ACLU
AMERICAN CIVIL LIBERTIES UNION of MASSACHUSETTS

The Docket

Because the rights you save may be your own > ACLUm.org

Spring 2012

Occupy Boston protestors projected this image for high-spirited crowds at the Dewey Square encampment in December.

ACLU defends rights of speech and assembly for Occupy protestors—what comes next?

The ACLU of Massachusetts sprang into action last fall to ensure the First Amendment rights of "Occupy" demonstrators. Our executive director Carol Rose tells the behind-the-scenes story of the legal struggle in "Rule of law triumphs in resolution to Occupy Boston," on page 6.

This year, the ACLU has also challenged an administrative subpoena from the Suffolk District Attorney's office seeking information about our client "John Doe," who sent anonymous messages about Occupy Boston through Twitter.

See pages 5 and 6 for more

ACLU vindicates your right to videotape and photograph police

Following a landmark federal appeals court ruling last August, declaring that the First Amendment protects the right to record police carrying out their duties in a public place, the City of Boston in March paid $170,000 in settlement for damages and legal fees to plaintiff Simon Glik, a Boston attorney wrongly arrested and prosecuted for using his cell phone to record police arresting a man on the Boston Common.

Mr. Glik had to defend himself against criminal charges of illegal wiretapping, aiding the escape of a prisoner, and disturbing the peace. After a judge threw out those charges, the ACLU filed a civil rights suit on behalf of Glik against the city and the arresting officers in federal court in Boston. The lawsuit, led by cooperating attorneys Howard Friedman and David Milton with ACLU staff attorney Sarah Wunsch, charged that the arrest violated the First and Fourth Amendments. The settlement resolved that case.

At press time, however, the ACLU has begun investigating whether Boston police are respecting the Glik decision, given reports that a Boston police officer grabbed for the cameras of those who photographed him with his hand on a counterdemonstrator's neck at a Tea Party rally April 15.

A Boston police officer grabs for photographer Paul Weiskel's camera in an April 15 incident on Boston Common, during which the officer allegedly gripped and shoved a demonstrator by the neck. The scuffle occurred just weeks after the City of Boston paid $170,000 to settle an ACLU lawsuit involving the right to videotape police. See aclum.org/glik for more. Photo by Paul Weiskel.

Trayvon Martin's murder in Florida by a man claiming the unarmed black teenager looked "suspicious" inspired rallies and demonstrations in Massachusetts, such as this one on Boston Common in April. Photo by Marilyn Humphries.

Lessons for Boston from the Trayvon Martin tragedy

A version of this column, by new ACLU of Massachusetts legal director Matthew Segal, appeared in the Boston–Bay State Banner in late March.

The tragic shooting death of Florida teenager Trayvon Martin has sparked a nationwide debate about why black men are profiled as criminals even when they're not. It should also spark a debate about how to stop that sort of profiling.

On February 26, Martin was killed in an Orlando suburb by George Zimmerman, a self-styled neighborhood watchman. Zimmerman pursued Martin after calling the police about a suspicious black teenager in his neighborhood. After a confrontation, Zimmerman shot Martin dead.

In his call with police, Zimmerman made Martin seem deeply suspicious. Zimmerman said that the teen was wearing a hoodie and carrying something near his waist. The teen, said Zimmerman, was "up to no good."

But Martin, an A-B student, was not up to no good. He was going to 7-Eleven.

The story of Martin's death has plenty of culprits. Foremost is Zimmerman, who confronted an innocent person. Next is the local police department, which blithely ac-

Continued on page 7

Senate defeats Blunt amendment—and ACLU wins case against religious restrictions on reproductive health services

On March 1, the US Senate rejected an extreme measure actively opposed by the ACLU known as the Blunt Amendment, which would have allowed any employer to deny employee health insurance coverage for any services, including contraception, simply by citing "religious beliefs or moral convictions."

Later in March, a federal judge in Boston ruled in an ACLU case that that the Department of Health and Human Services (HHS) could not allow a religious group to impose restrictions on taxpayer-funded reproductive health services for victims of human trafficking.

See page 2 for more

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Inside

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Take action! > aclum.org/action

Legislative victories like passage of the Transgender Equal Rights Bill (below) don't just happen! Join hundreds of ACLU supporters taking action through aclum.org/action. Current priorities include:

- Passing a bill to fight racial profiling in Massachusetts, in honor of Trayvon Martin;
- Updating the state public records law for the first time since1973;
- Ending harsh mandatory sentences that keep hundreds of nonviolent offenders in Massachusetts prisons, at a cost of nearly $50,000 each per year!

State Rep. Byron Rushing addresses a crowd of hundreds in January celebrating the signing the Transgender Equal Rights Bill. Photo by Marilyn Humphries.

ACLU applauds passage of Transgender Equal Rights Bill

The state legislature has passed a Transgender Equal Rights Bill long championed by the ACLU of Massachusetts, and which outlaws discrimination in employment, education, housing, and credit against transgender residents. Governor Patrick signed the legislation in January, and it goes into effect July 1.

"This bill gives transgender people an equal shot at obtaining everyday basics we all need—a job, a place to live, an education. It's a major step forward for fairness, but we won't stop working until transgender people are fully protected under the Commonwealth's civil rights laws, including in public accommodations," said Gavi Wolfe, legislative counsel for the ACLU of Massachusetts.

The bill addresses problems faced by thousands of state residents. A February 2011 study by the National Gay & Lesbian Task Force found that 76 percent of the estimated 33,000 transgender people in Massachusetts have been harassed on the job because of their gender identity; 20 percent have lost a job because of their gender identity; and 17 percent have been denied a promotion because they are transgender.

Supreme Judicial Court rules Massachusetts cannot cut immigrants from health insurance program

The state's highest court held Jan. 5 that the Commonwealth cannot discriminate against non-citizens when it comes to access to its state health insurance program, Commonwealth Care, because that is a violation of the right to equal protection under the Massachusetts Constitution.

"Today's ruling is a victory not just for immigrants, but for the Massachusetts Constitution," said Carol Rose, ACLU of Massachusetts executive director. "Even in tough fiscal times, the budget is no basis for discriminating against a whole class of people."

Facing a financial crisis, the state legislature had cut all non-citizens from the program in 2009. The ACLU of Massachusetts, with other groups, filed a friend-of-the-court brief arguing that discrimination against non-citizens is unconstitutional and that the state's justification did not pass the high hurdle set out by the court.

"We felt from the beginning that the Massachusetts Constitution precluded this kind of discrimination," said cooperating attorney Ara Gershengorn of Foley Hoag LLP. "We are gratified to see that the Court agreed."

ACLU scores huge victory in ruling that prohibits religious restrictions on government-funded trafficking victims' program

A federal judge ruled March 24 that the Department of Health and Human Services (HHS) cannot allow religious restrictions to be imposed on a federal program for reproductive health services for victims of human trafficking.

The ACLU of Massachusetts and national ACLU challenged HHS's decision during the Bush administration to award a contract under the Trafficking Victims Protection Act to the US Conference of Catholic Bishops (USCCB). HHS knew at the time that the Bishops would prohibit these funds from being used to pay for contraceptive and abortion referrals and services. Judge Richard Stearns agreed with ACLU that this violated the First Amendment's Establishment Clause barring the government from endorsing or supporting religious doctrine.

"The court is right to insist that organizations receiving government funding cannot use their religion as an excuse to discriminate and withhold crucial services from victims of human trafficking," said Brigitte Amiri, senior staff attorney with the ACLU Reproductive Freedom Project. "The court's decision ensures that people who have been forced into horrific circumstances will have access to all necessary services—including reproductive health care—to rebuild their lives." Since many trafficking victims are women and girls who have been raped by the traffickers and forced into prostitution, these services are vital.

The federal Trafficking Victims Protection Act funds an array of services for thousands of people brought into the United States annually, often being forced into the commercial sex trade. Many suffer extreme violence and sexual assault at the hands of traffickers, and risk contracting HIV/AIDS and other sexually transmitted diseases.

"Federal law calls for a full range of health care to be provided to the victims of human trafficking," said Sarah Wunsch, staff attorney with the ACLU of Massachusetts. "While the Catholic Bishops are entitled to their beliefs, freedom of religion does not mean the Bishops get to impose their doctrines on others with the use of taxpayer dollars."

See aclum.org/sebelius for more

FROM THE EXECUTIVE DIRECTOR

Heed their rising voices!

By Carol Rose

It is no accident that our Bill of Rights begins with the First Amendment. All other liberties depend upon our rights to a free press, free speech, religious liberty, and the right to assemble and petition our government. The ACLU was founded at a time when these rights were under sharp attack, and has played a central role in defending them ever since.

During the civil rights movement, freedom of the press and the right to petition the government played a key role in ensuring that another set of rights, namely equal rights under the law, was also realized. Key to success of the movement was the ability to awaken the American public to the brutal reality of segregation and discrimination.

In 1960, in response to the arrest of the Rev. Dr. Martin Luther King, Jr., in Montgomery, Ala., a group of Dr. King's supporters met in the New York apartment of Harry Belafonte and formed the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," to help raise money for Dr. King's legal defense and provide bail money for students arrested in civil rights protests.

On March 29, 1960, the Committee ran a full-page advertisement in *The New York Times* entitled "Heed Their Rising Voices," signed by Mr. Belafonte and other civil rights leaders. It applauded those who "engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the US Constitution and the Bill of Rights."

"The America whose good name hangs in the balance before a watchful world, the America whose heritage of Liberty these Southern Upholders of the Constitution are defending, is our America as well as theirs…" said the advertisement.

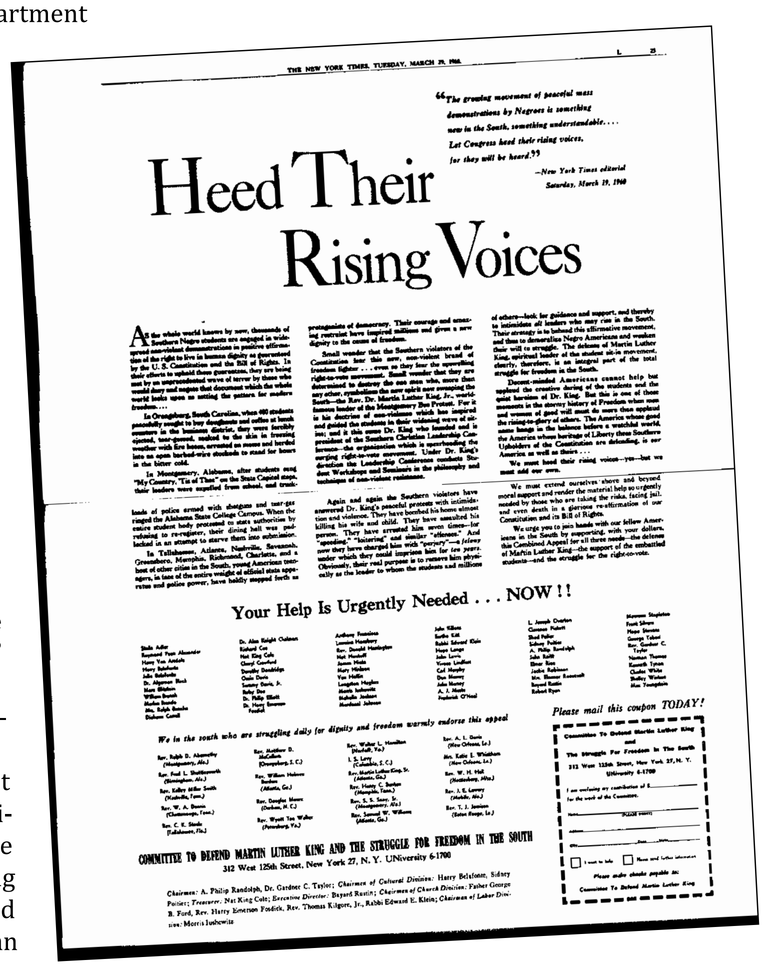
"We must heed their rising voices—yes—but we must add our own."

The advertisement named no names, but said that "Southern violators of the Constitution" had used lawless tactics against the civil rights movement—arresting Dr. King multiple times on trumped-up charges and mistreating demonstrators. In response, an Alabama official, L.B. Sullivan, sued the *Times* for libel because, while not named, he claimed that he could be identified as a "Southern violator" because he was in charge of the Montgomery police. Other officials soon filed their own libel claims. Their aim was to stop media coverage and thus undermine the movement's strategy of putting racism on display for the entire world to witness.

The strategy worked, at first. A local jury imposed a $500,000 judgment against the paper, and similar suits brought that amount to $3 million—enough to put the *Times* out of business and to scare off any other newspapers that dared to cover the civil rights movement.

On appeal—with the ACLU as *amicus curiae*—Supreme Court Justice William J. Brennan, Jr., joined by six members of the Supreme Court, reversed that decision in *New York Times Co. v. Sullivan*, a landmark First Amendment ruling that remains a hallmark of free speech jurisprudence in America:

"[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," wrote Justice Brennan, "and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials…."


THE NEW YORK TIMES, TUESDAY, MARCH 29, 1960.

"The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable.... Let Congress heed their rising voices, for they will be heard."

—New York Times editorial Saturday, March 19, 1960

Heed Their Rising Voices

Your Help Is Urgently Needed . . . NOW !!

We in the south who are struggling daily for dignity and freedom warmly endorse this appeal

Please mail this coupon TODAY!

COMMITTEE TO DEFEND MARTIN LUTHER KING AND THE STRUGGLE FOR FREEDOM IN THE SOUTH
312 West 125th Street, New York 27, N. Y. UNiversity 6-1700

The "Heed Their Rising Voices" ad in the New York Times, March 29, 1960.

The immediate result of the *Sullivan* decision was to free the press to report on the civil rights movement. Media coverage of the brutalities inflicted upon civil rights supporters made clear the violence of racism itself. As author and Pulitzer-prize winning *New York Times* columnist Anthony Lewis later wrote in his famous recounting of the story, *Make No Law*, "There, on television, were grown men and women screaming obscenities at little black children trying to go to desegregated schools. Professor Alexander M. Bickel of Yale Law School said, "The moral bankruptcy, the shame of the thing, was evident'."

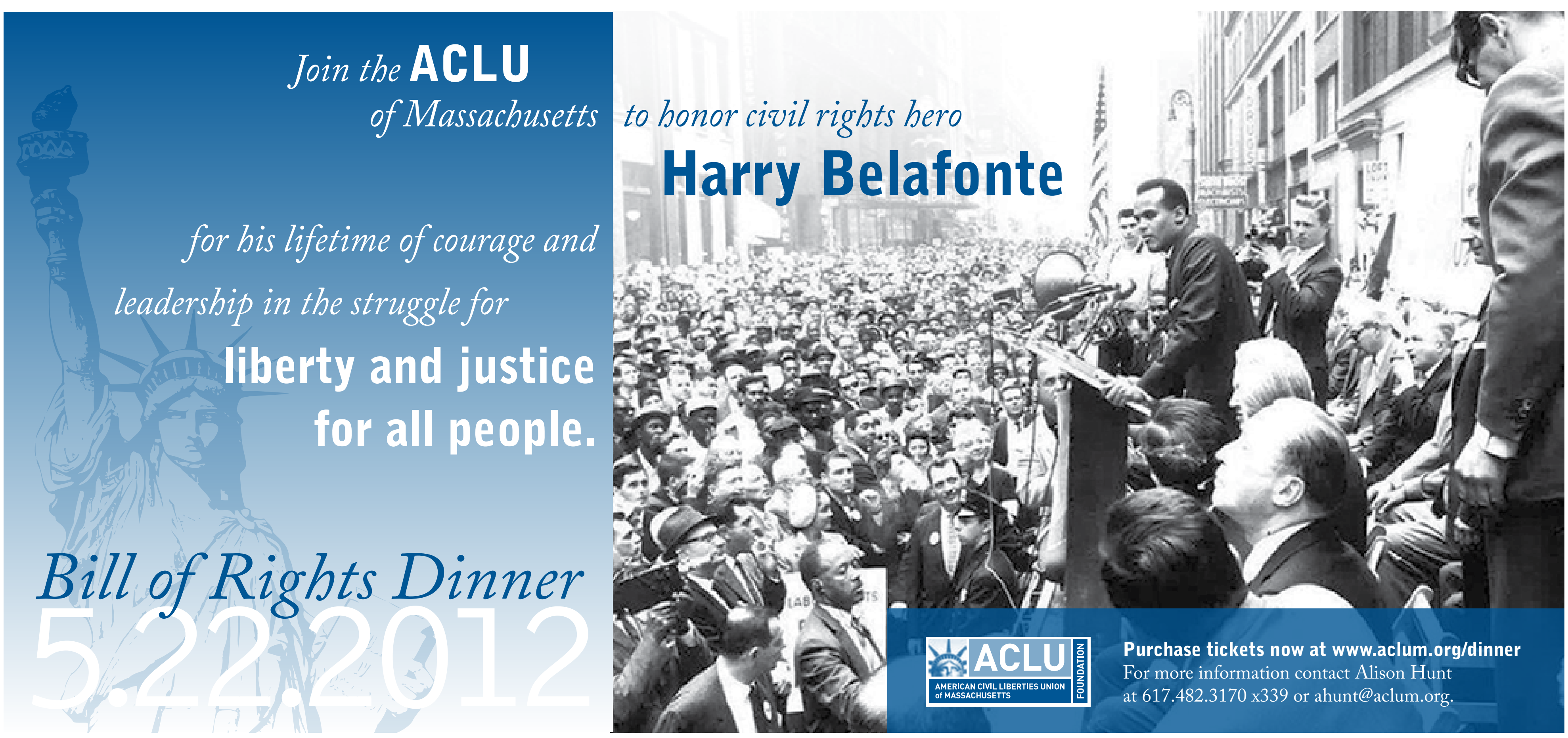
Public outrage at media images of violence against civil rights supporters forced Congress to act, leading to the passage of the 1964 Civil Rights Act and 1965 Voting Rights Act. In the years that followed, the *Sullivan* case emboldened the American press to challenge official government "truths," even when that meant questioning or even criticizing government officials.

The importance of a free press to stop abuses of power was evident in the immediate years following *Sullivan*, when reporters began to question the US war in Vietnam and the abuses of power arising from the Watergate cover-up. More recently, when traditional news outlets too often have failed to question government abuses of power, new forms of social media and public protest have emerged to give voice to calls for equal rights, as evidenced in the Arab Spring movement in the Middle East and the Occupy movement in the US and worldwide.

> "New forms of social media and public protest have emerged to give voice to calls for equal rights, as evidenced in the Arab Spring movement in the Middle East and the Occupy movement in the US and worldwide."

Throughout, equal rights and freedom of speech and the press have emerged as the twin pillars of any democracy—and the heart of the ACLU's mission.

On May 22, 2012, we will join together to honor Harry Belafonte, hear from Amy Goodman of *Democracy Now!*, and heed the rising voices of all those who stand together in support of liberty, justice, and equality for all. We hope you will join us!



ACLU advises that Massachusetts law permits organizational T-shirts at polling places

In advance of the preliminary election in Worcester last September—and in light of controversy over T-shirts worn at polls by supporters of the community organization Neighbor to Neighbor—the ACLU of Massachusetts concurred with the Worcester Elections Commission, affirming the right to wear organizational T-shirts at the polls.

"Massachusetts law provides for a zone of 150 feet around the entrance to a polling place within which no one can engage in activity aimed at influencing how a voter will vote on candidates or ballot questions that are on the ballot in that election. Wearing a T-shirt with the name of an organization is not prohibited advocacy," said Sarah Wunsch, ACLU of Massachusetts staff attorney.

"Those who tried to get the Worcester Elections Commission to prohibit the wearing of T-shirts bearing Neighbor to Neighbor's name are not only misrepresenting the law for their own political purposes, they are trying to divert attention away from real issues about access to the polls, such as efforts to intimidate and deter people from voting. People willing to assist with and observe the elections process should not be attacked for their commitment to our democratic system."

South Hadley discloses Prince settlement

In late December, the Town and School Department of South Hadley settled the lawsuit brought against them by the parents of Phoebe Prince for $225,000 in exchange for full release of all claims, according to documents released to *Slate* reporter Emily Bazelon. The 2010 suicide of Prince, a student at South Hadley High School, was widely linked in local and national media to severe bullying by students at the school, but the amount of the settlement was never known. The release of settlement details followed an order issued earlier the same month by Massachusetts Superior Court Judge Mary-Lou Rup in a case brought by the ACLU of Massachusetts.

"This is a victory for the public's right to know and for transparency in government," said Bill Newman, who represented Ms. Bazelon and directs the ACLU's Western Massachusetts Legal Office in Northampton. "The Court's decision highlights the importance of transparency in government at all levels."

US Dept. of Justice and US Attorney General's office investigate Springfield voter rights violations

Responding to appeals from the ACLU of Massachusetts, the Lawyers' Commitee for Civil Rights, the NAACP's Springfield chapter, and Springfield Ward 1 Councilor Zaida Luna, teams from the US Department of Justice and US Attorney General's office came to Springfield last November to investigate allegations of serious and widespread voting rights violations and to monitor polling places.

"In high minority wards like mine," said Councilor Zaida Luna of the preliminary election earlier in the fall, "less than a third as many registered voters actually cast a ballot as compared to low minority wards. It now appears that serious voter rights violations are at least part of the explanation."

"The City of Springfield appears to again not be complying with the laws designed to insure all voters have equal access to the polls, which fundamentally is undemocratic," said Bill Newman, director of the ACLU's Western Massachusetts Legal Office.

Further action by the DOJ is pending.

Lawsuit alleges Westfield mayor ordered public employees to remove political yard signs

A lawsuit filed March 21 in US District Court for the District of Massachusetts Western Division alleges Westfield Mayor Daniel Knapik ordered public employees to remove signs supporting other politicians from the yard of a private citizen who agreed to host the signs. The suit stems from November 7, 2011, when city employees removed candidates' signs from the property of David Costa, one day before Westfield voters decided municipal races by fewer than 30 votes.

Public records requests have revealed that city employees removed the campaign signs—which met requirements for size, placement, and distance from the nearest polling place—within an hour and a half of two calls placed by Westfield Mayor Daniel Knapik to the manager of the Westfield Department of Public Works. Signs for other candidates had already been in place in the same location for as long as a month prior to November 7, and city employees did not remove similarly displayed signs from other nearby properties.

"This action was no accident, and it was no routine enforcement of Westfield's signage laws. That the Mayor of Westfield had instructed the public employees to remove the signs, including signs endorsing the candidacy of a city councilor with whom the Mayor had a longstanding, contentious relationship, is the essence of the complaint," explained ACLU of Massachusetts cooperating attorney Luke Ryan, of Sasson, Turnbull, Ryan & Hoose.

The plaintiffs in this civil rights action are two politicians whose campaign signs were removed—David Flaherty, a candidate for re-election for an at-large seat on the Westfield City Council, and Jane Wensley, Ward 3 representative for the Municipal Light Board—as well as the private citizen, David Costa, who exercised his free-speech rights by agreeing to display the signs.

"Citizens have a right to post lawn signs. The ACLU vindicated that right in a case against Longmeadow in federal district court in Springfield in 1988," said Bill Newman, director of the ACLU's Western Massachusetts Legal Office. "The breach of that right by a high-ranking public official cannot go unchallenged."

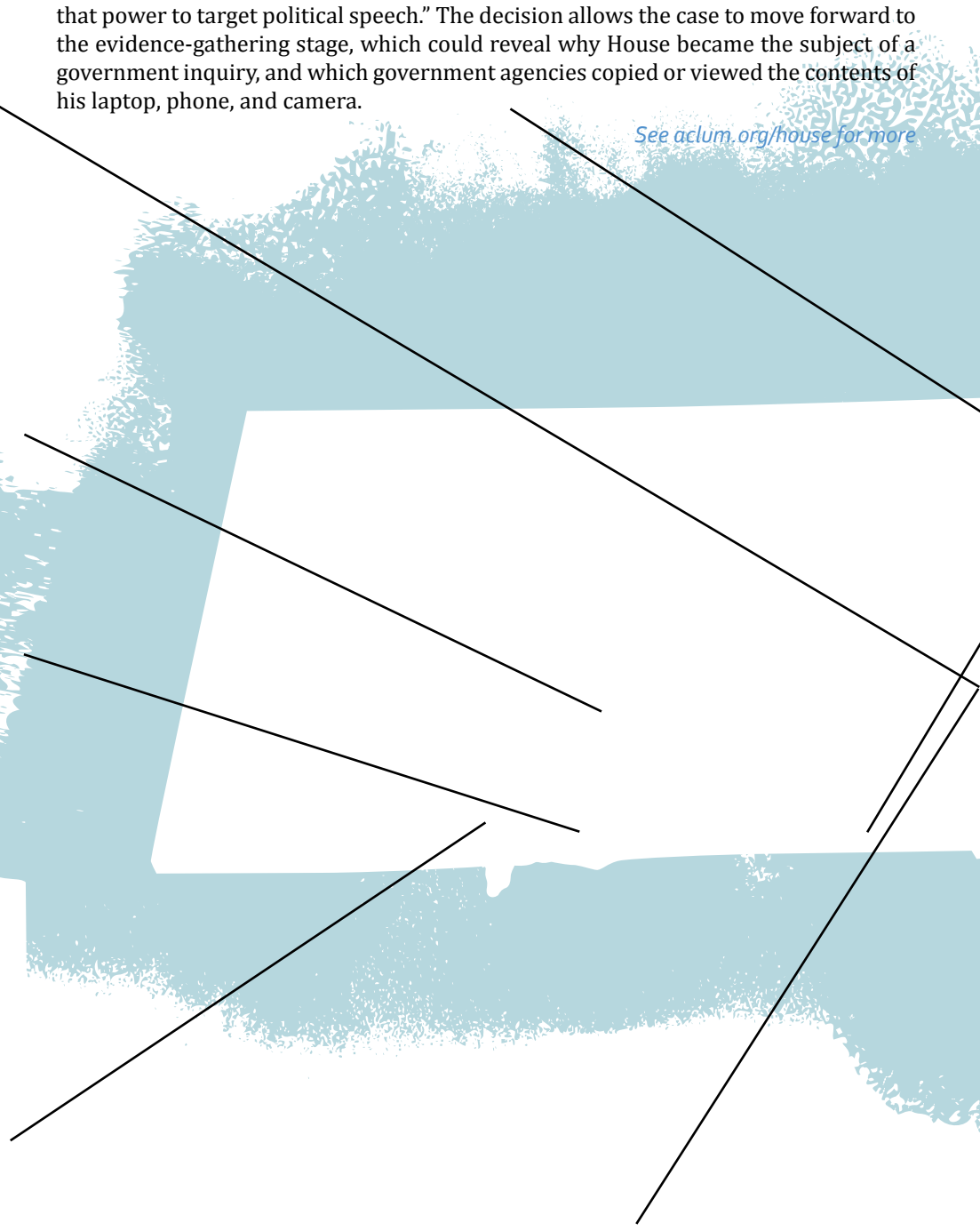
Judge rules in favor of Bradley Manning supporter, allows lawsuit challenging laptop search

On March 29, a federal judge denied the government's motion to dismiss a lawsuit challenging the suspicionless search and seizure of electronics belonging to activist David House when he reentered the US after a vacation.

The ACLU of Massachusetts and the national ACLU represent House in a suit charging that the government targeted House based on lawful association with the Bradley Manning Support Network, an organization created to raise funds for the legal defense of the soldier charged with leaking material to WikiLeaks. The government had asked the court to dismiss the case, arguing that it has broad powers to search and seize laptops, phones, and any other electronic device at the border without any justification.

"This ruling affirms that the Constitution is still alive at the US border," said Catherine Crump, staff attorney with the ACLU Speech, Privacy and Technology Project, who argued the case along with John Reinstein of the ACLU of Massachusetts. "Despite the government's broad assertions that it can take and search any laptop, diary, or smartphone without any reasonable suspicion, the court said the government cannot use that power to target political speech." The decision allows the case to move forward to the evidence-gathering stage, which could reveal why House became the subject of a government inquiry, and which government agencies copied or viewed the contents of his laptop, phone, and camera.

See aclum.org/house for more



ACLU names Christopher M. Robarge as field coordinator for Central Massachusetts

"The ACLU is thrilled to bring on Chris Robarge as the coordinator of our work in Central Massachusetts," said Carol Rose, executive director of the ACLU of Massachusetts. "His commitment to civil liberties, the city and county of Worcester, and the broader community will help us build a larger presence across the Commonwealth."

"The ACLU of Massachusetts has been the flagship defender of civil liberties in the Commonwealth for decades, and I am excited to have the opportunity to be a part of this team," said Robarge. "I look forward to bringing an enhanced focus and presence on outreach and advocacy to Central Massachusetts on behalf of the ACLU."

Chris Robarge

Robarge, who began work in February, comes to the ACLU with a background in community activism in Central Massachusetts, as well as extensive experience in outreach, communications, social media, and public speaking. He is an appointed member of the City of Worcester's Citizen Advisory Board, which is charged with the screening of applicants for citizen boards and commissions as well as with developing outreach and recruitment efforts to locate suitable applicants, particularly from under-represented communities in the city.

"The ACLU of Massachusetts is committed to expanding its advocacy and organizing presence in local communities across the Bay State," said Rose. "Chris is the perfect addition to our team to ensure that we are able to react to local civil liberties questions and abuses, as well as to create proactive advocacy and organizing projects on civil liberties in central Massachusetts."

Showing ID to vote is not the law in Massachusetts. *That's why last fall the Worcester County Chapter of the ACLU of Massachusetts gave its Defender of Civil Liberties Award to Amelia Peloquin for her efforts to end voter intimidation and harassment.*

Peloquin established Voters 4 Integrity in April 2011 in response to the voter suppression/intimidation campaign and billboard (shown above) put up in her lifelong home of Southbridge, targeting the spring 2011 6th Worcester State Representative District special election. Organized and paid for by the Greater Boston Tea Party-affiliated groups Empower Massachusetts and Show ID to Vote, the campaign focused on intimidating and suppressing Latino voters by calling for all voters to show IDs, and challenging voters at the polls based on ethnicity, spoken language, and disability status.

Falmouth pays $35,000 to settle lawsuit challenging removal of conservation commissioner who questioned lease of town land

In March, the Town of Falmouth agreed to settle the ACLU's civil rights lawsuit on behalf of Peter Waasdorp, who challenged the town's removal of him from his position on the town Conservation Commission (ConCom) in 2009. The Selectmen removed him, allegedly in response to a complaint made by the ConCom chair Karen Wilson, who objected to emails Mr. Waasdorp sent to her and other ConCom members during a short period of time when the Commission was investigating whether to back a proposed town lease of cranberry bogs. In settling the case, the Town "acknowledges that Mr. Waasdorp did not engage in any illegal harassment." The settlement also requires the town to pay $35,000 for damages and attorney's fees to Mr. Waasdorp and the ACLU of Massachusetts.

"I am overjoyed that after three and a half years, my public reputation has been repaired by the settlement, which I view as tacitly acknowledging that my First Amendment and Due Process complaint had validity," said Peter Waasdorp. "The settlement will allow me to repay the donations I received from over one hundred contributors to my legal fund, and I am also immensely grateful to all those who gave me their trust and support through this long ordeal."

The lawsuit charged that the removal violated the First Amendment because it was in response to Mr. Waasdorp's efforts to raise legitimate questions about the town's proposed lease of bogs to a cranberry grower and the way the approval was rushed through without time for adequate review.

ACLU fights Twitter subpoena and secrecy around court proceedings

After nine weeks of secret court hearings, on March 1 the Suffolk Superior Court ordered Twitter, Inc., to comply with a state administrative subpoena issued by the Suffolk District Attorney's Office, seeking personally identifying information about our client "John Doe," an anonymous Twitter user who posted messages about Occupy Boston.

"The ACLU challenged the lawfulness of this administrative subpoena and was told by the Superior Court that we did not have standing," said Peter Krupp, cooperating attorney for the ACLU of Massachusetts and partner at the law firm of Lurie & Krupp. "We continue to believe that our client has a constitutional right to speak, and to speak anonymously; and that this administrative subpoena both exceeded the scope of the administrative subpoena statute and infringed our client's rights under the First Amendment. With the turnover of these documents any subsequent review of these issues will be moot."

The courts have handled this case with an alarming degree of secrecy. Many of the court hearings were closed to the public, and the courts have "impounded"—i.e., kept from public disclosure—all of the case files except for the subpoena itself and the order requiring Twitter's compliance. In fact, the courts have impounded briefs filed by the ACLU of Massachusetts, even though we do not possess any sensitive information about the Commonwealth's underlying investigation. The ACLU of Massachusetts has fought this impoundment in court.

Learn more at aclum.org/twitter_subpoena

"All the cool girls are lesbians"

That message on a shirt worn by Lynn English High School student Rachel Bavaro caused a storm of controversy in March, when news broke that a school official had reprimanded her for wearing the "political" and "offensive" shirt and told her never to wear it in school again.

Thanks in part to *Pyle vs. School Committee of South Hadley*, an ACLU of Massachusetts case from the 1990s, students in Massachusetts enjoy some of the broadest free speech protections in the country. As ACLU of Massachusetts staff attorney Sarah Wunsch wrote to school officials, "It appears that reprimanding the T-shirt wearer in this context violated not only the state statute but also the First Amendment." The School Committee voted to require school officials to take a refresher course in student rights of expression.

ACLU joins fight to prevent disclosure of BC Belfast Project documents on conflict in Northern Ireland

On Feb. 27, the ACLU of Massachusetts submitted a friend-of-the-court brief in support of two Boston College researchers who seek the right to challenge a court order that the college turn over confidential material obtained as part of the researchers' work for BC's Belfast Project oral history of the "Troubles" in Northern Ireland in the 1960s through 1990s. The British government is demanding the documents through the offices of the US government. The two researchers, Anthony McIntyre and Ed Moloney, have asked the US Court of Appeals for the First Circuit to block the release and recognize their interests are in jeopardy.

The US District Court refused to permit the two researchers to join the case, saying that BC officials would adequately defend their rights. The college subsequently failed to appeal the initial ruling ordering disclosure, although it has now filed a notice of a partial appeal involving another subpoena for records that the US District Court also ordered to be handed over to the government.

At issue is whether researchers have a right to defend in court pledges of confidentiality made to their sources on matters of legitimate public concern, particularly where, as here, the safety of the researchers and those they interviewed is at risk from such disclosure.

"It is essential that those who assume confidentiality obligations in exchange for obtaining information have the right to oppose attempts by public or private parties to compel disclosure," said ACLU of Massachusetts cooperating attorney Jonathan Albano, deputy managing partner for the Boston office of Bingham McCutchen LLP. "Prohibiting academic researchers from defending their pledges of confidentiality—even when their own personal safety is at risk—would be an alarming and unprecedented infringement on First Amendment interests."

See aclum.org/belfast for more

"It's official—there is a Muslim exemption to the First Amendment"

ACLU of Massachusetts education director Nancy Murray attended and described court proceedings on April 12, the day US District Court Judge George O'Toole sentenced former Sudbury resident Tarek Mehanna to 17.5 years in prison on various "material support to terrorism" charges. Murray wrote:

> In her closing argument during the trial, defense attorney Janice Bassil stated that "the only idea that Tarek Mehanna had in common with al Qa'ida is that Muslims had the right and the obligation to defend themselves when they were attacked in their own lands. And we believe that. When the British came to reassert their hold over America—let's face it, we were a colony—we fought back. We rebelled. We defended our land."
>
> The lesson of the Mehanna case is that where Muslims are concerned, sentiments like these could constitute 'thought crime.'

Read Nancy Murray's full blog and more at aclum.org/usa_v_mehanna

Rule of law triumphs in resolution to Occupy Boston

By Carol Rose, ACLU of Massachusetts executive director

A version of this essay appeared originally in MassINC's CommonWealth magazine.

The rise and fall of the Occupy Boston encampment at Dewey Square has been hailed as a model of how police and city officials should respond to peaceful political dissent in the public sphere.

Compared with video footage of cops pepper-spraying and clubbing protestors in Oakland, San Francisco, New York, and elsewhere, Boston looked pretty good. After nine weeks of occupation, the Boston protestors peacefully left Dewey Square—their statute of Gandhi held high, their message against economic and power inequalities heard by millions. Their banners proclaimed: "You can't evict an idea."

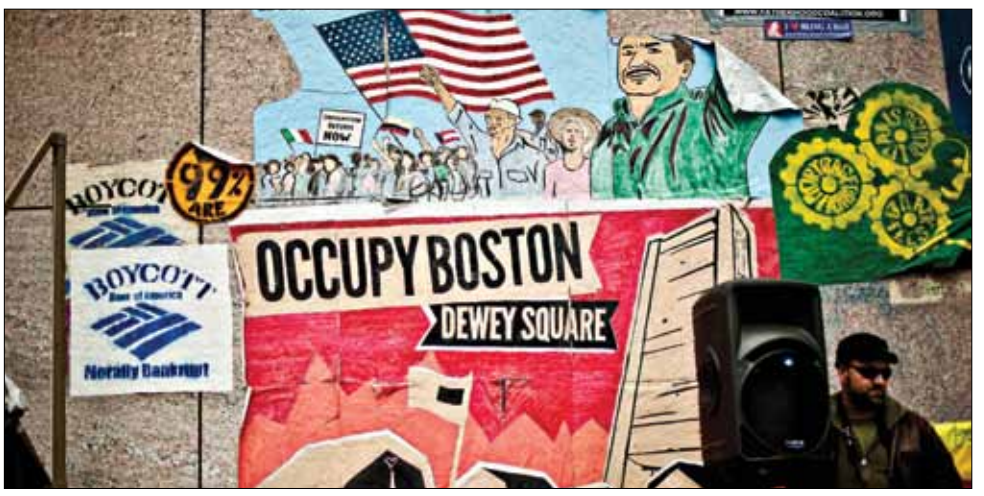


Photo by Lotus Ryan

Media pundits hastily praised police and city officials for showing "uncommon restraint." It's a narrative that, while true in part, misses the real story.

In truth, it was a Court's intervention—not benevolent cops—that protected both the peace and the right to protest in Boston. And who brought in the courts? The Occupy Boston protestors themselves.

Rising up in the shadow of the Fed

Occupy Boston started Sept. 30, 2011, when people from all walks of life assembled in Boston's financial district to join the nationwide "Occupy Wall Street" movement. They pitched their tents at Dewey Square, a small dirt patch that sits—literally—in the shadow of the looming Federal Reserve Bank of Boston. The Dewey Square camp took up only 4 percent of the Rose Kennedy Greenway, a strip of park that runs along the site of the old Central Artery and is designated by the state legislature as a "public park and traditional open public forum."

Greenway executive director Nancy Brennan initially welcomed Occupy Boston, issuing a statement on Oct. 6 that the Greenway is "available by law for expression of free speech." She praised protestors for not disrupting the nearby farmer's market and announced that there was ample space left on the Greenway for other public uses, noting: "The Conservancy views the Greenway as Common Ground."

But four days later, when protestors tried to expand their tent-city beyond Dewey Square, Boston police equipped in riot gear cracked down in the middle of the night, tearing down tents and handcuffing 129 protesters, medics, and legal observers.

The next day, hundreds of new protestors and thousands of dollars poured into Occupy Boston. Volunteer attorneys from the National Lawyers Guild stepped in to represent arrestees, and soon were joined by ACLU attorneys ready to defend the protestors' constitutional rights of speech, assembly, and petition.

Advocates first asked city officials to promise a 72-hour notice period before conducting a raid, giving protesters time to decamp peaceably and avoid arrest.

No way. "We can't tie our hands," said City Attorney William Sinnott.

Meanwhile, videos of violent crack-downs on Occupy encampments in New York and Oakland sent spasms of fear through the encampment. Greenway officials got jittery, too. On Nov. 8, the Greenway Board sent a private letter to Boston Mayor Thomas Menino asking him to order police to clear the camp. The mayor was widely quoted as saying, "There is a time and place when we have to end the encampment and that time and place will come in the near future."

Back at Dewey Square, Occupy Boston's governing body—the General Assembly—voted to authorize the lawyers to seek Court protection. On Nov. 15, the ACLU and National Lawyers Guild, led by pro bono attorneys Howard Cooper and Benjamin Wish (from the law firm of Todd & Weld), filed suit on behalf of Occupy Boston and four named protestors. They requested an emergency order to prevent a surprise raid at Dewey Square, followed by a hearing on the rights of protesters under the First Amendment.

Occupy goes to court

Presiding over a packed courtroom the next morning, Judge Frances A. McIntyre set rules: "You have come to the court to have this matter resolved using the tools of law and logic," she cautioned. No outbursts allowed.

In opening arguments, Cooper appealed to the judge to understand the expressive nature of the occupation. "The occupation of Dewey Square is not just integral to the protesters' expression of their grievances; it is their protest." At a minimum, he said, protesters deserve notice prior to an eviction.

ACLU of Massachusetts privacy rights coordinator Kade Crockford, senior legal counsel John Reinstein, and staff attorney Laura Rótolo at Dewey Square last fall.

Again, Sinnott rejected the idea of prior notice. While the police had no present plans to remove the protestors, he argued, they need the "element of surprise" for any raid.

Judge McIntyre didn't buy it. She issued an order preventing the police from raiding the camp absent an emergency and set a hearing on the constitutional merits for two weeks later—one witness for each side.

"Surprise in a military operation is an advantage," she wrote, "but it brings with it other elements with a civilian population. Surprise may invoke panic, flight, and violent resistance. This court believes that an orderly dispersal of Occupy Boston participants can reasonably be anticipated if it is preceded by a lawful court order. The public interest may well be thus advanced."

Who speaks for a leaderless movement?

Free from imminent arrest, the protestors had to decide whether to comply if the judge ultimately ruled against them. Rather than force a decision on the whole, the General Assembly approved a plan to allow individuals to sign affidavits promising the court they would comply with her ruling. Within a week, 74 Occupy Boston protestors had agreed to abide by the rule of law.

"The Occupy Boston encampment in Dewey Square is a uniquely expressive response to the problems we face as a society today," Cooper told the packed courtroom at the Dec. 1 hearing.

"At a time when many feel that our government is broken, the protesters have set up a small community to demonstrate how people can associate together in a more democratic, egalitarian, and just way," said Cooper. "In deciding to go to Court, the protesters have sought protection from interference with their efforts to communicate their message."

Kristopher Eric Martin, the sole witness for the Occupy movement, described Occupy Boston governing committees and spoke about taking school children on tours of the camp. "I show them how direct democracy works. They gain an appreciation for how it feels to have every person's voice heard in a true democracy."

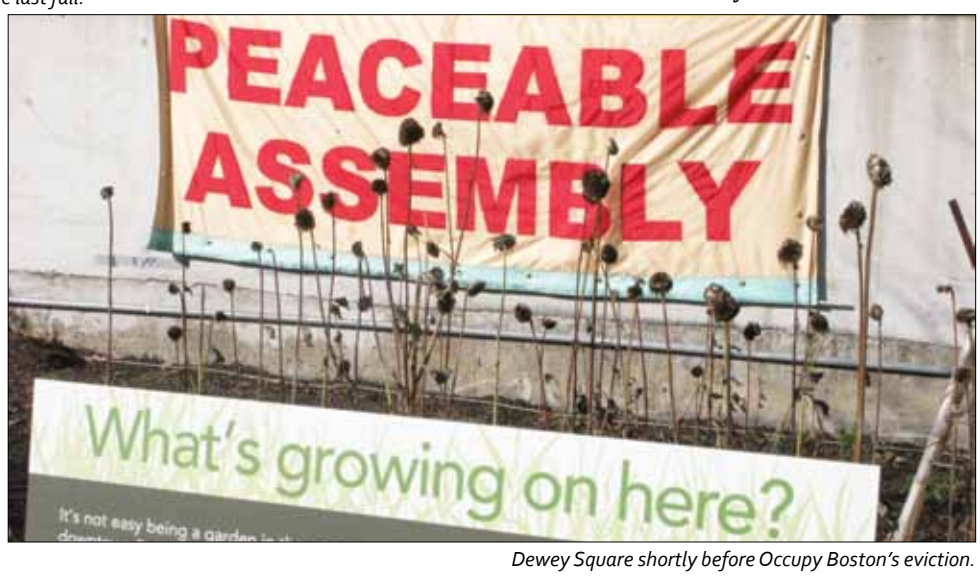
The city's sole witness was Boston Fire Marshal Bart Shea, who testified, "I fear for the life and safety of every person on that property." But when asked why the city failed to provide official notice to protestors about alleged fire code violations, Shea testified, "I didn't waste my time."

The final countdown

Within a week, Judge McIntyre issued an order that "clears the way but does not order the [protestors] to vacate the site."

She acknowledged that "the collective living activities at Dewey Square" were "conduct-which-speaks and [is] entitled to First Amendment protection." Nonetheless, she held, free speech at Dewey was trumped by the Fire Marshal's warnings about fire safety, which she accepted "in every particular."

Mayor Menino immediately announced a mid-night deadline for protestors to clear Dewey Square. Ironically, after giving notice, the city waited three days to move in.



Dewey Square shortly before Occupy Boston's eviction.

The protestors kept their word, obeying the court order even if they disagreed with it. Dozens of protestors decamped voluntarily, with only 43 staying behind to be arrested in an act of nonviolent civil disobedience.

In the end, Boston owes much to the Occupy Boston protestors who sought protection from the Court and thus obliged city officials to exercise "uncommon restraint." The protestors' willingness to exercise their constitutional right to access the courts and, ultimately, to abide by the Court's adverse ruling is what kept the peace, the right to protest, and the rule of law alive and well in Massachusetts.

BOARD OF DIRECTORS

Candidate Statements for Election to ACLU of Massachusetts Board Class of 2015

The Nominating Committeee offers the following slate for election to a three-year term on the ACLU of Massachusetts Board of Directors.

INCUMBENTS' STATEMENTS

Derege Demissie is a Partner at Demissie & Church, a Cambridge law firm that focuses on criminal defense and immigration law. He has represented numerous individuals in criminal cases and deportation proceedings. Derege handles major felony cases in State and Federal Trial and Appellate Courts. He is a member of the Federal Criminal Justice panel for the District Court as well as the First Circuit Court of Appeals where he takes court appointments to represent indigent defendants. Derege was previously a staff attorney with the Committee for Public Counsel Services (CPCS) in the Roxbury Defenders Unit. After leaving the public defender office, Derege was appointed by the Supreme Judicial Court to serve on the Committee that oversaw the provision of appointed legal representation in Massachusetts. Derege also worked as an associate at the law firm of Grayer and Dilday where he worked on civil rights cases. He is married to Susan Church, who is also his law partner, and has two kids: Maya (7) and Leo (5).

Ellen Lubell, Esq., of Tennant Lubell, LLC in Newton, works with nonprofits ranging from colleges and museums to scientific societies and social service organizations. She also focuses on intellectual property law, representing publishers, counseling companies, and advising individuals on protecting and licensing copyrightable works and new technologies. Ellen previously worked as a health lawyer at the Boston firm of Goulston & Storrs, as Counsel for Research & Technology Transfer at UMass Medical Center, and as General Counsel at Education Development Center. From 2006 through 2010, Ellen represented an Algerian man detained at Guantánamo, and she continues to support him in many ways now that he has been returned to Algeria. Ellen focused on child abuse prevention initiatives in past years and was a Harvard Law School Human Rights Fellow at the International Labor Organization in Geneva, Switzerland. Before attending law school, she worked in a Laotian refugee camp on the Thai border. Ellen is a graduate of Princeton University and Harvard Law School.

Norma L. Shapiro: Since 1989, Norma Shapiro has been a volunteer legislative lobbyist for the American Civil Liberties Union of Massachusetts. She has worked on a broad range of issues including public education—curriculum, safety, and adequate and equitable funding; anti-discrimination measures relating to race, disability, immigrant status and sexual orientation; women's issues including economic and reproductive freedom; First Amendment issues such as free speech and religion; and justice issues such as crime, punishment, the death penalty, drug policy reform, and ensuring due process. Ms. Shapiro is also a past Chair of the Massachusetts Coalition for Choice, which defends reproductive freedom, and since 1989 has been President of the Council for Fair School Finance, which works to secure adequate funding for public schools through litigation. She received both the Luther Knight Macnair Award (2003) from the ACLU of Massachusetts and the Roger Baldwin Award (2008) for advancing the causes of civil liberties and civil rights. She retired as Legislative Director in 2009, and has served as a Board Member since then. She is on the Executive Committee and Chairs the Ambassadors, an outreach committee of the board. Norma is also on the Board and Executive Committee of Citizens for Public Schools.

John Thomas: Dr. Thomas is a retired eye surgeon who was in private practice with the Ophthalmic Consultants of Boston. He was Clinical Instructor of Ophthalmology at Harvard Medical School and Clinical Assistant Professor of Ophthalmology at Tufts University School of Medicine. He was on the staff of the Massachusetts Eye and Ear Infirmary and the Massachusetts General Hospital. He specialized in cataract and intraocular lens implant surgery, glaucoma surgery and the laser treatment of glaucoma. He is an author or co-author of 65 scientific articles and two textbooks. A longtime member of the ACLU, he is also a member of Physicians for Social Responsibility and Physicians for Human Rights.

Paul Y. Watanabe: I would be honored to continue serving on the Board of Directors of the American Civil Liberties Union of Massachusetts. Currently, I am Director of the Institute for Asian American Studies and Associate Professor of Political Science at the University of Massachusetts Boston. I also serve as Vice Chair of the US Census Advisory Committee on the Asian Population, President of the Board of Directors of the Nisei Student Relocation Commemorative Fund, a member of the Committee on the Status of Asian Americans of the American Political Science Association, and a member of the Advisory Board of the New Americans Integration Initiative. My publications include *Ethnic Groups, Congress, and American Foreign Policy* and *A Dream Deferred: Changing Demographics, New Opportunities, and Challenges for Boston*. I received my Ph.D. in Political Science from Harvard University.

2012 ACLU of Massachusetts Board Ballot

The ACLU of Massachusetts annual meeting where new board members are announced will be held on Monday, June 25, 2012. For information, call 617-482-3170.

Two check boxes are provided for joint members. One can vote using the first box and the other using the second.

Ballots must be received in the ACLU of Massachusetts office, 211 Congress Street, Boston, MA 02110 by Friday, May 25, 2012.

For more information on the ACLU of Massachusetts nominating and voting procedures for the Board of Directors, go to *aclum.org/board*.

Vote for 6 or fewer

- ☐ ☐ Derege Demissie
- ☐ ☐ Ellen Lubell
- ☐ ☐ Norma L. Shapiro
- ☐ ☐ John Thomas
- ☐ ☐ Paul Y. Watanabe
- ☐ ☐ Susan Yanow

Susan Yanow: After many years providing therapy services, with a specialty in working with women and children with issues of violence and abuse, Susan transitioned to a career in political activism. A longtime reproductive rights activist, Susan was the founding Executive Director of the Abortion Access Project. Ms. Yanow is currently a consultant to a number of domestic and international reproductive rights and health organizations, including the Advancing New Standards in Reproductive Health (ANSIRH) program at the Dept. of Ob/Gyn at UCSF, the Reproductive Health Access Project (RHAP), and Women on Web. She has also consulted to the Byllye Avery Institute for Social Change, the International Consortium on Medical Abortion (ICMA), and SisterSong. Susan currently serves on Nominating Committee and is the affiliate's Affirmative Action Officer.

Lessons for Boston from Trayvon Martin tragedy

Continued from page 1

cepted Zimmerman's account. Another culprit is Florida's "Stand Your Ground" law, which allows nearly any shooter to claim self-defense—particularly if the only other eyewitness to the shooting is dead.

But Martin's death is not just a story about a rogue citizen, an obtuse police force, and a terrible law. In fact, seeing it only in those terms would risk overlooking what can be done in the future to protect people.

By Legal Director Matthew Segal

For starters, Zimmerman seems to have sincerely believed, at least at first, that Martin was suspicious. Zimmerman's call to the police focused on Martin's dress and behavior—including Martin's hand movements—not just Martin's race.

What's more, Zimmerman's attempt to profile Martin was not novel. Black men, and certainly black teens, are routinely sized up by passersby, including police officers. So looking at the people stopped by police officers is perhaps the best way to understand whether professionals accurately predict who is "up to no good."

Here in Boston, police collect data on these stops and, at the urging of the ACLU of Massachusetts, have pledged to release a report and the underlying data this summer. New York and Los Angeles, however, have already released data showing that the police often confront people for reasons much like Zimmerman's reasons for confronting Martin. In New York, where the police stop thousands of pedestrians every year, half of those stops involve reports of "furtive movements." Yet 90 percent of those stopped by the NYPD are innocent, and an astounding 87 percent are black or Latino.

At best, a black or Latino person stopped for wearing a hoodie and making a furtive movement is demeaned. That's bad enough. But at worst, the person stopped is in grave danger. Heaven help him if, as Trayvon Martin did, he puts his hands near his waist.

It might be tempting to blame racial profiling for these statistics. But the truth is probably more complicated. Even if race affects an officer's judgment about whether a black man is reaching for his wallet or a gun, the officer might believe that he is coldly assessing facts. So protecting innocent people of color from dangerous confrontations with the police, or with armed citizens, isn't as simple as decrying racism. It requires research and training on which behaviors are truly suspicious, and which are not.

Every level of government needs this same evidence-based approach. On the day he was shot, for example, Trayvon Martin was serving a school suspension for having a baggie containing marijuana residue. It is unclear why his school thought that the street, rather than the classroom, was the best place for him.

That's why the data being kept in Boston, New York, and Los Angeles is so important. The police and the public need to know how often blacks and Latinos are stopped, for what reasons, and whether those stops are out of proportion to actual black and Latino crime. If so, then all of us who engage in profiling—citizens and officers alike—should rethink our guesses about who is suspicious.

Other major cities, and all cities in Massachusetts, should duplicate what police are doing in Boston, New York, and Los Angeles. They should track who they are stopping and why, and they should share that information with the people they serve and protect. Armed confrontations are too dangerous, and the need to catch real criminals is too important, to leave it all up to gut instinct.

See page 8 for more about legal director Matthew Segal

Faces of the ACLU

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1/ Matthew R. Segal become legal director of the ACLU Foundation of Massachusetts on February 27, succeeding long-time legal director John Reinstein. Segal comes to the ACLU from the Appellate Division of the Federal Defenders of Western North Carolina, where he regularly argued cases before the Fourth Circuit.

His most significant appellate victory is the Fourth Circuit's decision in *US v. Simmons*. Adopting arguments he presented at a May 2011 en banc hearing, *Simmons* changed the Fourth Circuit's longstanding interpretation of several federal laws. Because of that decision, dozens of people have already seen reversals of their unjust convictions and sentences, and hundreds more stand to obtain similar relief.

"The ACLU of Massachusetts has an outstanding legacy of advocating for the people of the Commonwealth, and I am grateful for this opportunity to join its mission," said Segal. "I will work hard to help Massachusetts remain one of the nation's freest states."

Before his work as an appellate federal defender, Segal was a civil litigator at the law firms of Robbins, Russell and Goodwin Procter, in Washington D.C. He clerked for the Hon. Raymond C. Fisher on the Ninth Circuit Court of Appeals.

Segal obtained his law degree from Yale Law School and his B.A. from Brandeis University, where he graduated summa cum laude in Mathematics and Sociology. His writing has appeared in the Legal Times and FindLaw.com.

2 / ACLU supporters took part in an April rally for justice on Boston Common, in memory of Florida teenager Trayvon Martin.

3 / Taking to the streets, ACLU supporters marched and rallied against the indefinite detention provisions of the National Defense Authorization Act (NDAA), signed into law by President Obama late last year.

4 / National ACLU board president Susan Herman spoke at the Harvard Book Store last fall on her book *Taking Liberties: The War on Terror and the Erosion of American Democracy.*

5 / Front desk volunteer Carol Streiff at the rally for justice in memory of Trayvon Martin.

6 / The ACLU, with the Charles Hamilton Houston Institute for Race & Justice and the Prison Studies Project, brought Michelle Alexander—bestselling author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*—to a public forum at Harvard Law School in April.

7/ ACLU supporters marched with Occupy Boston participants in October from Dewey Square to the State House, in protest of the 10th anniversary of the so-called PATRIOT Act.

Photos 1, 2, 5, and 7 by Marilyn Humphries