy the organization, have obtained an order from the court requiring the disclosure of the identity of all NAMBLA members who attended meetings anywhere in the country over the course of a five-year period. Attorneys: John Reinstein (ACLUM), Sarah Wunsch (ACLUM).

Doe v. City of Worcester The Worcester Public Library limits residents of homeless shelters, transitional housing programs and adolescent programs to borrowing a maximum of two items. After borrowing for the first time, other library patrons – including individuals who reside outside of Worcester – are not limited to borrowing only two items. The library keeps a list of the names and addresses of the shelters and programs whose residents are limited in their borrowing privileges. As a result of the library's policy, the plaintiffs were unable to borrow books they needed for themselves and their children. In cooperation with Legal Assistance in Worcester, ACLU brought suit in federal court in Worcester challenging the Library's policy. The lawsuit was filed on behalf of three Worcester residents affected by the policy. The lead plaintiff, identified in the complaint as "Jane Doe," is a resident of a family shelter and was attempting to home-school her child but was unable to obtain the necessary educational materials from the library. The suit alleges that the policy is unlawful because it violates the guarantees of equal protection of the law, freedom of speech and expression and due process in both the federal and state constitutions as well as the rights of library patrons which are specifically guaranteed by the Massachusetts General Laws. Attorneys: Jonathan Manninai and Kate Fitpatrick (LACCM), John Reinstein (ACLUM).*

Harvard Crimson v. Trustees of Harvard College and Harvard Police Dept [see police practices]

<u>Hop Publications, Inc. v. City of Boston</u> The City of Boston entered an agreement with a private firm to replace news boxes owned by various newspapers with city-controlled multi-slot news racks, in which limited space would be available for newspaper distribution. To implement this program, the city proposed a ban on private news racks in the Back Bay Architectural District. This suit challenges the ban in the commercial areas of the district, an area bordered by Boylston Street, Massachusetts Avenue, Newbury Street and Arlington Street. The plaintiffs in the suit, *Editorial Humor*, *The Weekly Dig* and *The Improper Bostonian*, are publications that rely heavily or exclusively on such news racks for distribution. The suit was originally filed in state court, but was removed to federal court by the city. The court granted summary judgment for the City and the Back Bay Architectural Commission, holding that they could rely on a generalized concern for esthetics and that a case-by-case consideration of particular styles of news boxes was not required by the First Amendment. The court also found that alternative means of distribution were adequate for First Amendment purposes, even though they were substantially more expensive. Attorneys: Mark Batten (Bingham McCutchen), John Reinstein (ACLUM). †

<u>In the Matter of Attorney Discipline</u> While attorneys may sometimes be subject to restrictions on their rights under the First Amendment which do not apply to the general public, ACLUM strongly believes that any such restrictions should be narrowly limited. We felt this principle was violated in an attorney discipline case, where the state Office of Bar Counsel brought charges of ethics violations against an attorney because he had filed a complaint with the State Police alleging that one of its troopers was incompetent in the investigation of arson. The attorney made the complaint to the trooper's supervisor after the trooper testified at a deposition related to a civil suit relating to a fire in which the attorney represented one of the defendants. The Board of Bar Overseers (BBO) ultimately dismissed the charges of impropriety against the lawyer, but Bar Counsel appealed to the Supreme Judicial Court, seeking to discipline the attorney for alleged misconduct for having made a complaint about a witness to the case. ACLUM joined with the Massachusetts Association of Criminal Defense Lawyers (MACDL) in an amicus curiae brief to the Supreme Judicial Court and argued that the standard for determining whether the attorney's conduct was subject to disciplinary sanctions is whether the substance of his petition to the government, the complaint of incompetence, was a "sham." Although the SJC did not rule on this issue, it affirmed the BBO's dismissal of the charges and emphasized that a violation of a broad and vague disciplinary rule could be found only when the attorney's conduct egregiously undermined the administration of justice. The Court also agreed with our amicus brief that an attorney who obtains information about police misconduct or other threats to public safety during the course of litigation has a right to convey the information to the appropriate authorities without fear of disciplinary action. Attorneys: Patricia DeJuneas (Law Offices of Richard Egbert), David Duncan (Zalkind, Rodriguez, Lunt & Duncan), Sarah Wunsch (ACLUM).†

Jean v. Massachusetts State Police After a "nanny cam" captured on videotape the arrest of the homeowner and what appeared to be the direction to conduct an unlawful search of the house, the tape, containing both video and sound recording, was turned over to Mary Jean, the operator of a website opposing the re-election of the incumbent district attorney in Worcester County. Jean posted the recording on her website. She subsequently received a letter from the attorney for the State Police, demanding that the recording be removed from the website and threatening her with criminal prosecution under Massachusetts "anti-eavesdropping" statutes if she did not. Represented by private counsel, Jean brought suit in federal court in Worcester, seeking an injunction against interference with the webcast of the videotape. Based on the fact that Jean had not participated in the allegedly unlawful recording, the court entered a preliminary injunction. The State Police appealed. ACLUM represents Jean on appeal. Attorney: John Reinstein (ACLUM)*

Kohn v. Barker Alfie Kohn is an outspoken critic of high-stakes graduation tests for public school students. After Kohn was invited by the organizers of a conference to deliver the keynote address, senior officials in the Massachusetts Department of Education (DOE) threatened to rescind a grant for partial funding of the conference if Kohn spoke as planned. The government officials demanded that Kohn not speak because his views on standardized testing were "diametrically opposed to the state's and the board of education's legislative and policy agenda." In response to this coercion, the organizers notified Kohn that the keynote address had been cancelled but refused to give him any explanation. After a newspaper reporter discovered what had happened, ACLUM brought suit in Middlesex Superior Court against the DOE officials for violation of the First Amendment rights of Kohn and three conference attendees who had wanted to hear him speak. After one judge denied our motion for summary judgment, this case was scheduled for trial in the spring of 2005, but delays in the Superior Court led it to be rescheduled for trial in the spring of 2006, at which time a new judge viewed the case as appropriate for summary judgment and heard oral arguments in June of 2006. We are awaiting a decision from the court. Attorneys: Michael Rader and Michael Albert (Wolf, Greenfield & Sacks), Sarah Wunsch (ACLUM) and William C. Newman (ACLUM).

Mendoza v. Fall River Licensing Board Can a municipality enact a total ban on public nudity including nudity involved in artistic expression such as dance and theater? The U.S. Supreme Court by a plurality ruled that such a ban would not violate the First Amendment, based on the government's right to prevent the "secondary effects" of adult entertainment establishments - a doctrine that has been roundly criticized. Despite that federal precedent, ACLUM filed an amicus brief in this case in the Supreme Judicial Court in support of a challenge to a Fall River ordinance banning all public nudity. Our brief argued that Article 16 of the state Constitution provides greater protection for expression than does the First Amendment as interpreted by the Supreme Court, thus making a total ban on public nudity unconstitutional. In May of 2005, the SJC agreed, declining to follow the reasoning of the U.S. Supreme Court. The SJC held that the complete ban on public nudity was not "narrowly tailored" to achieve important government objectives and thus violated the state constitutional protection for freedom of expression. The decision contains an important affirmation that "this court will exercise its independent judgment to uphold the cherished protections of the Declaration of Rights as a matter of state constitutional law." Attorneys: Stephen Lehotsky and James Quarles III (Wilmer, Cutler, Pickering, Hale and Dorr); Sarah Wunsch (ACLUM).*†

Moran v. Thompson Following a series of adverse decisions in a disputed child custody case, the child's father (Thompson) wrote a book entitled "Exposing the Corruption in the Massachusetts Family Courts." The book, which takes the position that fathers are unfairly treated in the courts, contained an extensive discussion of the evidence presented at trial, his commentary on the evidence and his criticisms of various rulings by the courts at the trial and appellate level. After the book was published, the child's mother, asserting privacy claims, obtained an ex parte restraining order enjoining not only publication of portions of the book but any statements by the father about particular material. The order was subsequently extended indefinitely. ACLUM is representing the father on appeal to the Massachusetts Appeals Court, where the order is being challenged as a prior restraint on speech and publication. A single justice of the Appeals Court denied the father's motion for a stay of the injunction pending appeal on the grounds that a trial had been scheduled and that the stay was effectively relief on the merits. A motion for reconsideration of that order is pending. Attorneys: John Henn and Jeremy Evans (Foley Hoag), John Reinstein (ACLUM).*

Newark v. Trudeau The right of teachers to discuss controversial subjects that are age appropriate and relevant to the class is a critical freedom in a democracy. In this federal court action, we defended the right of Bellingham high school teacher Brian Newark to teach about the Iraqi prisoner scandal in his Current Events class for seniors and juniors. After a parent complained about the optional assignment to look at and write about photographs available on internet news sites, school officials immediately responded by telling Newark he could not give any more such assignments. The officials backed down after ACLUM intervened on Newark's behalf, but they then withdrew his previously announced appointment to teach the course the following term. In August of 2004, we filed a lawsuit alleging that Newark's academic freedom under the First Amendment had been violated by the school's retaliation against him for the prisoner assignment. Attorneys for the school defendants quickly agreed to a settlement of the case and paid our attorneys' fees, and Newark taught the course as originally scheduled. Attorneys: Leonard Singer; Sarah Wunsch (ACLUM). *†

Ridley v. MBTA Free speech did not fare as well in this lawsuit, which was a companion case to *Change the Climate v. MBTA.* In Ridley, the Massachusetts Bay Transportation Authority refused to display ads submitted by the Church with the Good News, on the grounds that the Church's ads demeaned or disparaged other religions, in violation of MBTA advertising guidelines. The U.S. Court of Appeals for the First Circuit upheld the government's refusal to display the subway ads, rejecting our argument that the ads had been turned down because of their viewpoint in violation of the First Amendment. In a 2-1 ruling, the majority of the Court said that the advertising guidelines were neither vague not viewpoint-based. Attorneys: Harvey Schwartz and Laurie Frankl (Rodgers Powers and Schwartz); Sarah Wunsch (ACLUM).†

NON-LITIGATION ADVOCACY

Freedom of Speech and Assembly Year in and year out, the ACLUM engages in a struggle to insure the rights of speech and assembly are not restricted. More often than not, these efforts take place outside the courtroom and have resulted in scores of small victories for freedom of speech and assembly. • When a columnist for a small newspaper tried to attend a "town meeting" conducted by Governor Romney at a public school, he was told, as a "security" measure, he could not enter the room with any of the literature he had been handed by various protest groups. After it was revealed that this was a policy of the governor's office, ACLUM wrote to the Governor objecting to the policy and it was subsequently withdrawn. • ACLUM assisted participants in a peace vigil outside the **Falmouth** post office who were being told they could not stand on a small grassy area in front of the post office or on the public sidewalk adjoining the post office property. Post office officials and police officers ultimately agreed the group had the right to stand in both of those areas. • ACLUM representatives served on a **Brookline** Committee and wrote a minority report to a Town Meeting, urging it to refuse to extend an expiring by-law that prohibited picketing in front of a residence on the grounds that the law did nothing to protect abortion providers who lived in the town (the proponents' main rationale), yet it limited peaceful expression by workers, tenants and environmentalists, as well as abortion opponents. • ACLUM assisted the members of Veterans for Peace and Military Families Speak Out when they sought to demonstrate outside the St. Patrick's Day Breakfast at the convention center in **South Boston**, and were told that the entire sidewalk area in front of the main entrance was private property and that no demonstrations could take place there. • Going door to door to solicit support for political causes is a traditional method of advocacy, but is often the target of local restrictions. ACLUM assisted an environmental advocacy organization that was prevented from soliciting in **Norfolk** and an equal marriage group which was told by police in **Hamilton, Ipswich** and **Westwood** that they had to comply with onerous permit requirements. In each case, we persuaded the police departments that under the First Amendment these rules did not apply to noncommercial political expression. • ACLUM assisted the Center for Economic and Social Change in obtaining permission from the **Northampton** Department of Public Works to sell literature and books from its table on the sidewalks. • In **Provincetown,** ACLUM successfully intervened when leaflet distributors were told that a permit was required to distribute leaflets and challenged the arbitrary citation of a street performer for obstructing a public way. • And local officials in both **Worcester** and **Northampton** were persuaded by ACLUM to modify provisions of anti-noise ordinances which restricted political speech. Cooperating attorneys who contributed to these efforts were Mark Michelson, Gregg Shapiro and Marc Jones (Choate, Hall & Stewart) and. Mark Batten and Eben Krim, (Proskauer Rose)

First Amendment Freedoms in the Schools. The protection of the constitution does not stop at the schoolhouse door, and ACLUM was frequently called upon over the course of the past two years to defend the exercise of freedom of speech by students, teachers and parents in Massachusetts public schools and colleges. • Students at the **University of Massachusetts at Amherst** were threatened with discipline for drawing a picture depicting themselves as KKK members, even though the picture was not published or distributed and was not intended for publication. After it was discovered by other students, and published in order to embarrass its creators, the University was reported to be considering discipline against both groups of

students. After ACLUM wrote to the school raising First Amendment objections, the administration backed down on its threats of expulsion or suspension but lesser discipline was imposed on some students. • At **Smith Vocational High School**, a student caused a stir at the school by wearing a confederate flag belt buckle which drew protests from both faculty and students who proposed that it be banned. The student was asked "unofficially" not to wear the buckle. ACLUM persuaded the school to rescind its policy banning the wearing of symbols on clothing, including confederate flag belt buckles. • A similar incident occurred at **Frontier Regional High School**, where a student was suspended for wearing a T-shirt that said, "I was raped by my priest and all I got was this lousy t shirt." After ACLUM contacted the superintendent, the suspension was revoked and the student was readmitted to school. • With increasingly intense efforts to recruit high school students to join the military, peace groups have been seeking equal rights to meet and talk with students, ranging from the right to have a table with literature, access to bulletin boards and the right to speak at "career" day events. ACLUM staff have been advising various groups on their right to have their views expressed to students. • And finally, ACLUM intervened when a first grade student in **Norton** was punished when, after being required to "donate" his recess time to write to U.S. soldiers in Iraq, he wrote an angry note to the troops. While recognizing that the child's protest may not have been intended as a political statement, ACLUM sought to impress on school officials the problems raised by establishing an orthodoxy of acceptable statements to be written to soldiers stationed in Iraq. Cooperating attorneys who contributed to these efforts were Jeffrey Pyle (Prince, Lobel, Glovsky & Tye) and Harris Freeman

Censorship Issues. The speech and expression protected by the First Amendment takes many forms, but none seems immune to the urge to censor. • ACLUM is providing representation for John Rosenthal, the owner of a large billboard overlooking the Massachusetts Turnpike. The message on the billboard, which was posted following the disclosure of unlawful NSA interception of domestic phone calls, consists of a photo of George Bush and the message, "Little Brother is Watching." Rosenthal received a warning from the state's **Outdoor Advertising Board** directing him to take down the billboard because it did not advertise an item for sale inside the building (an on-site Ad). It appears that if the billboard related to a business located in the building, it would not require a permit, thus treating commercial speech better than noncommercial expression. Our cooperating attorneys have written to the Outdoor Advertising Board on Rosenthal's behalf, raising a variety of arguments as to why the billboard is lawful and constitutionally protected. • For many years, the **Somerville Arts Council** has sponsored a street festival at which myriad groups have been permitted to rent a table. In 2005, the city excluded certain political organizations which appeared to be controversial. Through use of the state public records law, ACLUM has obtained and is reviewing records indicating how the excluded groups were selected as well as the city's revised guidelines for participation. • ACLUM has written to the MBTA requesting that it rescind or modify its prohibition of photography of MBTA stations, trains and buses. • The Prison Book Program (PBP) has been providing free books to prisoners across the country for over thirty years. Recently, the Massachusetts Department of Correction (DOC) barred further shipments from PBP on the grounds that it was not an "approved vendor" for DOC purposes. We have written to the Commissioner of Correction requesting that PBP be allowed to continue its shipments, either as an approved vendor, or under some other category. Cooperating attorneys who contributed to

these effort were Mark Robinson and Jon Albano, (Bingham McCutchen), Geri Haight and Noah Shaw (Mintz Levin) and Leonard Singer.

POST 9/11 CIVIL LIBERTIES ISSUES

Abou-Houssein v. American Airlines In the aftermath of September 11, 2001, there has been a fundamental change in the treatment of Muslims, Arabs and people of Middle Eastern descent or appearance. They are not only viewed more frequently with suspicion, but are frequently stopped by police and other law enforcement officials solely on the basis of race or appearance. Alex Abou-Houssein is a U.S. citizen, native of Egypt. He is an engineer who was scheduled to travel from Logan Airport to Washington's National Airport on Thanksgiving Day in 2001. Although he passed through the security screening without a problem, he was subjected to special screening at the gate, he heard loud mention of his Egyptian national origin, and was told that the pilot would not allow him to fly on that plane. Officers told him to take a later plane or the train. ACLUM filed a complaint of discrimination on the basis of national origin in a place of public accommodation on his behalf with the Massachusetts Commission Against Discrimination (MCAD). The case was removed to federal court by the defendants and has been resolved. Attorneys: Jean Musiker, Sulyken Walker (Sugarman, Rogers, Barshak & Cohen); John Reinstein (ACLUM). †

Commonwealth v. Picariello, Picariello v. U.S. Department of Justice At a rare appearance in Boston by President Bush in 2004, an anti-war protestor was picked out of the crowd and arrested. In defending against his prosecution for disturbing the peace, he claimed that he was arrested because he had been under surveillance by the police and *not* because he had violated the law. When he issued subpoenas to several Boston police officers in the Intelligence Division who were believed to have identified him in a briefing prior to the arrest, the Justice Department moved to quash the subpoenas on the grounds that the officers were assigned to the Joint Terrorism Task Force and, as such, were considered federal employees who could not testify without the assent of the U.S. Attorney. After the U.S. Attorney refused to give consent, ACLUM brought suit in federal court seeking review of the decision of the U.S. Attorney. After that suit was filed, it was disclosed that the two officers had not conducted the briefing. At the criminal trial, the officer identified by the police as having been responsible for the briefing testified that he was not present and could not identify the officers who conducted the briefing. When the prosecution was unable to produce the officer, the court dismissed the charges with prejudice. The Commonwealth has appealed from the order of dismissal. Attorneys: John Pavlos (Pavlos & Vitali), John Reinstein (ACLUM).*

Mayor of Newton v. AT&T Following reports that a number of telephone companies had disclosed customer long distance records to the National Security Agency (NSA) without a warrant, ACLUM filed a complaint with the Massachusetts Department of Telecommunications and Energy (DTE) against AT&T and Verizon on behalf of the mayors of Newton, Somerville, Chicopee and Northampton. The media reports suggested that a database, including billions of phone records from over 200 million customers, is being held by the NSA. *USA Today* on May 11, 2006, called the database the "largest…ever assembled in the world." According to the *New York Times* on May 12 and 13, 2006, the database includes dozens of fields of information, including numbers called, the time, date and direction of the calls, as well as other details. It

would be very easy for the NSA to determine the names and addresses associated with these calls by cross-referencing them with other, readily-available databases. The CIA, FBI, and DEA all have access to the NSA database. The complaint alleges that the disclosure of the customer records violates both state and federal law, and seeks an order by DTE prohibiting companies from disclosing records to NSA without a warrant or other lawful demand by NSA. Attorney: John Reinstein (ACLUM) *

Petition of the ACLU of Massachusetts for Rulemaking Along with the filing of the mayors' complaint against AT&T and Verizon, ACLUM has filed a separate petition on behalf of its 22,000 members asking the DTE to adopt regulations that would require telephone companies in Massachusetts to treat customer call records as confidential and would prohibit the disclosure of such records in the absence of specific legal authority and notice to the consumer. Attorney: John Reinstein (ACLUM).*

Downing v. Massport Behavioral profiling has been used as the basis for stopping individuals at Logan Airport since 2002 when Massport announced that State Police troopers were being trained by an outside security consultant. The procedures were subsequently incorporated into the state police "Behavior Assessment Screening System" used at Logan and other locations, and allows officers to detain anyone who they believe is exhibiting "unusual" or "anxious" behavior without regard to whether they are boarding an aircraft. ACLUM filed suit challenging the constitutionality of this on behalf of King Downing, who was stopped by Massachusetts State Police troopers after arriving at Logan Airport. Downing had left the gate area and was making a phone call in the public terminal when a state police trooper demanded that he produce some identification. Downing declined to do so and was told that he would have to leave the airport. However, when he attempted to leave the terminal building, he was stopped again, surrounded by four troopers and told that he was being placed under arrest for failing to produce identification. When he finally agreed to produce his driver's license, the troopers then demanded to see his airline ticket. After the police inspected Downing's identification and travel documents, he was allowed to leave. After the suit was filed, the defendants objected to producing any information about the behavioral profiling system on the grounds that it constituted "Sensitive Security Information," whose disclosure is prohibited by Transportation Security Administration (TSA) regulations. After review by TSA, some of the materials were produced. Attorneys: Peter Krupp (Lurie & Krupp), John Reinstein (ACLUM).*

Gray v. Transportation Security Administration (U.S. District Court)
Gray v. Transportation Security Administration (1st Circuit Court of Appeals)
Foreign born airline pilots have been subjected to tremendous scrutiny post-9/11 with some being denied the right to obtain further training necessary to obtain jobs, based on secret accusations and secret evidence. In these federal court actions (filed in both courts for technical reasons), we are representing a longtime U.S. permanent resident, born and raised in Northern Ireland, who lost a new pilot's job because Transportation Security Administration (TSA) denied his request for additional training on the grounds that he was a threat to national security or aviation. Unable to begin to refute the unknown evidence upon which this accusation was based, we first filed an appeal within the TSA which was denied, and subsequently filed a federal court action challenging the lack of due process. In the midst of litigation, the government added our client to the "no fly" list, making him unable to board an airplane as a passenger, let alone as a

pilot. We amended our lawsuit to add a claim that this last step was retaliation against our client for having filed the initial lawsuit challenging the training decision. Through informal non-judicial means, the government has now removed our pilot from the no-fly list and he has been able to return to work. We are in the midst of settlement negotiations to attempt to resolve the lawsuits. Attorneys: Paul Holtzman and Hugh Rappaport (Krokidas and Bluestein); Sarah Wunsch (ACLUM).*

<u>Kantamanto v. Peter Pan Bus Lines</u> The impact of 9/11 on the lives of Muslims in America goes far beyond FBI interrogations and the indefinite internment of aliens. Reflexive suspicion and discriminatory treatment are commonplace, as shown by the treatment of Abdur-Rahman Kantamanto, an African-American Muslim who at times wears traditional Muslim clothing. Mr. Kantamantu had planned to travel by bus from Worcester to Philadelphia with his wife and three young children. When he went to the bus station in Worcester to buy tickets, he was not only asked to produce identification for himself and his wife, he was told by the ticket agent that he would not be able to purchase tickets for his children without presenting their birth certificates. They were forced to postpone their trip until they could obtain the documentation. They later learned that this was not required, and that other passengers had not been subject to this treatment. ACLUM represented Mr. Kantamanto at the Massachusetts Commission Against Discrimination (MCAD) where he had filed a complaint against the bus company, charging discrimination in a place of public accommodation. Peter Pan agreed to settle the case with the complainant receiving a monetary payment, we received attorneys' fees, and the company agreed to undertake training of its employees to avoid future discrimination. Attorneys: Sarah Wunsch (ACLUM), Bill Newman (ACLUM).†

<u>Rahman v. Chertoff</u> A lawsuit filed in federal district court in Illinois on behalf of nine American citizens from across the country, including ACLUM's client from Massachusetts who is originally from Afghanistan. Niaz Anwar and his wife Mawash are both U.S. citizens who, when they return to the U.S. either by car from Canada or by plane from elsewhere, are repeatedly stopped, searched and detained for hours on end. They have joined with plaintiffs in Illinois, New York, Pennsylvania and Washington in an effort to force the federal government to implement changes to the Federal Bureau of Investigation's Terrorist Screening Center (TSC) and the policies of Customs and Border Protection (CBP) that will ensure that innocent Americans are not subjected to humiliating and unnecessary detentions and harassment by federal officials when they re-enter the United States. The other plaintiffs were also subjected to repeated lengthy stops, questioning, body searches, handcuffing, excessive force, separation from family members and confinement by customs officers when they returned to the United States from travel abroad. The plaintiffs all report being unnecessarily delayed, while some recite tales of being shackled to a chair for hours and others had their automobiles surrounded by agitated guards with firearms, a frightening sight for their young children. Attorneys: Roger Pascall, Everett Cygal, Paula Ketcham, and Joshua Lee (of the Chicago law firm Schiff Hardin LLP); Harvey Grossman & Adam Schwartz (ACLU of Illinois); Junaid M. Afeef of Hoffman Estates, Sarah Wunsch (ACLUM), Kary Moss and Michael Steinberg (ACLU Fund of Michigan), Noel Salah of Detroit and Aaron H. Caplan (ACLU of Washington).*

Sahni v. Secret Service Sundeep Sahni was a Sikh student at Boston College (B.C.) who, in accordance with his religion, wore a turban on his head. While walking on the campus in July of 2004 with two friends, one of whom was taking pictures of the campus, Sahni was detained by Secret Service agents who happened to be staying at B.C. during the Democratic National Convention. Despite the fact that Boston College police quickly identified Sahni as a student, the Secret Service agents held him and his friends for about seven hours, subjecting him to interrogation and searches of his person and his car, before allowing the three to leave. On his behalf, we objected to the Secret Service about this apparent ethnic and religious profiling as well as the unlawful detention and searches. After the agency refused even to meet to discuss what had occurred, we joined with the Sikh American Legal Defense Fund in filing a complaint with the Civil Rights office of the Department of Homeland Security. DHS sent three agents to Boston to investigate the complaint; and in November of 2005 we received notice that the office had concluded that the Secret Service agents had behaved entirely appropriately. Attorney: Sarah Wunsch (ACLUM) with Preetmohan Singh of the Sikh American Legal Defense Fund.*†

NON-LITIGATION ADVOCACY

Spy files FOIA Request ACLUM has filed Freedom of Information Act (FOIA) requests on behalf of four organizations and 10 individuals whom it believes may be targets of domestic FBI surveillance. The FOIA requests are part of a nationwide effort by the ACLU to make public the nature and extent of the government's domestic spying activities using local police and the Joint Terrorism Task Forces (JTTFs). The JTTF partnerships between the FBI and local police, in which local officers are "deputized" as federal agents, are intended to identify and monitor individuals and groups implicated in terrorism. The ACLUM FOIA requests were made on behalf of the ACLU of Massachusetts and the ACLU Foundation of Massachusetts (ACLUM), the American Friends Service Committee - New England Regional Office (AFSC), the American Arab Anti-Discrimination Committee, Massachusetts Chapter, (ADC), International Action Committee Boston (IAC Boston), John W. Roberts, Howard Zinn, Noam Chomsky, Charles "Chuck" Turner, Elaine Hagopian, Joseph Gerson, Kazi Toure, Stevan Kirschbaum, Yaju Dharmarajah and Naseer Aruri.

Fusion Center Public Records Request Responding to Governor Romney's unveiling of the so-called "Anti-terror Fusion Center," the ACLU of Massachusetts has made a formal request to Secretary of Public Safety Edward A. Flynn for documents describing the purpose, structure and funding of the fusion center. As chair of a Homeland Security working group, Romney has called the establishment of fusion centers that would collect information from sources such as "meter readers, EMS drivers, law enforcement, and other private sector personnel, which might, when stitched together, point to a potential terrorist attack," and made the Fusion Center the centerpiece of his September 14 speech in which he called for surveillance of religious leaders and immigrants. The Massachusetts Fusion Center, which will operate out of the State Police headquarters, is intended to be the hub of a widespread and highly-intrusive intelligence network in Massachusetts, collecting information about individuals from almost any available source. The initial response to the request provided only general information concerning the Fusion Center, and the state has informally advised ACLUM of the seemingly contradictory position

that the Center would be gathering "anti-terrorist" intelligence without looking at political activities or motivation.

Airport groping With the ACLU national office, ACLUM objected to the treatment of women passengers by Transportation Security Administration airport screeners. Over one hundred women from across the country filed complaints with ACLU, including a number from Massachusetts, stating they had been physically groped, forced into various states of undress in public areas, and subjected to sexual comments. ACLU advocacy with the Department of Homeland Security civil rights officials has led to a change in policy and practices and we have not received any complaints since then.

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U.S. Attorney's Opposition to Anti-Patriot Act Resolutions ACLUM has made a request under the Freedom of Information Act to obtain information concerning the nature and scope of the activities of the U.S. Attorney's office in opposing local resolutions concerning the Patriot Act.

Student Fees at UMass-Amherst We achieved a significant victory in challenging a fee that the university had imposed on foreign students. In light of a labor arbitrator's decision, which covered a significant percentage of the foreign students and held the University's policy to be discriminatory, the University folded and gave up the fee it has been charging all foreign students. Attorney: Bill Newman (ACLUM).

FREEDOM OF RELIGION/ SEPARATION OF CHURCH AND STATE

<u>ACLU of Massachusetts v. Leavitt</u> In its zeal to provide funding to "faith-based" organizations, the federal government has given over one million dollars to the Silver Ring Thing, a Christian organization that engages in what is referred to as "abstinence-only-until-marriage" education by means of religious proselytizing. ACLUM was the plaintiff in this lawsuit, brought in federal district court in Boston, against the federal officials who make the grants, charging that they violated the Establishment Clause of the First Amendment by using taxpayer money to support religious teaching. Just prior to our planned filing of a motion for a preliminary injunction, the federal government announced it was halting payments of any new money to the Silver Ring Thing, thus mooting our need for a preliminary injunction. The federal government entered into a settlement agreement with us in which, if Silver Ring Thing applies for and receives any future federal grants, it will be required to make detailed reports and the government will thoroughly monitor the programs to prevent use of government money for religious proselytizing. Attorneys: Julie Sternberg (ACLU Reproductive Freedom Project); Daniel Mach, Victoria Jueds, Thomas Pulham, Jessica Tillipman (Jenner & Block); Sarah Wunsch (ACLUM).*†

<u>Ahmad v. Maloney</u> This suit was brought in Superior Court on behalf of an Islamic prisoner who was confined in the maximum security Departmental Disciplinary Unit (DDU) at Massachusetts Correctional Institution (MCI) Cedar Junction challenging the refusal of the Department of Correction to provide him with Halal meals during Ramadan. The prisoner was released after the suit was filed, leaving only a claim for damages. The trial court granted a motion for summary judgment on the basis of qualified immunity, and the Supreme Judicial Court affirmed. Noting that the Department of Correction had provided pork-free meals, the

court held that a reasonable prison official could have concluded that this was a sufficient accommodation of the prisoner's religious belief and that he was therefore entitled to qualified immunity from a suit for damages. Attorneys: Julia Frost-Davies and Neil McGaraghan (Bingham McCutchen LLP) †

Brissot v. Transportation Security Administration Post-9/11, the federal government took over the task of airport baggage screening and has claimed to have improved the quality of performance by the screeners. In the case of Josue Brissot, however, the TSA is demonstrating that its judgment on what is needed for airline safety is thin indeed. After Brissot began questioning why he was being denied promotions, the TSA began threatening to terminate the employment of Brissot, an experienced baggage screener at Logan Airport, because he wears his hair in dreadlocks as part of his Rastafarian religion. Josue Brissot has college degrees from his native Haiti and from the University of Massachusetts and has received good job evaluations. He wore his hair in dreadlocks at the time of his hiring and explained then that the dreads were an important part of his religion. In the spring and summer 2005, TSA told Brissot to cut his hair or face firing. We have filed an administrative complaint of religious discrimination with the EEO office of the TSA. Mediation has been unsuccessful and the agency investigation of the complaint is ongoing. Attorney: Sarah Wunsch (ACLUM).*

Gordon v. Pepe This is a suit in U.S. District Court on behalf of a prisoner whose Rastafarian beliefs compel him to eat a vegetarian diet. The prisoner was originally provided with vegetarian meals, but the DOC subsequently adopted a so-called "religious diet" for all faiths containing soy-based dishes that were intended to have the appearance of meat. The plaintiff asserts that he cannot eat the generic "religious diet" without violating his beliefs. The suit asserts that the DOC policy violates the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA). The DOC challenged the constitutionality of the federal statute on the grounds that Congress exceeded its constitutional authority. The Court denied the DOC's motion to dismiss, holding that RLUIPA is constitutional and that the prisoner is entitled to a trial on the underlying claims. The case was subsequently dismissed as moot after the prisoner was deported. Attorneys: Julia Frost-Davies (Bingham McCutchen LLP) and John Reinstein (ACLUM). †

O'Leary v. Norwood School Committee It had been a tradition for over seventy years in Norwood for the town government to erect a Christmas display consisting of a Nativity scene in front of the town offices and on the front lawn of a local elementary school. In response to complaints from residents about the town's sponsorship of overtly religious symbols, officials transferred ownership of these crèches to a private organization. That group, with the permission of the Norwood School Committee, placed one of the two crèches back on the front lawn of the elementary school under a new policy plainly adopted to allow the crèche to remain there as usual. The School Committee declared that the lawn of the school was a "public forum," a place where all members of the public had access. In fact, this was a sham because the school lawn has never been used by the public for displays other than the crèche and few would believe that the front lawn of an elementary school was an appropriate place for robust adult speech and expression. After ACLUM filed suit in U.S. District Court challenging the decision of the School Committee, its members agreed to settle the case by repealing the policy under which the crèche had been maintained on the school lawn and, in December of 2004, for the first time in

many years, the crèche was displayed on private property instead of at the public school. Attorneys: Eric Hermanson (Choate Hall & Stewart) and Sarah Wunsch (ACLUM).†

NON-LITIGATION ADVOCACY

Quincy Church Banner We represented the United First Parish Church of Quincy when it ran into obstacles in being allowed to display a banner on the front of the church in support of equal marriage rights. The historical commission objected that the horizontal lines of the banner detracted from the vertical lines of the historic building, and the zoning commission appeared poised to deny a permit for the display. With our intervention, the City agreed that the church was exempt from zoning regulations governing signs based on the "Dover Amendment," a state law easing the application of local zoning laws on religious and educational entities, and that the federal Religious Land Use and Institutionalized Persons Act prevented the historical commission from denying the church the right to display the banner unless it had a compelling government interest to support the denial. Plainly there was no such compelling interest and the City allowed the Church to put up the banner. Attorneys: Liz Pyle, (Anderson & Kreiger); Sarah Wunsch (ACLUM).*

POLICE PRACTICES

<u>Boston Police Patrolmen's Association v. City of Boston.</u> Legislation enacted in 2000 requires law enforcement authorities to address the problem of racial profiling in Massachusetts. In the first stage of the inquiry, data on traffic citations was collected from police departments across the state. In May of 2004, researchers from the Northeastern University Institute on Race and Justice issued a Final Report, which analyzed this data and determined that "249 law enforcement agencies in Massachusetts had disparities in at least one of four categories citations of residents compared to the residential population, all citations compared to the driving population estimate, searches of motorists once cited and the issuance of written warnings versus a payable citation." In the second phase required by the statute, the Secretary of Public Safety, in consultation with the Attorney General, required 247 law enforcement agencies to collect data on all traffic stops for a period of one year. The Secretary has provided a form for the collection of that data which allows records of the identity of the officer making the stop. Based on a provision of the statute which limited the collection of personal identifying information, the Boston Police Patrolmen's Association brought suit in Superior Court seeking an injunction to prevent the Police Commissioner from requiring the recording the names of police officers. The Superior Court denied the plaintiff's motion for a preliminary injunction, and the case was appealed. An amicus brief filed by ACLUM on behalf of advocacy and community groups, members of the Racial Profiling Working Group and individual members of the Legislative Black Caucus argued that the ambiguity of the statute required the court to examine its legislative history and purpose and that collection of officer identification is not only consistent with the remedial purpose of the statute but essential to the development of meaningful remedies. On February 8, the SJC affirmed the order of the Superior Court, holding that the act requires the collection of officer identification during the second, or remedial, phase of the statute's implementation. Attorneys: John Reinstein (ACLUM), Barbara Dougan (LCCR).*†

Commonwealth v. Teixeira Bishop Filipe Teixeira is a community activist from Brockton who has taken a leadership role in protesting racial profiling and police misconduct. Late one night, he was awakened by a disturbance outside his home. When he went to the door to investigate, he saw his brother and another man being pulled from their car by the Brockton police. As he came out of the house to see what was going on, he was stopped by a police officer. He returned to his porch, but when he saw the officers striking his brother he came forward to protest. As he did, he was sprayed with pepper spray. He was then arrested and charged with interfering with a police officer, disorderly conduct, disturbing the peace and resisting arrest. The case was continued without a finding and will be dismissed. Attorney: John Reinstein (ACLUM). †

Harvard Crimson v. Harvard Univ. Police Dept. This suit contended that when private college and university police officers are given government appointments to exercise the same police powers as municipal officers, they should be subject to the same type of public scrutiny through the state's public records law. ACLUM brought this suit in Middlesex Superior Court on behalf of a college newspaper after its request for access to Harvard University Police Department records under the Massachusetts freedom of information statute was denied. Many of Harvard's police officers have appointments as special state police officers and deputy sheriffs, with full powers to carry and use weapons and stop, detain and make arrests. The Superior Court granted Harvard's motion to dismiss the case, ruling that because Harvard was a private entity, the public records law did not apply to its police department. While the judge acknowledged that "the public importance of disclosing police records is just as high when the police officers at issue, although not state and local police officers, are authorized to perform and often do perform the same functions as the state and local" officers, she concluded that a record had to be made or received by a "specific instrumentality of state or local government" to be covered by the public records law. While the Supreme Judicial Court rejected our appeal of the dismissal, a bill pending in the legislature would make campus police records available under the public records law. Attorneys: Frances Cohen and Amber Anderson (Dechert, LLP) and Sarah Wunsch (ACLUM).†

Van Der Meer v. Lanergan This is a civil rights action for damages brought in Suffolk Superior Court on behalf of an African-American professor at the University of Massachusetts at Boston who was arrested by campus police officers when he protested against racist statements made by an Army National Guard recruiter. A student who was standing near the recruiter's table was handing out flyers concerning the anniversary of the assassination of Martin Luther King, Jr. which contained a statement from Dr. King's 1967 speech "Beyond Vietnam" and drew parallels between the wars in Vietnam and Iraq. The student was wearing a shirt bearing the message "Military recruitment off my campus." The recruiter confronted the student and said that he, like Dr. King, should be "shot in the head." When Professor Van Der Meer objected to the recruiter's provocative comment and an argument between them ensued, a campus police officer intervened. Ignoring the recruiter's inflammatory comments and aggressive behavior, the police officer aggressively sought to silence Van Der Meer, knocked him to the ground, used "pain techniques" to subdue him and placed him under arrest. Attorneys: John Pavlos (Pavlos & Vitali), John Reinstein (ACLUM). *

NON-LITIGATION ADVOCACY

DNA ACLUM continues to monitor the use of the state's DNA data bank. In January of 2005, police began collecting DNA samples from each of the nearly 800 adult male residents of the Town of Truro. Police officers approached residents in various public locations and asked them to provide a DNA sample on the spot. Citing a 2004 study by the Police Professionalism Initiative at the University of Nebraska at Omaha, which reported that "a national survey of all the reported cases of police requesting voluntary DNA samples from potential suspects found that the tests successfully identified an offender in only one of eighteen cases," ACLUM wrote to law enforcement officials in Truro asking them to discontinue the DNA dragnet. In response to a follow-up letter from ACLUM, the District Attorney formally agreed that the DNA profiles obtained from Truro residents would not be included in the state's DNA database and that the sample would be destroyed if there was not a match. In 2006, ACLUM undertook to document the practices of the State Police concerning the retention of DNA samples provided on a voluntary basis or pursuant to court order and the inclusion of identifying information obtained from those samples in the state's DNA database. Among other things, review of the State Police operating and procedures manual for the State Police Laboratory showed that, while the "allowed" categories of data which may be uploaded to the state and national databases do not include samples provided on a voluntary basis or pursuant to a court order, the manual does not expressly prohibit uploading that data (as it does for certain other categories) and makes no provision for the destruction of the samples from which the data is obtained.

Less Lethal Force Citing safety concerns following the death of Victoria Snelgrove and other fatal incidents arising from the introduction of new police weaponry around the country, ACLUM issued a report setting forth specific recommendations for improved training, use and monitoring of so-called "less lethal" weapons by the Boston Police Department and other law enforcement agencies in the Commonwealth. Less Lethal Force: Proposed Standards for Massachusetts Law Enforcement Agencies. The ACLU report addresses a range of less lethal weapons currently available to law enforcement, including chemical sprays, pepper spray, impact projectiles, electroshock weapons and other devices. It then examines the national legislative and legal landscape regarding less lethal weapons and surveys current less lethal force policies of major metropolitan police departments. Specific ACLUM recommendations cover (1) independent review of weapons systems; (2) training; (3) use; (4) post-use practices; and (5) monitoring of less lethal force weapons. Subsequently, the Harvard Law School Chapter of the ACLU completed a survey of compliance with state law requirements for law enforcement agencies which are using stun guns (a/k/a "tasers"). The law students prepared and sent public records requests to the Executive Office of Public Safety, the Department of Corrections and some local police departments for information relevant to the statutory requirements.

Surveillance Camera Project Over the last few years, a number of local police departments have obtained funding for and have touted the benefits of placing surveillance cameras in public areas such as streets, sidewalks and parks. Contrary to the claims made on their behalf, these circuit television cameras do not seem to prevent most types of crime, while there are other measures that could be taken, such as better lighting, genuine community policing, and neighborhood watches, that may be more effective in reducing the problem of crime in our neighborhoods. Given the technological capabilities of modern cameras, combined with the ineffectiveness of

the cameras in reducing crime, we are concerned about the storage and sharing of cctv digital files, the ability of the cameras to zoom in and see what someone is reading, and the overall sense that the cameras are part of the "Surveillance Society" which is contrary to American values. In conjunction with the law firm of Foley Hoag and Eliot, we are working on research that will be used for a report to help educate the public on the dangers and drawbacks of police surveillance cameras in public spaces. Attorney: Vincent Canzoneri, (Foley Hoag and Eliot).

PRIVACY RIGHTS

Commonwealth v. Rivera Do people believe their conversations are being audiotaped whenever they see video security cameras in retail stores? Some justices of the Supreme Judicial Court (SJC) apparently made the suggestion, during oral argument in this murder appeal, that when a video camera is visible in a store, any voice recording made by the camera is not "secret" and are not prohibited by our state wiretapping law, which makes it illegal to secretly tape-record a conversation. Since there was no evidence or briefing on which the justices could base this conclusion, the defendant's attorney, post-argument, filed a motion for a stay of the court's consideration of the appeal and requested time to supplement the record. ACLUM filed a letter with the SJC supporting the request for a stay and suggesting that there is no general agreement that retail stores engage in audiotaping with their security cameras. To the contrary, news of audiotaping by such businesses as Dunkin Donuts has led to loud protests and changes in policies by a number of stores. Our letter also argued that the court should reject an argument made by the Commonwealth in its brief that the court should judicially construct a "security exception" to the secret audio recording prohibition. The SJC denied the motion for a stay, but in its ruling on the merits of the appeal about whether the audiotape could be introduced into evidence, the justices did not decide the question of whether the store audiotape was a secret recording in violation of the state wiretap law. Instead, the court adhered to a prior decision which held that where the police had no part in making the illegal recording, the evidence need not be suppressed. We consider it a victory of sorts that the SJC avoided making any ruling about the legality of undisclosed audio taping by means of store video cameras, but we can glean from the concurring opinions that a majority of the justices appears poised to rule that such recordings are not secret and do not violate the wiretapping statute. Attorneys: Sarah Wunsch (ACLUM) and Bill Newman (ACLUM).*†

Nelson v. Salem State College One of the most subtle intrusions on personal privacy is the ubiquitous presence of the video surveillance camera, the silent eye that not only watches but records everything in its field of vision. These devices are sometimes obvious, but are frequently hidden so as to permit the secret recording of people's activities. This can result in substantial violations of privacy. Gail Nelson is an employee at Salem State College. Unknown to her, the college and college officials had secretly videotaped her college workplace 24 hours a day. As she was unaware of the videotaping, she regularly used a private area of the office before and after working hours to change her clothes. The complaint alleges that she was videotaped while changing her clothes and that at least one of the individual defendants was aware that she used the office to change clothing and would have been videotaped in a private area of the office that was under video surveillance. The defendants filed a motion for summary judgment arguing that an employee could not have a reasonable expectation of privacy in the workplace and that a suit for damages was barred by the doctrine of qualified official immunity. After scheduling the case

for trial, the court reconsidered and dismissed the plaintiff's claims. The Supreme Judicial Court affirmed the decision of the trial court. In an opinion written by Justice Ireland that may open the door to the expansion of video surveillance in the workplace, the court held that a person does not have a reasonable expectation that their conduct will not be subject to video surveillance, unless there is an absolute guarantee that other people cannot enter the area where it takes place. Attorneys: Jeff Feuer and Lee Goldstein (Goldstein & Feuer) and John Reinstein (ACLUM).†

Smith v. Justices of the Hampden Probate and Family Court This suit, in the Supreme Judicial Court for Suffolk County, challenges the practice in the Hampden Probate and Family Court of obtaining from the Department of Social Services personal records concerning litigants which contain subjective evaluations. The records are released to the court without the knowledge or consent of the parties and are used by the court without notice to the parties and without an opportunity to contest the information they contain. Attorneys: Pat Rae, Colleen Lippiello, Peter Benjamin, Meredith Morrison (Western Mass. Legal Services) and John Reinstein (ACLUM).*

NON-LITIGATION ADVOCACY

Drug testing at homeless shelters Acting jointly with Greater Boston Legal Services, we intervened on behalf of several women who have been subjected to random drug testing at certain shelters for homeless families. The testing is done frequently, is highly invasive, and not justified by any behavior on the part of the women. All the shelters at issue have stopped the practice in response to our objections. Attorneys: Tony Doniger and Liza Tran (Sugarman Rogers Barshak and Cohen); Steve Valero (GBLS); and Sarah Wunsch (ACLUM).

Military recruiting in high schools The federal "No Child Left Behind" Act requires that schools receiving federal education money must give military recruiters the names, addresses and telephone numbers of high school students. However, the law also requires that schools notify students and parents of their right to have this "directory" information withheld. In August of 2005, we wrote to all Massachusetts high school principals urging them to make sure that they give adequate notice of this right, with sufficient time for an opt-out decision to be made by parents or students. Working in conjunction with members of the Boston College Law School ACLUM chapter, we are preparing public records requests to determine whether schools are adequately complying with the notice requirement.

Salem public schools drug testing ACLUM objected to a proposal made by the Salem School Superintendent to impose random drug testing on either all students or those who participate in athletics or other extracurricular activities. The Superintendent appointed a study commission that was to make recommendations and we continued to oppose the proposal there. The study commission ended up not recommending any without-cause drug testing of students.

Voice Recordings on Pioneer Valley Transportation Authority buses The sign at the front of the buses says that conversations with the driver may be recorded. The fact is that the system is sensitive enough to record conversations throughout the bus. Our efforts to persuade the transportation authority to remove or modify the recording system have been unsuccessful and we are preparing to file a lawsuit. Attorney: Bill Newman (ACLUM).

Monson School Searches ACLUM wrote to the Superintendent of Schools in Monson requesting revision or repeal of a school policy providing for breathalyzer tests of any student attending an extra-curricular event sponsored by the school, including school dances and athletic events. A public debate has ensued.

Springfield School searches Springfield school administrators last year (and perhaps previously) were conducting searches by entering randomly selected classrooms and requiring all students to empty the contents of their book bags, pockets and pocketbooks. Some students were required to lift their shirts and unbuckle their belts for visual inspection. These searches are not based on suspicion of any wrongdoing, but are conducted for the purposes of preventing (and finding) weapons and drugs in the schools. In light of our objections, the school is reviewing its policies and practices.

Assabet Regional Vocational Technical High School We assisted a high school senior who was forced by school officials to undergo drug testing after the administrators saw a photo of him on the Internet site, MySpace, that showed another student apparently passing a pipe to him. When the student tested positive for marijuana, the school suspended him, threatened him with expulsion and required him to undergo random drug testing. We argued to the school and its attorney that the school had no right to require the student to take the initial drug test since there was no evidence in the MySpace photo of any connection to the school, and that the results of that test could not be used against him. The school dropped the threat of expulsion and the drug testing requirement, and agreed to remove any evidence of this incident from the student's record.

Family Rights and Privacy We submitted a memorandum to the state Attorney General, urging his office to disapprove a Milford by-law that would exclude from the definition of a "family" that may live together, any group of more than three people who are not within the second degree of kinship. This would prevent relatives like aunts and uncles, and nieces and nephews, among others, from living together if the family unit would be more than three people. We also objected to the bylaw because it fails to recognize the many different types of families in which people live and have important relationships. We are awaiting a decision by the Attorney General's office.

REPRODUCTIVE FREEDOM

Gordon v. 9 Branch Street LLC The right to abortion has been attacked in many ways, some of which include threatening, harassing and sometimes murdering abortion providers. In this context of needing to protect and defend those who help women exercise their constitutional right to terminate a pregnancy, ACLUM is representing a gynecologist whose landlord threatened to evict him because he performs abortions as part of his outpatient gynecological

surgery practice. We filed a lawsuit in Norfolk Superior Court in June of 2005, seeking a declaratory judgment that the doctor is not violating the terms of his lease by including abortion in his practice and asserting that the landlord is interfering with the doctor's rights (and those of his patients as well), in violation of the state civil rights act. The defendants removed the case to federal court where we engaged in discovery and, more recently, settlement negotiations are ongoing at this time. Attorneys: Dorothy Bickford and R. Alan Fryer (Badger, Dolan, Parker & Cohen); Sarah Wunsch (ACLUM).*

NON-LITIGATION ADVOCACY

In defending the right to reproductive freedom, ACLUM has worked to ensure access to contraceptives, confidential family planning and counseling services, and comprehensive accurate sexuality education in the public schools. Much of our work has involved the reproductive rights of minors who have been an easy target for those who are hostile to these freedoms.

Reporting pregnant teenagers to DSS During 2005-2006, we revived a coalition of organizations which originally had been formed when a few district attorneys ordered school employees to report all pregnant teenagers under the age of sixteen to the Department of Social Services. Counselors, nurses, doctors and teachers had sought our assistance in combating the reporting demand, based on the view that it would drive teenagers away from counseling programs and violate their right to privacy, confidential family planning and reproductive health services. The Coalition includes the Massachusetts Alliance on Teen Pregnancy, Planned Parenthood, AIDS Law Project of GLAD, and the Judicial Consent for Minors Lawyer Referral Panel. Our coalition believes state law requires the provision of confidential family planning services to minors, that the state child abuse reporting law does not require that all sexual activity involving minors be presumed to be child abuse, and requiring the reporting of pregnant teenagers - regardless of the circumstances - raises serious constitutional questions and constitutes sex discrimination.

Abstinence-only-until-marriage programs The right to reproductive freedom depends in large measure on being educated well about sexuality. In the past few years, we have had to confront efforts by the federal government, the Massachusetts governor, and others to promote "abstinence-only-until marriage" sexuality programs in the public schools, which are inaccurate, often sexist and homophobic, and at times religious in nature. [See ACLUM v. Leavitt in religious freedom section]. We have made a public records request to Boston Latin School for documents relating to Healthy Futures, an organization which has provided an "abstinence-only until marriage" course at the school - a program that was touted by Governor Romney as so successful that it will be receiving additional government grants to provide the program at other schools. Healthy Futures was founded by a group called A Woman's Concern, a religious-based anti-abortion organization which describes itself as a pregnancy health organization based on the importance of the gospel, the sanctity of human life, the soundness of sexual purity, marriage and family. The Healthy Futures curriculum does not appear to directly use religious doctrine but it is not accurate or comprehensive health or sexuality education and it uses sexual stereotyping about males and females. We are working with parents and other organizations to have Boston

Latin School and other schools adopt scientifically accurate and comprehensive sexuality education curricula.

Contraceptive Equity Several years ago, ACLUM joined a coalition that succeeded in obtaining the enactment of legislation requiring employers who provide coverage for contraceptives in employee health plans to include coverage for prescription contraceptives. The law has a narrow exemption only for certain religious institutions which hire and serve adherents of that religion. Religious affiliated organizations that serve the public and hire without regard to religion are not exempt. In 2006, we were contacted by an employee of a Catholic-affiliated hospital which has failed to comply with the statute. ACLUM has been attempting to convince the hospital that it must provide coverage for contraceptives. If that fails, we will seek enforcement action because the hospital does not meet the requirements for an exemption because it employs many people without regard to religion, it serves the public and it receives tax dollars and payments for services from the public.

Reproductive Rights Strategy Sessions In 2004-2005, ACLUM joined in two major strategy meetings for organizers working on reproductive freedom issues in Massachusetts. The first covered a range of issues, from threats of the Supreme Court overturning *Roe v. Wade*, to legislative initiatives of the Bush Administration to further erode what remains in effect of *Roe*. Louise Melling of the ACLU Reproductive Freedom Project (RFP) joined us at this session. The second was aimed at preparing for the difficult problems expected from passage of the federal legislation making it a crime to assist a minor to cross state lines to obtain an abortion. We were joined by attorneys from the ACLU's Reproductive Freedom Project, Planned Parenthood Federation of America, the Center for Reproductive Rights, as well as staff of the Abortion Rights Project and Mass NARAL.

DUE PROCESS/CRIMINAL JUSTICE

Commonwealth v. Dwyer In November of 2005, ACLUM joined the Committee for Public Counsel Services and Mass Association of Criminal Defense Lawyers in an amicus brief urging the Supreme Judicial Court to revise the procedures governing when and how defense counsel may obtain and review records which, under the terms of a statute, are considered confidential (e.g., rape counseling records). Because the liberty of defendants is at stake, along with rights to obtain exculpatory evidence, to confront witnesses against them, and to obtain a fair trial, the brief urges that the current protocol to obtain pretrial access to records relating to the complaining witness erects too great a hurdle for defense counsel to meet in almost every case and jeopardizes the constitutional rights of defendants. Attorney: Carol Donovan, (CPCS).*

Commonwealth v. MacDougall A state statute permits a pre-trial detainee to be transferred from a county jail to a maximum security state prison prior to trial if the detainee has at any time previously been sentenced to a state correctional facility. Mark MacDougall was transferred from the Norfolk County Jail to the Sousa Baranowski Correctional Center, a maximum security facility. Arguing that the transfer interfered with his meetings with his lawyer, made it difficult for his family to visit him and constituted the imposition of punishment without trial, he requested that he be returned to the Norfolk County. The Superior Court denied his request and

he filed a pro se petition in the Supreme Judicial Court. ACLUM and the Committee for Public Counsel Services filed an amicus brief arguing that the transfer constituted punishment without trial and the prisoner was entitled in any event to a hearing prior to the transfer. Attorneys: Peter Onek (CPCS), John Reinstein (ACLUM).

Lavallee v. Justices in the Hampden Superior Court In the spring of 2004, the system for providing lawyers to indigent persons entitled to counsel in Hampden County collapsed. On a regular basis, men and women accused of crimes were brought from the county jail to the courthouse only to be returned without having been heard because assigned counsel was not available. The cause of this crisis was undisputed. Compensation rates for the attorneys in private practice who handle nearly ninety percent of the representation of indigent criminal defendants in Massachusetts were shockingly low. Those rates had remained essentially unchanged for nearly a generation and were among the lowest in the nation. As a result, many bar advocate attorneys had stopped accepting assignments in indigent defense cases because they could no longer afford to do so in Hampden County, and there simply were no longer enough lawyers available to satisfy the Commonwealth's constitutional obligation to provide competent counsel for indigent defendants in that county. ACLUM, together with the Committee for Public Counsel Services, sought review in the Supreme Judicial Court. After expedited briefing and argument, the court held that the Commonwealth’s failure to provide compensation for court-appointed attorneys which is adequate to insure representation for those who are unable to afford their own attorney violates the Massachusetts Constitution. Rather than order the payment of higher rates, however, the court took the unprecedented step of ordering that any person who is held without counsel for seven days must be released on personal recognizance and that any charges which have been pending for forty-five (45) days without counsel being appointed must be dismissed without prejudice. A special commission was subsequently appointed by the governor to review the issue of attorney compensation. The commission concluded that the rates paid to court-appointed attorneys were insufficient to insure that indigent defendants would be adequately represented. It recommended that the rates be increased substantially over the course of the next three years, that more full-time public defenders be hired by the Committee for Public Counsel Services, and that a significant number of minor crimes be treated as civil infractions for which the appointment of counsel would not be required. Subsequent legislation substantially increased the number of full-time defenders and funded an initial increase in the rates for court-appointed lawyers. Attorneys: David Hoose (Katz, Sasson, Hoose & Turnbull), John Reinstein (ACLUM), and Bill Newman (ACLUM); William Leahy and Benjamin Keehn (CPCS).

Tokarski v. Stennett and City of Springfield In the summer of 2005, Commerce High School senior Nicholas Tokarski was charged with some property crimes, not in any way related to school. He is a superb basketball player with prospects for a college scholarship, and even though similarly situated students had been allowed to play on high school sports teams and participate in other extra-curricular activates, and there was no rule which advised that a criminal charge could result in a ban, Tokarski was banned form playing basketball. The Superior Court issued a TRO and then a preliminary injunction allowing Tokarski to play this season, his senior year. We participated as amicus in the hearings, pleadings and briefing. Attorney: Bill Newman (ACLUM).*

NON-LITIGATION ADVOCACY

Hector Garcia.and Hector Sola-Rosa Garcia and Sola-Rosa are immigrants who were subject to deportation, but both had lived in the United States for an extended period while challenges to their deportations were pending. During this period, each of them had married a U.S. citizen and their spouses had filed petitions to classify them as immediate relatives eligible for a permanent resident visa. After several years, each couple was notified to appear for what is known as a "marriage interview" at which they would have the opportunity to present evidence that the marriage was entered into in good faith. Garcia and his wife were notified to appear in December of 2005. Sola-Rosa was directed to appear in January. Unknown to either party, the notice was a ruse. The Bureau of Citizenship and Immigration Services had no intention of conducting the interview. Instead, when the couple appeared at the CIS office, the non-citizen spouse was immediately taken into custody and transferred to a detention center to await deportation. The marriage interview was never held. In each case, ACLUM, in cooperation with their immigration attorneys, wrote to CIS and to ICE protesting their treatment of the applicants and requesting that the couples be permitted to complete the marriage interview. Immigration officials relented in both cases. Shortly after this, the regional director of ICE announced that the practice of scheduling sham interviews would be discontinued.

Recording of Attorney-Client Conversations We recently learned that the Suffolk County Jail has been monitoring and recording privileged telephone conversations between pre-trial detainees and their attorneys, and that it is the policy of the Sheriff to release the recordings of telephone calls placed by prisoners upon request of a law enforcement agency. As a result, the District Attorney's (DA's) office has been able to obtain, without a warrant, the recordings of detainees' telephone conversations, including privileged attorney-client communications. The matter came to light after a number of defense attorneys representing individuals held at the jail on pending Suffolk County charges were provided with discovery materials that included recordings of privileged attorney-client telephone conversations originating from the jail. ACLUM, together with the Committee for Public Counsel Services and Massachusetts Correctional Legal Services, has written to the Sheriff and the District Attorney requesting that the Sheriff end the practice of monitoring and recording prisoners' legal calls and that the DA discontinue requesting and/or listening to the recordings of detainees' telephone conversations until the Sheriff's office can guarantee that no privileged calls will be monitored or recorded. Attorneys: Joseph Savage, David Apfel and Kathryn Alessi (Goodwin Procter).

EQUALITY

Dupont v. Department of Correction This case raises an important question about the legal standard by which to judge sex discrimination claims brought by prisoners. Normally, under the Massachusetts Equal Rights Amendment, if the government discriminates on the basis of gender, race or certain other categories, it must demonstrate that the classification is narrowly tailored and is needed to achieve a compelling government interest. A Superior Court judge asked the Appeals Court to answer the question of whether this strict scrutiny is applicable to claims of sex discrimination brought by prisoners. ACLUM and the Women's Bar Association filed an amicus curiae brief, arguing that the compelling interest test applies to prisoner sex discrimination claims under the ERA. The Supreme Judicial Court then granted direct appellate review and will

hear oral arguments in the fall of 2006. We have filed a motion asking that our cooperating attorney, Professor Martha Davis, be permitted to argue before the court as amicus curiae. Attorneys: Martha Davis, (Northeastern University School of Law); Beth Z. Boland and Rheba Rutkowski, (Bingham McCutchen LLP); Ellen Zucker, (Dwyer & Collora); Sarah Wunsch (ACLUM).*

Flynn v. Johnstone An action filed in the Supreme Judicial Court for Suffolk County by former Boston mayor Raymond Flynn and Thomas Shields, which seeks a declaration that marriages contracted by nonresident same sex couples are null and void and requests an order that municipal clerks stop issuing marriage licenses to nonresident gay and lesbian couples. On behalf of the Somerville clerk, we asked the court to throw out the case, arguing that Flynn and Shields have no cognizable legal interest in the case. In response, the plaintiffs filed a motion to transfer the case to the Superior Court and to consolidate it with *Johnstone v. Reilly* (see below), the clerks' civil suit challenging orders by the Attorney General that they cease and desist from issuing marriage licenses from nonresident same sex couples from every other state in the U.S. A single justice of the SJC transferred the *Flynn* case to the Superior Court but denied the motion to consolidate it with *Johnstone v. Reilly*. In the Superior Court, we are now representing the municipal clerks of Somerville and Provincetown and our motion to dismiss for lack of standing is pending. Attorney: Sarah Wunsch (ACLUM).

Gorlier v. Whittier Street Health Center; Garcia v. Whittier Street Health Center Complaints filed in the Equal Employment Opportunity Commission on behalf of two employees who were fired after opposing the adoption of an "English-only" policy at their workplace. The EEOC found probable cause to believe the health center administration engaged in illegal discrimination by adopting its language policy and illegally retaliated against the employees who protested against the policy. We reached a settlement with the health center under which the two employees received monetary payments, the health center agreed to change its language policy, and we received a payment of attorneys' fees. Attorneys: Jody Newman and Laurie Carafone (Dwyer Collora), Sarah Wunsch (ACLUM).†

Hancock v. Commissioner of Education We joined in an amicus brief in this case which challenges the inadequate funding provided by the state to the poorer school districts. The brief, submitted to the Superior Court judge post-trial, focused on the disparate racial impact of the state's method of funding public education. The Superior Court judge made extensive findings of fact and reported the case to the Supreme Judicial Court, after concluding that the current education provided to plaintiff students was indeed inadequate and unconstitutional. Judge Botsford recommended to the SJC that the state determine the cost of providing the education required by all seven curriculum frameworks, the cost of improving the educational leadership in the districts, and determine the funding and implementation to accomplish these goals in a limited but defined time frame. In the SJC, ACLUM joined in a second amicus brief with the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association (LCCR). The Supreme Judicial Court accepted the findings of the Superior Court, but rejected the judge's recommendations and dismissed the case. The legislature and Governor were encouraged to improve the conditions in the schools. Attorney: Julie Patiño (LCCR).†

Johnstone v. Reilly With the landmark ruling in *Goodridge v. Department of Public Health* in November 2003 by the Supreme Judicial Court, Massachusetts became a beacon for equality,

allowing gay men and lesbians the right to marry under our state constitution. Yet, the need to continue to struggle for liberty and equality obviously did not come to an end. After the conclusion of the 180-day stay by the SJC of its ruling in *Goodridge*, city and town clerks in Massachusetts began issuing marriage licenses and marrying same sex couples, including nonresident gay and lesbian couples, just as they have always married nonresident heterosexual couples. In response, Governor Romney and Attorney General Reilly ordered the municipal clerks to stop marrying nonresident same sex couples, relying on an archaic, and heretofore unenforced 1913 state law, which provides that no marriage is to be contracted here by a nonresident if the marriage would be void in the nonresident's home state. Enactment of the law appears to have been motivated originally by a nationwide hysteria about some highly publicized interracial marriages. Despite the history of the statute, Romney and Reilly called on the clerks to enforce the 1913 law in a way it had never been enforced before and they presumed, incorrectly, that same sex marriages contracted in Massachusetts would be void in all other states. A number of city and town clerks resisted the demand that they engage in the discriminatory practice of treating nonresident gay couples differently from straight couples and ACLUM brought suit in Suffolk Superior Court on their behalf, challenging the orders of the Executive Branch and the Attorney General. The superior court judge denied our motion for a preliminary injunction on the grounds that the municipal officials lack legal standing to sue the state for unconstitutional directives. On appeal, the Supreme Judicial Court rejected our appeal on behalf of thirteen city and town clerks who objected to the Attorney General's order that they not issue marriage licenses to nonresident same sex couples. We won one small part of the appeal, getting recognition from the court that the clerks had legal standing to challenge the order as unconstitutional because it placed them in the position of violating their oath of office to uphold the constitution. Attorneys: Scott Lewis, Anne Robbins, Kevin Batt, and Kara Krolikowski (Palmer & Dodge), Gretchen Van Ness; and Sarah Wunsch (ACLUM).†

<u>Shedlock v. Mass. Dept. of Correction</u> Conditions in Massachusetts prisons are harsh. Indeed, they are intended to be harsh. But for prisoners with physical disabilities, they are more than harsh. In this case, a physically handicapped prisoner sought to challenge the Department of Correction's (DOC's) refusal to provide for his extensively documented physical disabilities, which make it difficult for him to use stairs. The suit was brought under the provision of the Massachusetts Constitution which prohibits discrimination based on disability. The trial court ruled in favor of the Department of Correction, holding that Art. 114 of the Constitution only prohibits exclusion from a program, that the Department had not excluded the prisoner from any program, and that it had satisfied its legal obligations by providing the prisoner with a cane. On appeal to the Supreme Judicial Court of Massachusetts, ACLUM joined with the Disability Law Center and Massachusetts Correctional Legal Services in an amicus curiae brief which argued that the state constitutional provision prohibiting discrimination against the handicapped provided much stronger protection to disabled prisoners than the lower court had ruled. The SJC agreed and reversed the lower court in substantial part, holding that a prisoner may bring claims of disability discrimination even if not totally excluded from a program. Attorneys: Jane Alper (DLC); James Pingeon (MCLS), Sarah Wunsch (ACLUM).†

<u>Thomka v. MIAA</u> As amicus, ACLUM supported a claim that the policies of the Mass. Interscholastic Athletic Association are discriminatory. The plaintiff in the suit is a girl who plays on the boys' high school golf team because there is no girls' golf team at her school. The

team qualified for western Mass. tournament. Although Ms. Thomka had played under boys rules throughout the season and had qualified for the boys' individual tournament, she was not allowed to participate in the boys' tournament on the grounds that there was an open (non-competitive) tournament for girls which would be held in the spring. The Superior Court ordered that she be allowed to play in the tournament in the fall. Attorney: Bill Newman (ACLUM).*

NON-LITIGATON ADVOCACY

Harvard Law School and Discriminatory Military Recruiting Because the U.S. military discriminates against gays and lesbians who want to serve in the armed forces, many colleges and universities refused to allow military recruiters all of the privileges of on-campus recruiting services because military recruiters cannot comply with the school nondiscrimination requirements that other job recruiters were obligated to adhere to. In response, Congress enacted the "Solomon Amendment," a federal law which provides for the denial of federal funding to those institutions that prohibit military recruiting on campus or deny military recruiters the same access that other recruiters are given. In response to the Solomon Amendment, Harvard University granted the military full access to all campus recruiting services, a step that law students and faculty objected to as going beyond the requirements of the Solomon Amendment. The groups also objected to Harvard Law School touting its nondiscrimination policy to prospective students without informing applicants that the policy is not applied to military recruiters. ACLUM has supported the law students and faculty in advocating for the law school and the university as a whole to more vigorously oppose discrimination by the military. In November of 2004, the Harvard Law School Dean announced that the law school would no longer allow the military to use the law school's recruiting resources until the Pentagon signed a pledge promising not to discriminate against gay and lesbian employees. This followed a ruling by the U.S. Court of Appeals for the 3rd Circuit that the Solomon Amendment was unconstitutional because it interfered with the First Amendment rights of the schools to express their views through their anti-discrimination policies. The military, which discharges openly gay servicemen under its "don't ask, don't tell" policy, refused to sign the pledge. However, the U.S. Supreme Court recently reversed the 3rd Circuit decision, holding that the schools' First Amendment rights were not violated by the recruiting requirement and the law school then reverted back to its prior policy of allowing military recruiters full use of campus recruiting facilities.

Somerville High School Five African-American students at Somerville High School who allege that they were assaulted by Medford police officers in April of 2005 were arrested and faced felony charges for assaulting the officers. Under a state law, G.L. c.71, §37H½ that allows the suspension of students who have been charged with felonies, the principal of Somerville High School suspended all five students. John Reinstein (ACLUM), along with Rev. William Dickerson (Greater Love Tabernacle), Angela Williams-Mitchell (Mass. Ass'n of Minority Law Enforcement Officers) and Chuck Turner (Boston City Council), wrote to Somerville's Superintendent of Schools urging reinstatement of the students. Noting that the criminal charges in this case grew out of a confrontation with disturbing racial overtones, in which the criminal responsibility of these students was anything but clear, and that the relationship between the

charges and the safety and welfare of the school was tenuous at best, we argued that the students should be readmitted to school.

Catholic Charities and Adoption Services to the Public At the behest of the Archdiocese of Boston, Catholic Charities, a nonprofit social service agency affiliated with the Catholic Church, requested an exemption from state law prohibiting discrimination based on sexual orientation by agencies licensed to provide adoption services. Governor Mitt Romney quickly announced his support for such an exemption in the name of religious freedom, and ACLUM promptly voiced its opposition, arguing that this distorted the meaning under the Constitution of religious freedom because such discrimination deprived children in need of good homes, caused harm to third parties, and used tax dollars and state grants to impose religious doctrine on others. No exemption was granted and Catholic Charities announced it would cease providing adoption services. Other agencies are taking over the contracts the state formerly awarded to Catholic Charities.

VOTING RIGHTS

<u>¿Oiste? Inc. v. City of Lawrence</u> On the eve of the city-wide election in Lawrence, the ACLU and the Lawyers Committee for Civil Rights brought suit in federal court on behalf of Latino voters and candidates asking that the election be held open for several weeks to permit participation by voters who had been relegated to “inactive” status and discouraged from voting. The suit was brought after Lawrence city officials placed more than half of the registered voters within the City (reportedly 18,400 voters, out of a total of 27,198) on an “inactive” voter list. As a result, when people tried to vote in the preliminary city elections on September 27, 2005, there was widespread chaos, long lines and confusion among previously registered voters who were suddenly listed as “inactive.” It appears that the overwhelming majority of those dropped were Latino voters. There is also a question about the timing of the purging of the voter list, coming as it did before the first mayoral election following the enfranchisement of large numbers of Latino voters pursuant to the settlement of the DOJ suit against the city under the Voting Rights Act. A federal district court judge denied the plaintiffs’ request to extend the election, but approved an agreement providing for notices in print and electronic media advising inactive voters of their right to vote. Attorneys: J. Anthony Downs, Iraida Alvarez (Goodwin Procter LLP), John Reinstein (ACLUM).*

ACLUM RACIAL JUSTICE PROJECT

Juvenile Justice. Through a grant from the national ACLU office, our racial justice fellow, Anjali Waikar, has been researching the issue of Disproportionate Minority Contact (DMC) in the state juvenile justice system. The eight-month research project will culminate into a final report, serving as a follow-up to the national ACLU’s May 2003 report entitled, Disproportionate Minority Confinement in Massachusetts. In addition to highlighting improvements made by the Commonwealth over the past several years after the first DMC report was released, the new report seeks to examine the use and over-use of pre-adjudication detention, conditions of confinement of pre-adjudication facilities, and the allocation of state and federal monies to fund these facilities. To this end, the ACLUM has been collecting data from various state agencies

and conducting meetings and interviews with area-wide juvenile justice advocates. The new report will be issued in the fall of 2006 in collaboration with the national ACLU.

Immigration ACLUM's Racial Justice Project has also been working to address immigration issues and problems of immigrant communities. One of the most critical issues in Massachusetts has been the use of state and local police to enforce immigration laws. ACLUM has publicly opposed Governor Romney's initiative to involve the state police in immigration enforcement and has encouraged local departments not to follow suit. We have responded to several reports of the involvement of MBTA police in immigration matters and worked with immigrant advocacy groups in conducting outreach on this issue and in preparing and distributing a Know Your Rights pamphlet in both English and Spanish. In East Boston, the Project is involved with local community organizers, parents and students at East Boston High School in addressing the treatment of immigrant students and responding to the actions taken against students involved in a demonstration in support of immigrant rights.