

Mass Dissent

Massachusetts Chapter

National Lawyers Guild

14 Beacon St., Boston, MA 02108

April 2008

www.nlgmass.org

Vol. 31, No. 3

In This Edition

Guild News

page 3

NLG Massachusetts Chapter New Board of Directors

page 4

NLG Annual Dinner

page 4

From the Front Lines to the Top Shelf

page 5

New Initiative on Hate Crime

page 7

Backwards Towards Segregation

page 8

Unlawful Detention of a Traveler

page 9

Tips from the Trenches

page 10

BOARD MEETING

April 15, 6:00pm

14 Beacon St., 1st Fl.
Boston

Civil Rights/Human Rights

This month in *Mass Dissent* we examine several timely civil rights issues. Two of our articles have a similar theme: proposals directed to the Patrick Administration on important civil rights initiatives and the frustrating wait for a meaningful response. Are we too impatient in the post-Romney era? Or should we expect more?

David Harris, from Harvard Law School's Charles Hamilton Houston Institute for Race & Justice, describes efforts to engage the Patrick Administration on a proposal to create a senior level Civil Rights Advisor position. Guild members have been active in this effort and the Massachusetts Chapter is one of the endorsers. A summary of the proposed position is on page 6.

Don Gorton, Chair of the Gay & Lesbian Anti-Violence Project, writes about a similar effort to revive the state's Hate Crimes Task Force. The Guild signed on to this

request as well, sent to the Administration one year ago.

Nadine Cohen discusses the U.S. Supreme Court's 2007 decision on the constitutionality of school desegregation plans and its possible impact on previous litigation in Massachusetts.

Chris Ott from the Massachusetts ACLU reports on an important jury verdict in a case about racial profiling at Logan Airport. Ironically, the person profiled was the National Coordinator of the ACLU's Campaign Against Racial Profiling.

Finally, NLG member Ellen Messing and Kevin Merritt describe how employment discrimination plaintiffs in the financial services industry have found an unexpected ally in the U.S. Securities and Exchange Commission, due to its requirement that finance companies must retain employee e-mails for three years.

- Barb Dougan -

NATIONAL LAWYERS GUILD
Massachusetts Chapter, Inc.
14 Beacon St., Suite 407
Boston, MA 02108
tel. 617-227-7335 • fax. 617-227-5495
nlgmass@igc.org • nlgmass-director@igc.org
www.nlgmass.org

BOARD OF DIRECTORS

CHAIRPERSONS

Neil Berman, Common Sense Legal Counseling
Eleanor Newhoff, solo practitioner

TREASURERS

Burton Nadler
Jeff Petrucelly, Petrucelly & Nadler

MEMBERS

Laura Alfring, Adkins, Kelston, Zavez
Jason Corral, GBLS
Barb Dougan, FAMM
Benjamin Falkner, Krasnoo Klehm
Hillary Farber, Northeastern University
Jeff Feuer, Goldstein & Feuer
Nancy Kelly, GBLS
David Kelston, Adkins, Kelston, Zavez
David Milton, Law Offices of Howard
Friedman
Halim Moris, Moris & O'Shea
Judy Somberg, solo practitioner
Bonnie Tenneriello, MCLS
Carl Williams, CPCS Public Defenders
John Willshire-Carrera, GBLS

STUDENT REPRESENTATIVES

Thomas Becker, Harvard
Allison Garren, Northeastern
Rachel Kling, Boston College
Tony Naro, Suffolk
Sarah Roxburgh, New England
Patrick Scruggs, Boston College
Lauren Vitale, New England

EXECUTIVE DIRECTOR

Urszula B. Masny-Latos

LRS COORDINATOR/ADMIN. ASSIST.

Caroline Lorenz

STREET LAW CLINIC COORDINATOR

Lori Hill and Charlotte Noss

Mass Dissent (ISSN 0887-8536) is published monthly except January, May, July and August by the National Lawyers Guild, Mass. Chapter, 14 Beacon St., Suite 407, Boston, MA 02108. Second-class postage paid at Boston, MA. POSTMASTER: Send address changes to *Mass Dissent*, NLG, 14 Beacon St., Suite 407, Boston, MA 02108.

Join a Guild Committee

Street Law Clinic Project: The Street Law Clinic project provides workshops for Massachusetts organizations that address legal needs of various communities. Legal education workshops on 4th Amendment Rights (Stop & Search), Landlord/Tenant Disputes, Workers' Rights, Civil Disobedience Defense, Bankruptcy Law, and Immigration Law are held at community organizations, youth centers, labor unions, shelters, and pre-release centers. If you are a Guild attorney, law student, or legal worker interested in leading a workshop, please contact the project at 617-723-4330 or nlgmass-slc@igc.org.

"No to MBTA Searches": Works in coalition with the American Arab Anti-Discrimination Committee, American Friends Service Committee and American Civil Liberties Union of Massachusetts to stop searches on the MBTA. If you would like to be involved in the campaign, either on its political or legal end, please call the office at 617-227-7335.

Lawyer Referral Service Panel: Members of the panel provide legal services at reasonable rates. Referral Service Administrative/Oversight Committee members: Neil Burns, Neil Berman, Joshua Goldstein, Jeremy Robin, and Azizah Yasin. For more information, contact the Referral Service Coordinator at 617-227-7008 or nlgmass@igc.org.

Independent Civilian Review Board: In coalition with the American Friends Service Committee and Greater Boston Civil Rights Coalition, the NLG has been pushing for the creation of an independent civilian board to review complaints against Boston police officers. To get involved in the campaign, please contact the office at 617-227-7335.

NLG National Immigration Project: Works to defend and extend the human and civil rights of all immigrants, both documented and undocumented. The Committee works in coalition with community groups to organize support for immigrant rights in the face of right-wing political attacks. Ongoing projects include asylum advocacy and the rights of immigrant minors. For more information contact the NLG National Immigration Project at 617-227-9727.

NLG Military Law Task Force: Provides legal advice and assistance to those in the military and to others, especially members of the GIRights Hotline, who are counseling military personnel on their rights. It also provides legal support and helps to find local legal referrals when needed. The MLTF and the Hotline exchange many questions and information through their listserves. Calls to the GIRights Hotline from phones in New England are handled from the AFSC office in Cambridge. To get involved, please contact Neil Berman (njberman2@juno.com) or Marguerite Helen (mugsm@mindspring.com).

COALITIONS:

Jobs with Justice, a coalition-based organization addressing workers' rights. The NLG is a member of Jobs with Justice; any interested Guild members can attend meetings & events.

GUILD NEWS

NLG HAPPY HOUR

The NLG Massachusetts Chapter's **Happy Hour** - for Guild members and non-Guild members - takes place on the **2nd Wednesday of every month, between 5:30 and 7:30pm, at Felt Billiards Club** (533 Washington St., Downtown Crossing, next to Paramount). We hope you will join us for the next NLG Happy Hour on **April 9** - and bring friends!

Ave.) This year we are honoring lawyers **Sharryn Ross** and **Jeff Feuer**, legal worker **Anibal Lucas**, and law student **Tony Naro**. We will also pay a special tribute to our past honorees to commemorate the NLG's 70th Anniversary (see page 4). Please call the office (617-227-7335) about ticket reservations and about placing a greeting in the dinner journal.

ANNUAL DINNER

The 27th Testimonial Dinner of the NLG Massachusetts Chapter will be on **Friday, May 16, 2008, 6:00pm, at the Colonnade Hotel in Boston** (120 Huntington

NATIONAL CONVENTION

This year's NLG Convention will be held in Detroit between **Wednesday, October 15 and Sunday, October 19**. It will take place at the **Marriott Detroit** (Renaissance Center). To register and for more information, please contact the National Office at 212-679-5100 x.13.

Street Law Clinic Report

March 18: The SCALE (an adult education center in Somerville) hosted a clinic on Workers' Rights. The clinic was conducted by Guild member **Mark Stern**.

March 24: Guild member **Deborah Roher** conducted a clinic on Workers' Rights for the residents of the Saint Ambrose Shelter in Dorchester.

March 25: The Workplace, an organization in Boston hosted a clinic on employment law and workers' rights. The clinic was conducted by Guild member **Jeff Petrucelly**.

NLG Massachusetts Chapter Welcome Caroline Lorenz

We hope you will join us in welcoming Caroline Lorenz who in March started her work for the Massachusetts Chapter as the coordinator of the Lawyer Referral Service and Administrative Assistant. She has replaced Robin Trangrud who left us for a very exciting volunteering work in Quito, Ecuador.

Caroline grew up in Florida and moved to Boston last year after graduating from Bowdoin College in Brunswick, Maine. She majored in American history and film studies. When asked why she left sunny Florida, Caroline says: "We'll never know what my teenaged self was thinking when I decided to flee my little Florida beach town in favor of a school who prides itself on its Arctic history museum and polar bear mascot, but here I am!"

We are very fortunate to have Caroline working with us and see her excitement about the Guild.

Please call Caroline at 617-227-7008, so she can meet you all.

ARTICLES FOR MASS DISSENT

The June issue of *Mass Dissent* will focus on the legacy of the Bush administration.

If you are interested in submitting an article, essay, analysis, or art work (cartoons, pictures) related to the topic, please e-mail the articles to nlgmass-director@igc.org.

The deadline for articles is May 15th.

New Board of Directors

Last March, the NLG Massachusetts Chapter held its Annual Meeting at which new Chapter officers and members of the Board of Directors were elected. **Neil Berman** was elected to join **Eleanor Newhoff** in Co-Chairing of the Chapter; **Burt Nadler** and **Jeff Petrucelly** were re-elected to serve as Chapter's Co-Treasurers; **Laura Alfring**, **David Milton**, **Halim Moris**, and **Carl Williams** were elected to be on the Board of Directors.

After serving two terms (unprecedented!), **David Kelston's** reign as a co-chair of the Chapter ended, but, fortunately for the Guild, he will continue his service as a member of the Board. We would like to thank David for his exceptional commitment and leadership for the Massachusetts Chapter.

We would also like to express our gratitude to members of the Board who decided to step down: **Peter Berkowitz**, **Patrick Colvario**, **David Conforto**, **Lee Goldstein**, **Marguerite Helen**, **Dawn Johnson**, **Maria Muti**, and **Hema Sarangapani**. Over the years, they contributed enormously to the Guild, and the Chapter will always be grateful and indebted.

At the meeting, NLG member Robert Meeropol gave a very interesting presentation on "1/20/2009: Light at the End of the Tunnel?" which stimulated a long and engaging discussion.



Guest speaker Robert Meeropol (2nd from r.) with the Chapter's Co-Chairs (l.-r.) newly elected Neil Berman and Eleanor Newhoff, and outgoing - David Kelston.



(l.-r.) Anne Sills, Judy Somberg, Bonnie Tenneriello, Carl Williams

NLG 70th Anniversary

This year our **Chapter's Annual Testimonial Dinner** (27th!) will be very special - in addition to this year's honorees (Sharryn Ross, Jeff Feuer, Anibal Lucas, and Tony Naro), we will also celebrate the **National Lawyers Guild's 70th Anniversary**. At the Dinner, we will offer special recognition and thanks to all recipients of the Chapter's Lawyer Award - from 1982 to 2007: Howard Zinn (1982), Jan & Ira Solet (1983), Jeffrey Isaacson (1985), Jack Backman (1986), Margaret Randall (1988), Jamie Ann Sabino (1989), Margaret Burnham & Max Stern (1990), Denise Carty-Bennia (1991), Geraldine Hines (1992), Deborah Anker & Lucy Williams (1993), Derrick Bell (1994), Sarah Wunsch (1995), Michael Avery & Monica Halas (1996), Kehoe Doyle Playter & Novick (1997), Lee Goldstein & Lory Rosenberg (1998), Martin Rosenthal & Judy Somberg (1999), Nancy Kelly & Jonathan Shapiro & John Willshire-Carrera (2000), Nadine Cohen & Ira Sills (2001), Petrucelly & Nadler and Allan Rodgers (2002), Patricia Garin & John Roberts (2003), Mary Bonauto & Howard Friedman (2004), Martin Kantrovitz & Judith Liben (2005), Kaplan O'Sullivan & Friedman, and Leslee Klein (2006), John Salsberg & Barbara Zimbel (2007). We will also pay a special tribute to the Lifetime Achievement Award recipients: Lawrence Shubow (2004), Jan Solet (2005), Jane Alper (2006), and Marguerite Helen (2007).

This will be, we hope, a different, memorable, and very special dinner, one that will recognize the NLG's and our Chapter's long and proud history.

We hope you will be there.
NLG Massachusetts Chapter 27th Testimonial Dinner
Friday, May 16, 2008
6:00 p.m.
The Colonnade Hotel
120 Huntington Ave., Boston, MA



(l.-r.) Mark Stern, Rachel Benedict, Benjamin Falkner, Ana Lucia Ulieg-Paulin, Josh Paulin, Lori Hill, Charlotte Noss, David Kelston

From the Front Lines to the Top Shelf: Making Civil Rights a Priority

David J. Harris

...We must find a way to shift civil rights from the periphery to the center of public policy ...there is a critical need to consider the civil rights implications of all state policies from the top down...Therefore, I call upon Governor Patrick to create a cabinet level civil rights position to oversee enforcement of our civil rights laws and monitor performance across departments... whose sole mission is to promote, establish and maintain an effective civil rights platform across the Administration.

The passage above is from a January 2007 address to the Jewish Alliance for Law and Social Action. It began what has been a 15-month effort to establish a new state Office of Civil Rights. The call was first issued to a sympathetic audience giddy with enthusiasm over the election of Deval Patrick as the first Democratic governor in over a decade of putatively the nation's most liberal state. Throughout the campaign Patrick had deftly negotiated some of the thornier issues facing a black candidate campaigning to a predominantly white electorate, only very occasionally speaking directly of race or civil rights. Some of his opponents certainly feared that Patrick was a wolf in sheep's clothing who would, when elected, trade his tailored suit for a blue dashiki. But others of us realized it would require a mixture of pressure and support for him to promote the kind of creative and aggressive civil rights agenda for which we hoped.

The proposal

A group of civil rights advocates started working on the proposal to create such a position in early 2007. We draft a detailed job description (see page 6) to carry out this general charge:

...develop and implement a civil rights initiative for the Governor that establishes the philosophy, framework, and benchmarks for achievement by all state government entities to ensure that the principles of non-discrimination, diversity, equal opportunity, and civil rights are knit into the fabric of state government--reflected in its policies and programs, in the delivery of state services, and in the direction by which administrative agencies fulfill their public interest mandates.

As our vision of the position took shape, we obtained endorsements by dozens of organizations from around the state and grew to a larger coalition, representing a wide array of constituencies. But our most challenging task was engaging the Administration.

We understood that such a position would be the first of its kind in the nation, but it still seemed a simple mandate that echoed some of the Governor's campaign rhetoric. He had already quickly, but quietly, sought to repair the damage of his predecessor's effort to gut the state's affirmative action policy. But the emphasis is on "quietly," for the record shows a continued tendency to downplay civil rights issues. While the Administration has not rejected the proposal, and as I write it appears the office may be in the offing, our coalition

has spent the 15 months struggling to make it happen. The process has been characterized by fits and starts, as we have met repeatedly with Administration officials whose repeated expressions of sympathy and understanding have so far yielded dialogue and assurances but no concrete results.

Rethinking our strategy

These developments raise serious questions about the strategies we used, relying as we did upon the quiet give-and-take of insider politics. We developed an extensive list of endorsers and met with state officials from policy analysts to mid- and high-level officials, up to the Governor's Chief of Staff. This strategy yielded baby steps toward success, highlighted by the Governor's public embrace, during a speech commemorating the Little Rock Nine, of the need to view state policies through the "lens" of civil rights. That speech was delivered in October 2007, however, but in the five months since the state's policy-making has lacked such concentrated focus.

Looking back, we stayed with the insider game far too long. Our coalition was as naïve as some critics claim of the Governor. In trying to balance support and pressure, we erred far too much toward the former. We relied on the mere heft of our endorsers without mobilizing their influence. This is in contrast to the approach used by a sibling coalition to reform the criminal offender reporting system in Massachusetts. That coalition used a two prong strategy, com-

Continued on page 6

Proposal for Civil Rights Advisor

Civil rights activists, including several NLG members, drafted a proposal to create a new senior level position for state government, the Civil Rights Advisor. The NLG was among the many organizational endorsers. Discussions with the Governor's staff are ongoing. These are the main points.

Duties and role:

- Be part of the Governor's senior staff, reporting directly to him.
- Create civil rights policy for the Commonwealth; participate in decision-making to ensure that policies, programs and services further the interests of civil rights.
- Serve as a liaison between the Governor, state agencies and constituents to inform and broadcast the Governor's civil rights priorities.
- Provide the Governor, Cabinet Secretaries, state agencies and commissions with an analysis of the civil rights impact of current and proposed state programs.
- Work collaboratively with MCAD, Attorney General's Civil Rights Division, MA Office of Disability (MOD) to ensure their civil rights enforcement efforts address the Administration's priorities.
- Work collaboratively with State Office of Affirmative Action (SOAA) and the State Office of Minority Business Assistance (SOMBA) to ensure that the Administration's civil rights goals are advanced within state hiring, employment prac-

tices and contracting.

- Organize community meetings throughout the state to hear from residents on the civil rights issues they are facing
- Issue an annual State of Civil Rights report, identifying needs, goals, and meaningful responses to civil rights issues within state government and the Commonwealth.

Issues to address:

- Work with Department of Education and advocacy groups to promote and maintain racial diversity in our public schools in light of the U.S. Supreme Court's decision striking down voluntary desegregation plans.
- Advise Development Cabinet on compliant zoning and planning policies to increase housing options for families with children, people with disabilities, and racial and ethnic minorities lacking adequate housing choices.
- Collaborate across departments and communities to promote constructive civil rights solutions for public safety concerns, including CORI reform, racial profiling and youth offender intervention opportunities.
- Work with Division of Medical Assistance to ensure that no person who is recognized as a spouse under state law is denied benefits that are otherwise available under MassHealth due to the federal government's refusal to recognize same sex marriages.
- Pursue legal and service avenues to allow our growing immigrant populations full access to public services like education, health care, and housing.

From the Front Lines

Continued from page 5

binning insider meetings with more public calls for reform. The premise of the latter is that the Administration would be more responsive to pressure than persuasion alone. Although the result was not everything the coalition sought, it seems clear that even with an ally in the Executive office, it is essential to

mobilize at the grass roots level to bolster one's policy agenda. Indeed, I also noted in my JALSA speech:

...there will be moments...when political expediency and decency collide head on and the best way we can support the ideals we share with the Governor is to encourage and support him in making the right choice. To do less

would be a disservice to his leadership and his place in history, as well as to ourselves.

Sometimes we have to express our support by raising our voices and unbuttoning our jackets -- to reveal our blue dashikis!

David J. Harris is Managing Director of the Charles Hamilton Houston Institute for Race & Justice at Harvard Law School.

Civil Rights Activists Await New Initiative on Hate Crimes

by Don Gorton

In a regressive move that received little attention at the time, former Governor Mitt Romney shut down the Governor's Task Force on Hate Crimes in 2003, his first year in office. The Administration of Governor Deval Patrick has signaled its intention to revive the commission, although the timetable remains unclear.

The Task Force was chartered by former Governor William Weld in 1991, following passage of the Massachusetts Hate Crimes Reporting Act of 1990, to coordinate the reporting and training efforts called for in the statute. During the 12 years of its existence, the Task Force brought together law enforcement and other government officials, educators, and advocates for communities affected by hate crimes to ensure that hate crimes enforcement and prevention efforts received priority. Early activities included a series of statewide training conferences to spearhead implementation of the Reporting Act, initiatives to spur the voluntary reporting of hate crimes data by local law enforcement officials, creation of training curricula and resource information for law enforcement, and a successful drive to expand the Massachusetts Hate Crimes Penalties Act, G.L. c. 265, § 39, to include sexual orientation and disability-related bias crimes.

In 1997 the Task Force added staff and began its Statewide Initiative, resulting in nearly 100% participation by law enforcement agencies in the program of voluntary hate crimes reporting established by the 1990 law. In 1998, in response to data indicating that a majority of hate crimes were com-

mitted by perpetrators under 21, the Task Force launched its highly successful Student Civil Rights Project, which initiated pioneering efforts aimed at improved hate crimes awareness, responsiveness, and prevention in high schools. The Task Force conducted a victimization survey in cooperation with Northeastern University, documenting an alarming incidence of hate crimes in Massachusetts high schools. The Student Civil Rights Project created an award-winning youth-oriented web site to encourage reporting, bystander responsibility, and peer leadership against bias. The Project also started "civil rights teams" in pilot schools, whereby student volunteers underwent specialized training to become peer leaders against hate in campus environments. Meanwhile, curricula for alternative sentencing programs were developed to engender civil rights and diversity awareness among offenders.

In its last year of existence, the Task Force began an ambitious anti-bullying initiative aimed at the state's middle schools, in an attempt to reduce behavior often precursory to hate activity. The centerpiece was an Anti-Bullying Best Practices Guide. A middle school survey gathered details of what measures had worked to prevent bullying in field experience. The Guide blended survey results with the latest academic research on bullying prevention.

In 2003, Romney vetoed the hate crimes prevention line item in the state budget and separately impounded funds already set aside for the anti-bullying initiative. Staffers were laid off and the Task Force was disbanded. Pending projects, including the partially completed Anti-Bullying Guide, were left to die on the vine.

With the change of administra-

tion in 2007, the Greater Boston Civil Rights Coalition, the Gay and Lesbian Anti-Violence Project, and the Anti-Defamation League took the lead in an effort to revive the Task Force. These groups, along with approximately 20 other endorsers (including the NLG), sent a letter to Governor Patrick in April 2007, urging him to reconvene the anti-hate crimes body.

Since Romney terminated anti-hate crimes programs, advocates have grown concerned about degraded law enforcement effectiveness in dealing with hate crimes and reduced levels of police participation in hate crimes reporting. By 2005, the last year for which data is available, voluntary reporting had fallen to only 20% of the state's law enforcement agencies, a low level of engagement not seen since the early 1990's. As a result, there is no current information on the prevalence of hate crimes in most communities. In addition, law enforcement training curricula have fallen out of date and few officers are receiving the civil rights training mandated by law. Advocacy organizations have tracked civil rights cases that were poorly investigated by local police departments. The Anti-Violence Project sounded alarms over hate crimes in Provincetown and Somerville in which perpetrators were allowed to escape justice.

In November 2007, Secretary of Public Safety Kevin Burke addressed a joint meeting of the Greater Boston Civil Rights Coalition and the Mass. Association of Human Rights and Relations Commissions. He announced that a new hate crimes commission would be convened. Noting the work done in years past, Burke commented that the administration didn't need to rein-

Continued on page 11

Backwards Towards Segregation: an Analysis of the Supreme Court's School Desegregation Decision

by Nadine Cohen

In a major decision last year, a sharply-divided Supreme Court invalidated the voluntary efforts of public school districts in Louisville and Seattle to address racial segregation in their schools. Parents Involved in *Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007). The decision was extremely disturbing – and not within the mainstream views of most Americans. The majority opinion found that the Seattle and Louisville plans were not “narrowly tailored to the goal of achieving educational and social benefits asserted to flow from racial diversity.”

Most people in our country believe in the goal of quality education for all children and understand that we cannot have equal educational opportunity if schools are racially segregated. By holding that our schools have no compelling need to promote diverse and equitable education, four of the justices have shown that they are out of touch with our nation's history, values and the true meaning of our Constitution.

There are five separate opinions in the case, showing us that the issue of race is, and most likely will always be, a major issue facing our country. Four Justices – Roberts, Alito, Scalia and Thomas – believe race conscious measures can never be used to achieve equality, even if used to include people rather than exclude them. They see no difference between forced segregation where Blacks were kept out of white schools and denied an equal education with plans to

encourage diversity and prevent segregation. They do not see the value of racial diversity – calling it “racial balancing” – and find it can never be a compelling government interest.

But they are only four Justices, not the majority. Justice Kennedy specifically said that there is a compelling interest in avoiding racial isolation and in achieving a diverse student body. He also said it is permissible to consider the racial make-up of schools and to adopt general policies to encourage diversity. While it is not exactly clear what Justice Kennedy meant by such “general policies,” he did indicate that if the racial composition of the student body interferes with the ability to offer equal educational opportunity to all students, then school authorities can use race-conscious measures. It is clear that race-conscious desegregation plans can be used if there are no race-neutral alternatives that work.

Justice Breyer, joined by Justices Ginsburg, Stevens and Souter, wrote a scathing 77-page dissent, clearly articulating that the Constitution “emphatically” does not forbid the use of race-conscious measures by school districts seeking to desegregate their schools. The dissent discusses how the very purpose of the 14th Amendment's Equal Protection Clause is to provide opportunity, not to deny it. Breyer distinguished between using race-conscious criteria to keep the races apart and to bring the races together. The dissent attacked the plurality's view that schools can only use race in remedial plans if there has been de jure segregation, but not if

there is de facto segregation resulting from segregated housing or other factors.

There is overwhelming evidence that Black students' educational achievement is improved in integrated schools, and that the earlier they are removed from racially isolated schools the better their educational outcomes. Studies also show that desegregating schools can help bring communities together and reduce residential segregation patterns. Unfortunately there is also overwhelming evidence that schools across the nation are becoming increasingly segregated. More than one in six Black children attend a school that is 99-100% students of color. Nearly three-quarters of Black and Latino students in the U.S. attend schools that are predominantly non-white. Almost 40% of Black and Latino students attend schools that are racially isolated – where less than 10% of the students are white. Levels of segregation are highest in the Northeast, where segregation has dramatically increased in the last 15 years.

How does this decision affect Massachusetts? In *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005), the First Circuit upheld Judge Gertner's finding that the Lynn Voluntary School Desegregation Plan was constitutional and that it helped to improve the quality of education for all children. The white plaintiffs in the Lynn case filed a motion for relief from judgment shortly after the Supreme Court decision in the Seattle School District case. Judge Gertner heard oral arguments and took

Continued on page 11

Jury Finds Unlawful Detention of African-American Traveler

by Christopher Ott

On December 7, 2007, a federal jury in *Downing v. Massachusetts Port Authority* found that the Massachusetts State Police unlawfully detained King Downing at Logan Airport in October 2003. Downing agreed to a settlement of his claims against the Massachusetts state trooper principally responsible for the unlawful detention, William Thompson.

At issue in the case was the Passenger Assessment Screening System (also known as the Behavior Assessment Screening System). The PASS program was designed to thwart terrorists and was put into effect at Logan Airport in 2003. The criteria used to assess potential security threats are secret. Similar screening systems are now in use at dozens of airports around the country.

The jury did not find that the incident on Oct. 16, 2003, was necessarily the result of the PASS program. Nonetheless, it did find that the police had unlawfully detained Downing because they had done so without reasonable suspicion to believe he had committed any crime. Defendants steadfastly contended that at all times during the 30 - 40 minute encounter at Logan, Downing was free to leave the police -- but the jury rejected this notion.

Downing testified at the trial that he was stopped for questioning by state police troopers after simply using a pay phone on his way out of Logan Airport on the morning of October 16, 2003. Police demanded to see Downing's identification and travel documents, which he was under no obligation to provide. After initially being told that he must leave the airport, which he intended to do anyway, five state troopers surrounded Downing and said he was

under arrest. Although the police had no reason to stop him, Downing was detained for 40 minutes until he finally acceded to police demands for his identification and travel papers.

Downing's legal team had argued that his detention was the result of the PASS program, and the case raised important questions about how - and against whom - security measures are applied. Downing is a Harvard-educated lawyer who serves as the National Coordinator of the American Civil Liberties Union's Campaign Against Racial Profiling. If someone with these advantages and high level of awareness of his rights could not prevent his own unlawful detention, then what chance do other citizens have in a situation in which they, too, have mistakenly been identified as a security threat?

"This jury verdict put the state police on notice that its programs, including the post-9/11 Passenger Assessment Screening Program, must assure in the future that voluntary encounters between troopers and members of the traveling public do not become the type of unlawful detention that Downing experienced," said attorney Peter B. Krupp, of the firm Lurie & Krupp LLP. Krupp represented Downing in cooperation with the ACLU of Massachusetts.

Downing had stopped on his way out of the airport to use a pay phone outside the secure area, and he contended that the only thing that would have attracted the attention of the trooper was his appearance. Downing is an African American who wears a beard. Downing testified that while he was on the phone, a state trooper positioned himself just a few feet away where he could easily listen in on Downing's call. When Downing objected, the trooper demanded to see his identification.

Ironically, Downing had traveled to Boston to participate in a meeting about racial profiling.

"There is an African saying, 'In the court of chickens the roach never gets justice,'" said Downing. "But here a jury with no blacks found that my rights were violated. This case sends a message to blacks, and to all people, to stand up for their rights."

"This jury verdict upheld an important principle," said Carol Rose, Executive Director of the ACLU of Massachusetts. "In the United States, people cannot be stopped without cause by the police and required to produce identification and papers proving that they have a right to be in a particular place. 'Your papers please' is a phrase that should be alien in a free society. Police and airport security personnel should be on the lookout for genuinely suspicious behavior, but the law is clear that they may not stop someone unless they have a reasonable suspicion that a crime or an act of terrorism might be committed. The use of behavioral characteristics, like those that were kept secret in this case, does not justify the detention of someone in a non-secure area."

The ACLU of Mass. has questioned the use of behavioral pattern recognition out of concern that it increases the likelihood of racial profiling. "The police are going to find suspicious behavior where they look for it," Rose said. "Experience teaches us that they are more likely to look for it among people of color or a particular ethnicity. We will all be safer if security personnel base their investigations on evidence, not simply racial characteristics."

Christopher Ott is Communications Manager at ACLU-Massachusetts.

Tips from the Trenches: Using E-Discovery in Financial Industry Sexual Harassment Cases

by Ellen Messing & Kevin Merritt

Although we hear a lot in the media about the strides women have supposedly made toward workplace equality, we have not found many signs of it in our employment litigation practice. Most industries do not pay, promote or retain women equally with men and in some, women are simply nowhere close to equal treatment. One notoriously problem industry continues to be the financial services sector. It largely remains a “boy’s club,” and women working in finance are routinely subject to bias and harassment. Our firm, which is women-owned, has taken on a number of cases where women at all levels are harassed or excluded, or their contributions are exploited without credit.

In these cases, one challenge is corroborating the claims our clients make about the disgusting behavior to which many of them are subjected. Co-workers are understandably fearful of retaliation and reluctant to participate as witnesses in an industry known for hardball tactics, and where memories are long. But in many cases, we have found key support for our clients’ claims in electronic communications.

Financial services firms, like most businesses today, have gone all-electronic. Watercooler talk has been replaced by fast, easy, electronic communication, by email and increasingly by instant messaging, all of which leave a documentary trail. Thankfully, the SEC has passed regulations (primarily to address concerns about corporate accountability, in the wake of the financial scandals of recent years) that require securities-industry businesses to retain copies of “all communications . . . relating to its business as such” for a period of

three years. 17 C.F.R. § 240.17a-4(4). This requirement applies to most emails or instant messages sent or received via employees’ company email accounts.

Even so, many industry employees do not act as if they understand that electronic communication records are permanent and are not secret. As a result, employees continue to treat their email activity casually. Their sexism, which might once have been kept to oral conversations that could be denied or forgotten, bleeds into the electronic record, complete with time- and date-stamps. Thanks to the SEC, that record of sexism gets preserved. That can make all the difference in a hard-to-prove sexual harassment case.

E-discovery has become a critical factor in the financial-sector cases we handle. Sometimes our requests for emails and instant messages have turned up direct evidence of discrimination—e.g., pornographic cartoons and pictures, dirty jokes shared with (or originated by!) the boss, epithets, or other explicitly sexual content. But we do not limit our requests just to emails that contain “bad words” or nasty pictures. Indeed, requests narrowly seeking “sexual” content or related terms have often met the objection that these are subjective terms and accordingly it is unfair to require defendants to conduct electronic searches based on them.

In response, we have found it useful to adopt the posture that we are constrained to agree with defendants, but then prescind from that posture to one they don’t appreciate at all. We argue that because the definition of sexual content, or offensive content, or lewdness, vulgarity, etc., is so subjective that “you know it if you see it,” and indeed the defendants think so too, the only way we can deter-

mine if inappropriate or illegal communications have been sent is for us to have discovery access to all the emails of various identified individuals for a given period of time, and make those inherently subjective judgments ourselves. Defendants tend to howl bitterly at this proposition, but we have had some success in advancing it.

In fact, the kinds of communications we have uncovered in this way, which frequently reveal a remarkably degrading view of women, as well as associated manipulation of such employment events as the performance review process, salaries, client assignment, etc., have demonstrated that there are truly an infinity of words and expressions used by sexists to express hostility and contempt toward women and gender-based abuse. We ourselves could never have dreamed of many of them as we struggled to create comprehensive lists of search terms for our discovery requests. Although it is painful to see such bigoted views preserved, and accordingly to reflect on how much more work we need to do to end sex discrimination in the workplace, we have to appreciate how much these records benefit our clients in the here and now.

So we urge Guild members handling these cases to get creative, seek the defendants’ sexual-themed electronic communications, and if that doesn’t work, demand all of them; their unsavory contents will more than likely help your clients get the vindication they deserve.

Ellen Messing is a partner at Messing, Rudavsky & Weliky, P.C., where Kevin Merritt is an associate. The firm specializes in the representation of employees and labor unions.

Massachusetts Chapter Sustainers

In the spring of 2003, the Massachusetts Chapter of the NLG initiated the Chapter Sustainer Program.

Since its inception, the Program has been very successful and has been enthusiastically joined by the following Guild members:

Adkins, Kelston & Zavez; Jane Alper; Samuel Berk; Neil Berman; Howard Cooper; Melinda Drew & Jeff Feuer; Howard Friedman; Benjie Hiller; David Hoffman; Stephen Hrones; Martin Kantrovitz; David Kelston; Leslee Klein & Mark Stern; William Newman; Petrucelly & Nadler; Allan Rodgers; Martin Rosenthal; Sharryn Ross; Anne Sills & Howard Silverman; Judy Somberg; and Stern, Shapiro, Weissberg & Garin.

This is one of the most important initiatives the Chapter has undertaken to secure its future existence. Please consider joining the Program. We need you in order to have a strong and active Guild!

YES, INCLUDE MY NAME AMONG NLG MASSACHUSETTS CHAPTER SUSTAINERS

I, _____, am making a commitment to support the Massachusetts Chapter of the Guild with an annual contribution of:

_____ \$500 (not including my membership dues)

\$_____ (Other above \$500)

As a Sustainer I will receive:

- Special listing in the Dinner Program;
- 1/8 page ad in the Dinner Program;
- Acknowledgement in every issue of *Mass Dissent*;
- Two free raffle tickets for a December Holiday Party;
- Invitation to a Guild reception.

Please mail to: NLG, Massachusetts Chapter
14 Beacon St., Suite 407, Boston, MA 02108

Backwards Towards Segregation

Continued from page 8

the case under advisement.

We believe that the Supreme Court decision does not alter the Comfort decision, which made detailed findings based on extensive evidence presented at trial that the Lynn Plan was "narrowly tailored" to meet a "compelling state interest." The District Court specifically found that Lynn considered alternative plans that were not race conscious, but that they did not accomplish the goal of achieving racial diversity in Lynn's schools. Twenty-one other cities and towns in Massachusetts also have voluntary school desegregation plans. The Supreme Court decision may be used to challenge these plans, as well as the 40-year old METCO program, in which urban students are voluntarily bused to

racially isolated suburban schools. The Massachusetts NLG must be prepared to support METCO and the other school desegregation plans in Massachusetts, if they are challenged in court.

It is ludicrous to think that schools can foster integration and educational equality if their hands are tied by not permitting them to use race when making student assignments. *Brown v. Board of Education* is still good law. Racially separate schools are racially unequal schools – and are still unlawful. We in the NLG must continue to fight against a racially segregated educational system.

Nadine Cohen represented the NAACP and Lynn parents of color who sought to intervene in the Comfort case. She is an attorney at GBL and a long time NLG member.

Hate Crime Initiative

Continued from page 7

vent the wheel, but just to get it rolling again. The GBCRC, MAHRRRC and the Anti-Violence Project followed up with a set of recommendations concerning the new commission's duties and membership.

To date, the new hate crimes commission had yet to be finalized or announced. Advocates will continue to press the Patrick Administration to get the task force back up and running. Meanwhile, in a separate development, the Department of Public Health under Commissioner John Auerbach took up the Anti-Bullying Guide that the Romney Administration had scuppered. The Guide is scheduled to be released to middle schools statewide in April. Advocates are hopeful, if impatient, for the damage wrought by the Romney Administration to be undone.

Don Gorton is Chair of the Gay & Lesbian Anti-Violence Project. He served as Co-Chair of the Hate Crimes Task Force throughout its existence.

Mass Dissent

USPS 0760-110 PERIODICAL

Periodical
Postage & Fees
PAID
USPS Permit
0760-110

The National Lawyers Guild is...



"... an association dedicated to the need for basic change in the structure of our political and economic system. We seek to unite the lawyers, law students, legal workers and jailhouse lawyers of America in an organization which shall function as an effective political and social force in the service of people, to the end that human rights shall be regarded as more sacred than property interests. Our aim is to bring together all those who regard adjustments to new conditions as more important than the veneration of precedent; who recognize the importance of safeguarding and extending the rights of workers, women, farmers, and minority groups upon whom the welfare of the entire nation depends; who seek actively to eliminate racism; who work to maintain and protect our civil rights and liberties in the face of persistent attacks upon them; and who look upon the law as an instrument for the protection of the people, rather than for their repression."

Preamble to the Constitution of the National Lawyers Guild, originally adopted February 22, 1937, and most recently amended in July 1971.

Please Join Us!

Dues are calculated on a calendar year basis (Jan.1-Dec.31) according to your income*:

Jailhouse Lawyers.....	Free
Law Students.....	\$25
up to \$15,000.....	\$40
over \$15,000 to \$20,000.....	\$50
over \$20,000 to \$25,000.....	\$75
over \$25,000 to \$30,000.....	\$100
over \$30,000 to \$40,000.....	\$150
over \$40,000 to \$50,000.....	\$200
over \$50,000 to \$60,000.....	\$250
over \$60,000 to \$70,000.....	\$300
over \$70,000 to \$80,000.....	\$350
over \$80,000 to \$90,000.....	\$400
over \$100,000.....	\$500

* Any new member who joins after September 1 will be carried over to the following year. Dues may be paid in full or in quarterly installments. Dues of \$80 cover the basic membership costs, which include publication and mailing of *Mass Dissent* (the Chapter's monthly newsletter), national and regional dues, and the office and staff.

No one will be denied membership because of inability to pay.

Fill out and send to: National Lawyers Guild, Massachusetts Chapter, 14 Beacon St., Suite 407, Boston, MA 02108. Tel. 617-227-7335.

Name: _____

Address: _____

City/State/Zip: _____

Phone: (w) _____ (h) _____

Fax: _____ e-mail: _____

Circle one: Lawyer, Legal Worker, Law Student, Jailhouse Lawyer

Alumna/Alumnus of/year: _____

Dues (from schedule): _____

Amount Enclosed: _____

I am interested in working on the following projects:

_____ Lawyer Referral Service

_____ Workers' Rights Board

_____ Street Law Clinic

_____ Civil Disobedience Defense Group

_____ National Immigration Project

_____ *Mass Dissent* (monthly publication)