



The Reformer

The Magazine of the MSLAW Community

Spring 2011

The Reformer

Table of Contents

Departments

- 3 Message from the Diversity Alliance
- 4 Message from the Student Bar Association
- 5 Message from the Black Law Students Association
- 6 Alumni Spotlight
- 11 Alumni News
- 30 MSLAW Events
- 40 Student Spotlight
- 42 Upcoming Events
- 43 Books of Our Time Selections

Features

- 12 Destined to be a Judge**
MSLAW student Margaret Byrnes interviews Justice Joseph Trainor
- 14 Case Note: No More Exemption from Premises Liability for Snow and Ice**
MSLAW Professor Constance Rudnick discusses the result of *Papadopoulos v. Target Corp.*
- 18 Massachusetts' New Anti-Bullying Law: Too Much, Too Quick, Too Soon?**
MSLAW student Dean Graziano examines the impact of the new bullying legislation
- 35 MSLAW in Lone Star State of Mind**
Trial advocacy team returns to nationals for fourth time in five years
- 38 School is in Session at History College**
New undergraduate school opens its doors
- 44 MSLAW Professor Prevails in New Hampshire's High Court**
Professor Olson relates his experience in the New Hampshire Supreme Court

The Reformer is published by the Massachusetts School of Law for students, alumni, and the legal community.

Faculty Editors

Professor Paula Kaldis
Professor Mary Kilpatrick
Professor Constance Rudnick
Professor Holly Vietzke

Alumni Contributors

Michelle Hebert, Esq.
Ron Sellon, Esq.

Photography

Kathy Villare

Submissions are welcome and encouraged. Please send an electronic version of your submission to holly@msslw.edu or rudnick@msslw.edu.

© Copyright 2011 Massachusetts School of Law

Printed by Kelley Solutions
Portsmouth, New Hampshire

Diversity Alliance News



Dear Members of the MSLAW Community,

When I attended my first Diversity Alliance meeting as a 1L nearly three years ago, the then existing officers tried to elect me president. Mostly nervous about passing first semester, I declined but looked forward to participating in Alliance events.

That the Alliance was looking for a new president told me that it was looking for a jumpstart. Before this year, the Alliance had mostly sat idle, still waiting for that jumpstart. I made some efforts for the Alliance while muddling through my first two years, making contact with The Gay and Lesbian Advocates and Defenders (GLAD) and securing MSLAW a yearly table at their Spirit of Justice Awards. I attended Diversity Alliance meetings, but there wasn't a lot of action by the Alliance.

This year, with just as little time on my hands but a firmer grasp of how to "do" law school, I accepted the nomination for President of the Alliance, elected alongside Vice President Dean Graziano, Treasurer Barb Campagna (both also 3Ls), and an enthusiastic 1L Steve Dwyer was elected Secretary. Sometimes we're the only ones, along with our faithful advisors Paula Kaldis and Mary Kilpatrick, at our meetings, but we're all excited to work for the Alliance. Call us the jumpstart.

This year we more than doubled our attendance at the Spirit of Justice Awards, and MSLAW's 20 students and faculty hugged, cried, and laughed as we listened to honoree Gene Robinson talk about his journey as the first openly gay priest to be ordained a bishop in a major Christian denomination. Robinson challenged us to face our own tendencies to think of the LGBT struggle as "the" struggle, encouraging us to seek equality for all, not just a different division of the spoils that would benefit LGBT people. We also welcomed back MSLAW's own Brian Tessier as a speaker. Tessier inspired a group of 50 attendees as he spoke about the law of gay adoptions, and challenged us to use our law degrees and the privileges they offer to fight for equality. We organized a workshop attended by nearly 80 Massachusetts educators, that helped them understand how Massachusetts' new Anti-Bullying law can be used to protect LGBT students along with other bullied students, and we collaborated with Kaplan on a fundraiser that had the Alliance sitting front and center in the cafeteria, meeting with students and faculty to discuss the Alliance, and gave to one lucky winner a free Kaplan Bar review course.

This semester we look forward to working with other MSLAW organizations on events—we'll continue to reach out to them to offer our support, and we challenge them to seek ours. We're planning on a guest speaker from Boston's Center for Disability Law in April to address civil rights for persons with disabilities; we'll soon have our own bulletin board in the cafeteria to increase our visibility; and we're also developing a alumni advisor position, so that the Alliance can have a connection to the outside legal world before its members even finish MSLAW. We've also come together on a mission statement that states we will work "toward promoting a positive, safe and welcoming environment to members of the LGBT Community, through outreach and education. We'll work to instill tolerance, promote the value of diversity, and demonstrate the inherent worth of all people."

We hope that the Alliance continues to grow, and that other members of MSLAW's community will find new ways to help it grow. We've given it a jumpstart this year, and we're excited to see the various directions others may take it.

The Alliance can be reached at gibt@mslaw.edu. We meet on the first Wednesday of each month at 5:30 p.m.

Jason Prokowiew, President

SBA News

Dear MSLAW Students, Faculty, Administration, and Alumni:

The fall semester was a great success, with much more to come this spring. The Student Bar Association, with the assistance of MSLAW Administration, faculty, and students has been able to continue to serve the school and local community.

Fall bake sale proceeds benefitted the St. Ann's group home and the school's newspaper, *The Verdict*. We plan to hold another bake sale for spring semester events.

In December, with the generous help of students and faculty, we successfully sponsored a wonderful Christmas Party for the children of the St. Ann's group home. This year, the SBA surprised each child with all of the presents that were on their wish lists. The children of St. Ann's group home unfortunately have not had families for years, and the luxury of Christmas may seem non-existent. It gives us great pleasure to know that with our efforts, these children may anticipate Christmas knowing that they will be welcomed as guests at the Massachusetts School of Law.

In March, the SBA will be participating in the Attorney General's Office second annual Legal Food Frenzy for Massachusetts. The Legal Food Frenzy is a competition in the legal community to raise funds and collect food for pantries, local-hunger relief agencies, and soup kitchens. The goal is to collect 500,000 pounds of food or its equivalent in monetary donations during the two-week campaign. The campaign will be from March 28 to April 8.

The event of the year, Law Day Dinner Dance, will be held on Saturday, May 7th at the Indian Ridge Country Club in Andover. Join us for an unforgettable night of recognition and celebration of our achievements! Tickets are on sale now; for more information on purchasing tickets, please e-mail sba@mslaw.edu. We hope to see you all there!

Finally, on behalf of the Student Bar Association, thank you all for your support, as nothing we do would be possible without the MSLAW community. The Student Bar Association invites incoming and returning students to be involved and join us for this upcoming semester's events. For more information, please e-mail sba@mslaw.edu.

Respectfully submitted,

Chantelle Hashem & Donovan Boyle
Co-Presidents, Student Bar Association



BLSA News



Greetings MSLAW Family,

The Black Law Students' Association (BLSA) believes in "Getting Involved and Getting it Done!"

This unique phrase was chosen as our theme for this year in an effort to show our dedication in energizing our MSLAW community and the local community to volunteer, mentor, and educate. Our theme reminds us of our duty in "Building on Excellence" and celebrating "A Legacy of Empowerment."

BLSA kicked off the school year by teaming up with Open Arms International Foundation of Cambridge, a non-profit organization which provides relief to the most vulnerable and underprivileged Haitians, Americans, and others across the world, in conducting a "Back to School Supplies and Medicine Drive" for Haiti. BLSA also held a fall membership drive, where upper-level students interacted with first-year students during the Orientation Dinner. Other activities included attending the Congressional Black Caucus in Washington D.C., hosting a "Dinner with BLSA," where faculty members, students, and alumni discussed ways to champion law school, and feeding the less fortunate with the Barristers Club. During our Week of Service, we collected winter clothes and wrapped gifts for local families in need at the Lazarus House of Lawrence; we also had an international book drive and sent the books to schools in Africa. MSLAW-BLSA was publicly thanked by the Pumpkin Patch Organization for volunteering in its annual giveaway of costumes to 1,500 children at the Lowell Memorial Auditorium. Fall fundraisers for chapter initiatives included the Annual Black & White Soiree Social, car wash, and a good old fashioned bake sale.

MSLAW-BLSA believes in education and awareness. The C.H.A.I.N. Fund Program, a non-profit program that takes care of the immediate needs of many affected with cancer, was introduced to the MSLAW community for the first time. On December 1, MSLAW students and faculty donned red and white in support of World Aids' Day. BLSA members distributed red ribbons and pamphlets regarding prevention and helping those affected with the virus. Funds were raised for "Keep a Child Alive," a program that provides medication to children affected by the virus in Africa. Finally, the annual Midnight Breakfast was another popular success, as BLSA and the Office of Academic Support offered students reviews, study sessions, and breakfast as they prepared for final exams.

BLSA has started the spring semester with its MLK Day of Service in Jamaica Plain, where volunteers made dental kits, scarves, hats, Valentine's Day cards, and MLK & Malcolm X picture frames for a local homeless shelter. A Valentine's Day Bake Sale raised funds for a bone marrow drive that will happen later in the semester, and students and faculty participated in the re-enactment and discussion of the 1954 case of *Brown v. Board of Education of Topeka*. Future events will include "Legacy of Empowerment Speakers Series of National and Regional Leaders," Soul Food & International Day, BLSA Alumni BBQ, Self-Care Workshops, Juvenile Incarceration Empowerment Day, College Students Division Shadowing Program, and mentoring the youth of the Lawrence Boys & Girls Club.

On behalf of the association, I extend many thanks to the MSLAW community for its gracious support. If interested in participating in BLSA, please contact blsa@mslaw.edu, blsapres@mslaw.edu, Professors Rudnick (rudnick@mslaw.edu) or Puller (puller@mslaw.edu).

Sincerely,

Felicea Robinson, Black Law Students' Association President, 2010-2011

MSLAW Alumni Make Good Councilors

One was the youngest ever to win a seat on his City Council. Another organized an effort to rebuild a playground. And one succeeded in cutting taxes for his city's residents. But what four of these alumni have in common is that they used their law degrees to serve their communities.



Kevin Jourdain, Esq.

When Kevin Jourdain was elected to the Holyoke, Massachusetts city council in 1993 at age 22, he was the youngest in that city's history. As a life-long resident of that city, Kevin says he was motivated to take such a big step at such a young age by the desire to help Holyoke get on the right path to the future by adopting a sensible long-term fiscal plan. Being a lawyer has helped immensely in his role as a city councilor.

"Being a city official, you are constantly interacting with the law," he explained. "Being a lawyer helps me to understand the case law and statutory law which is the framework of government and how laws can or cannot be changed. As an attorney, I understand much better the rules my position is governed by so that I can make intelligent decisions that will not be overturned in the courts."

Although he admits that "running a city is hard work (we have to make many difficult decisions related to the budget, personnel, taxes, and

capital improvements)," Kevin notes that it is very rewarding to see firsthand the effects of that work. "I get to see the new senior center, a new school, the new police station, the improved bond rating, the balanced budget, the economic development that makes our city a stronger and more vibrant place for all of our residents. Holyoke has come a long way in the last 18 years. We have over \$10 million in our stabilization fund, \$3 million in free cash and an A1 bond rating. We have miles of new roads and sidewalks, a new police station, new library, new senior center, two new fire stations, massive school improvements, a new high performance computing center, and millions in new city equipment, all acquired while we maintained a balanced budget."

Although it often seems like it, being a Holyoke city councilor is not Kevin's primary job. Since 2008, he has been the Senior Financial Analyst for the Sisters of Providence Health System ("SPHS"), a large hospital system based in Springfield that operates both Mercy and Providence Hospitals. Taking a finance-based job even after

passing both the Massachusetts and Connecticut bar exams was a natural choice for Kevin, who has an undergraduate degree in political science and economics, and a Masters of Business Administration. "The Sisters of Providence have a tremendous tradition and history here in Western Massachusetts, and to be involved with such a great organization for me is a privilege and a benefit both professionally and personally," remarks the former tax examiner for the MA Department of Revenue.

Kevin decided to go to law school when he was working for the Commonwealth's Division of Insurance. "I was a gubernatorial appointee to the Board of Appeal on Motor Vehicle Liability Policies and Bonds in 2006. Every one of my colleagues was a lawyer. While I always wanted to go to law school, it was this environment that finally sealed it for me and inspired me to get it done." He chose MSLAW because it was affordable, he didn't have to take the LSAT, and he could start in January. He has never regretted the decision. "I loved MSLAW. It was one of the best decisions of my life. I got a wonderful and challenging

continued on next page

continued from previous page

education. I was a very disciplined student and wanted a rigorous and in-depth education. I got all of that and more," he stated. Kevin, who graduated in 2010 *magna cum laude*, credits his professors with preparing him well for the bar exams and his career. "MSLAW made my dream of being a lawyer come true without saddling my young family with an overbearing debt. Being a lawyer, you become part of a very prestigious and rewarding profession. Now holding both

an MBA and a JD, the sky is the limit for me professionally. Every door is open and MSLAW made it all possible," he said. He says he regularly recommends law school and MSLAW in particular to anyone who seems interested in the profession, particularly any one who wants to have a positive impact on society.

In 2010, Kevin opened his own practice in Holyoke, sharing space with members of the law firm Brunault, Proulx and McGuinness, whom he interned with while going to MSLAW. "They continue to be great men-

tors to me," he added. Although his role as a city councilor limits some of the kinds of law he can practice, he considers himself a general practitioner, focusing in bankruptcy, RMV/Board of Appeal matters, personal injury, and real estate.

In his "free" time, Kevin also is a member of the Western Mass. Baseball Umpires Association, umpiring high school baseball games, while spending as much time as possible with Kevin Jr. (age 8), daughters Jacqueline (6) and Allison (4), and his wife Shari. ■

Jim Kelcourse, Esq.

Jim Kelcourse ('07) is a competitor. The former Division I college football player who received a full athletic scholarship to Villanova University, tackles challenges as he did opponents—successfully and eager for the next one.

After graduating college in 1997, Jim continued at Villanova for his MBA, which he obtained in 1999. He accepted a job with Fidelity Investments, where he worked for a year before deciding to attend law school. "I had had an interest in the law since I was a teenager, and I chose MSLAW mainly because of its proximity to Amesbury," explained Jim, who is from Amesbury. "MSLAW is also more affordable than other law schools, and its part-time evening program was convenient for me, since I was committed to working full-

time days."

As if law school weren't rigorous enough, Jim amplified that challenge by simultaneously working full time with his father at the family business, Larry's Marina, Inc. When he graduated law school, Jim faced his next challenge: opening his own law practice as a sole general practitioner. He currently has offices in Amesbury and Newburyport. He also immediately started on his next goal, by joining Amesbury's planning board.

Most lawyers with a full-time practice, including two offices, and a newborn (Jim and his wife had their first child in 2009) might consider that to be enough of a challenge. But not Jim. So what else could he take on? In November 2009, Jim was elected to serve on the Amesbury city council as an at-large member. "I wanted to

give back to the community that has given so much to my family and me," he remarked. "It was an opportunity to share the knowledge, background, and experience that I acquired both from good professors at Villanova University and MSLAW and from working alongside my father in the marina business."

Of the city councilor role, Jim says that the biggest challenge he faces is "being able to provide quality services to all residents at an affordable cost." He added that it is even more difficult to achieve this in the current economy, with the increased cuts in state aid to municipalities. Yet he not only accomplished that, he also



continued on next page

continued from previous page

worked with the mayor and other department heads to pass a budget that reduced the amount of taxes the residents would have to pay, an achievement Jim is most proud of.

As a lawyer, Jim said that juggling all of his priorities has proven to be his most difficult task. "Work and family both require a tremendous amount of time, especially with a young child at home," he admitted. "While my family are the most important people in my life, my clients are very important, too, so striking a balance between the two is always a challenge, but I think I'm doing OK for the most part."

Jim credits his MSLAW experience with helping him both in his practice and in his city council position. "MSLAW's practical approach really helped me the most," he added. "The good instructors did an excellent job of preparing us for the issues that we encounter on a daily basis as lawyers, and their experience and insight provided me with the ability to work through complicated matters with confidence. My experience at MSLAW was truly rewarding."

Jim encourages current students to take advantage of their time at MSLAW. "Really listen to your professors and absorb what they have to say because each one has a tremendous

amount of knowledge to share," he stated. "The experience at MSLAW will prove to be invaluable going forward in life. Use your education wisely, and be a good person."

In addition to their son Michael, Jim and his wife Amanda share their home with their yellow Labrador retriever Luke and their cat Frankie. And while it may seem like he has finally reached his limit of challenges, Jim is already thinking about his next one: "I may campaign for office at the state level in 2012," he admitted. "However, I will likely wait to make that decision until some time next year." I'm guessing he won't stay complacent for too long. ■

Marc Laplante, Esq.



Marc Laplante ('06) takes his job at the Massachusetts Department

of Environmental Protection seriously. He sold his car and bikes to and from work (Lawrence to Wilmington) every day (even in the winter), a 23-mile round trip, in part because it's better for the environment. "I bought the bike with hopes of riding across the country," he added. But while he has not yet done that, he has put thousands of miles on the bike, "my version of Senator Scott Brown's pickup truck."

As enforcement coordinator for the Massachusetts DEP, Marc initiates action against

violators of various state environmental statutes and regulations, such as the Wetlands Protection Act, Safe Drinking Water Act, and the Clean Water Act. He derives much satisfaction when he is able to reach a settlement with a violator without having to "take unilateral action or suggest litigation through the Attorney General's office," he stated. But getting to that point can be difficult. "I'm currently involved in a case that involves retrieving back fees owed to the Commonwealth," Marc said. "In this difficult budgetary climate, ensuring that the Commonwealth has the legal authority to recoup back fees that could equal hundreds of thousands of dollars is very important."

Marc is proud to be a third-generation Lawrencean, and his enjoyment of using politics to improve people's lives caused him to run for (and win) a seat on the Lawrence city council in 2010. "On any given day, the local newspaper highlights the various challenges facing my city," he noted. "While Lawrence is a rich environment for challenges, those challenges also provide many opportunities to accomplish positive outcomes and results."

Marc did not need his law degree to enter the political arena—he actually served on the city council in Lawrence from 1998 to 2002, a position he relinquished when he decided to enroll in law school. But he admits that having the degree

continued on the next page

continued from previous page

makes him a better councilor this time around. "Confidence can sometimes be as important as knowledge," Marc explained. "MSLAW provided me with a legal skill set that took the mystique out of working with or against other attorneys and gave me the confidence to be a more effective advocate for the Commonwealth and my constituents."

While he could do without the "score keeping and personal vendettas" that some political leaders exhibit, Marc greatly enjoys his role on the council, so much so that he can envision

himself being involved for the next 10 years. His web site—www.MarcLaplante.com—is full of examples of his work and council agenda and the issues that he brings on behalf of his constituents.

To current MSLAW students, Marc advises them to take "smart risks. Don't be afraid to consult with others whom you admire and respect for their advice before taking that risk. In order to achieve greater success and to experience more out of life, smart risks must be taken."

Although Marc states that his active involvement with

work, the city council, his wife Sue, their three boys (ages 10, 7, and 3), and the family dog (a Boston Terrier named Steven F. Mali) precludes him from enjoying any hobbies, he can often be seen on the Lawrence roads, where he runs 20 to 25 miles a week. "You would think that with all that biking and running, I would have lost my 'baby fat,' but that hasn't happened yet," Marc joked.

Marc is very interested in hearing from other alumni and current students, especially those from Lawrence. E-mail him at marclaplante@rocketmail.com. ■

Joan B. Lovely, Esq.

There is a humorous maxim that states, "Everything you need to know, you learn in kindergarten." In Joan Lovely's case, everything she needed to know about her desire to enter politics, she learned on a playground. "When my children were quite young (1994-95), I chaired an ad-hoc committee to rebuild our local dilapidated playground," she explained. "We worked with political leaders, city officials, and the neighborhood to rebuild the playground with a modern expansive structure. It turned out great, and the children and parents love it."

That positive experience prompted Joan to then run for her first city council seat two years later, a local ward seat in Salem, Massachusetts that she held for three terms. In 1999, she set her sights higher and ran for the councilor-at-large posi-

tion, a two-year term that she has been elected to four times now. "The most enjoyable part of being a city councilor is building and getting consensus on issues," she remarked. "It is difficult to make everyone happy—impossible, really—but when you can reach consensus, it is always a good thing."

Joan, who graduated from MSLAW in 2009, decided to attend law school after years of working as a real estate agent, because she had an opportunity to further her education. "It is one of the best decisions I have ever made," she states unequivocally. "I chose MSLAW because it is geared toward the working student. MSLAW educates and trains its students to be able to practice law when he or she graduates and passes the bar exam. I like the practical approach of the school's philosophy to produce working

lawyers."

Joan, who adds that she is "happy

and proud to be part of the MSLAW community," also had a little familiarity with the school: her husband Stephen P. Lovely graduated from MSLAW in 1992 (and her daughter Jenna is a 2L now). Joan and Stephen have their own private practice in Salem, where they concentrate in real estate, family law, probate law, civil litigation, and bankruptcy. "I like the flexibility of being in a small firm and working in my local community," she noted. "I also enjoy working with other attorneys towards resolving our clients' respective issues and differences." What is most frustrating? "Getting some attorneys to return telephone calls or



continued on next page

attend to cases in a timely manner," she lamented. "Everyone is busy, including me, but chasing information can be frustrating."

Joan credits MSLAW with giving her the confidence to "hit the ground running once I entered the legal community," she said. "I am confident in my writing skills due to MSLAW's extensive writing courses and dedicated professors who made us get it right. My research skills also greatly assist me in finding the answers when I don't know them."

Joan urges recent graduates to network as much as possible.

"You are trying to make a name for yourself in the field," she explained. "The broader the net you throw, the better, and not necessarily just in the legal community, but also in any social, professional, personal, or religious network you belong to."

Joan is about to seek her eighth (overall) term as a local politician, and she is far from done. Although she lost in her bid to be State Representative in 2004, she is not deterred from future similar aspirations. "It was a great experience and one that I think has prepared me should I decided to run for

mayor," she added. "I also remain interested in the state representative seat, and in the next five to 10 years, I see myself either in higher office or firmly ensconced in a busy law practice."

In addition to Jenna, Joan and Stephen have two other children: Stephen is at Salem State University, and Taylor is at University of New Hampshire. They share their Salem home with their cairn terrier Annie and yellow Labrador retriever Maddie. They enjoy traveling and boating in their "spare" time. ■



Felicia E. Higginbottom, Esq.

MSLAW alumni don't need to be elected municipal officials to contribute to the community, however, and Felicia E. Higginbottom is such an example. How she got to MSLAW is unique. Although she graduated *magna cum laude* from Florida A & M University, she simply could not get into the law schools to which she applied because of her LSAT scores. So she took a temporary job as a camp counselor. One of her campers mentioned that the camper's mother was a student at MSLAW. Although she had never heard of the school, she thought this might be her one chance to fulfill a dream she had had since the age of six—to become a lawyer. So she came

to MSLAW, graduated in 2005, and passed the bar on the first try. In 2006, she joined the firm of Vesper Gibbs Barnes & Associates in Roxbury. The firm, at which she interned as a student, has a diverse practice, including but not limited to family law, probate law, estate planning and real estate, landlord/tenant, and personal injury. Felicia practices in all those areas but finds family law, estate planning, and real estate law most rewarding. "Family law and estate planning allow me to represent clients who are dealing with very emotional, yet important, needs that must be met," she explained. "Most recently, I've become more interested in supplemental process/debt collection because I am representing clients from different ethnic backgrounds and financial

positions, and I work towards settling and/or dismissing their debts. So far, I have settled about 99% of my cases, which is such a blessing, and the clients as well appreciate my assistance."

Felicia may well come by her love for the law honestly. Her grandfather, the late Joseph W. Higginbottom, Sr., told her that they are cousins of the Higginbothams, particularly, the late Judge Leon Higginbotham, former civil rights attorney, the first African-American Justice on the Federal District Court for the Eastern District of Pennsylvania, and former Chief Judge of the Third Circuit Court of Appeals. She says that she is honored to be a relative of such an important jurist.

Felicia is quick to credit MSLAW with giving her the

continued on next page

continued from previous page

skills she needs to be an effective and successful attorney. "MSLAW has helped me succeed professionally in so many ways. MSLAW equipped me to know how to research cases and extract legal principles from those cases, and how to apply the law to my case. It equipped me to become a better public speaker, which is essential in my practice, as I appear in different courts in different districts and counties on motions and even trials on my landlord/tenant cases, debt collection (defending the debtor) cases, and child support cases, just to name a few areas in which I regularly practice."

Felicia enthusiastically recommends both the practice of law and MSLAW to anyone who seems interested in either. "I would recommend becoming a lawyer to others looking for a career because being a lawyer is such a rewarding profession," she stated. "But it is even a more rewarding profession if you have the passion to learn and study the law, which can help you bring about changes in

the law in areas which you believe are flawed or are in need improvement. At times, I find myself acting as a therapist, which is rewarding as well. Sometimes my clients just need someone to talk to, someone to listen to them, someone to give them non-legal, everyday life advice. I find that some even just need or want to express their emotions, despite their legal issues."

She has recommended MSLAW to several individuals whom she has met over the years, and one or two (including her supervisor's godson) applied and were accepted. The senior attorney in her firm, Vesper Gibbs Barnes, "speaks very highly of this school and reminds me often that MSLAW truly equipped and prepared me, as much as it could, based upon what I have helped her accomplish in our firm."

In her "spare" time, Felicia is active in her church, is a liturgical dancer with Redeemed Ministries, and assists in the Higginbottom-Jones College Tour, "a program created and developed by Senior Pastor, Willie S. James, of my church,

Bibleway Christian Center. The name 'Higginbottom-Jones' originated from the two elders at our church, Joseph W. Higginbottom, Sr., who was also my grandfather, and Eugene Jones. The Higginbottom-Jones College Tour has been in effect for over 10 years. The program is designed to take up to 30 students, from grades 8 to 12, on a one week tour to visit historically black college and universities, and introduce them to institutions of higher learning and the university life. We hope their experience will spur them to finish high school and go on to college. If anyone is interested, contact our coordinator, Margaret Higginbottom, who can be reached at 617-445-2259 or Pslams110@yahoo.com."

Felicia is married to Will A. Leaston, an account manager in the Client Operations Department at State Street. "Together, we have an amazing 21½-month-old daughter named Na'Dajjah Skyy Leaston," she added. They also have two cats, one of who currently is residing with her parents, and live in Hyde Park. ■

Alumni News

Amy Beth Baron ('00), and her husband (former Adjunct Professor) Allan have returned from Arizona and opened Baron Law & Mediation in Andover, where they are emphasizing family law, elder and estate planning matters . . . **Bob Charland** ('95) practices elder law in Leominster, as does **Tim Sullivan** ('93) in Dracut . . . **Jim Carnevale** ('98) is Executive Vice President of Sentinel Benefits Group in Reading, where he handles risk management and financial planning matters . . . **Matt Lallier** ('08) is practicing in Amesbury . . . **Mike Lord** ('06) joined Buyers Brokers Only where he represents buyers in the purchase of real estate operating from the company's Dedham office . . . **Phil Kalil** ('07) is with Germaine & Blaszk, P.A, in Derry, NH, where he concentrates on criminal defense cases . . . **Andrew Sabourin** ('10) has opened an office in Winchester, where he has a broad based practice. He recently became engaged to Ashley Cunningham, and will be married in September, 2011 . . . **Jim Muggleton** ('02) is in New York State, waiting to be sworn in! He will be practicing in the Buffalo area . . . **Deb O'Neill** ('07) has joined the DiFruscia Law offices in Methuen where she focuses on elder law . . . **Kara Roy** ('08) opened her own practice in Haverhill, hoping to specialize in bankruptcy, consumer, and domestic relations cases . . . **Richard Clark** ('02) practices civil and criminal litigation in Portsmouth, NH . . . **Donald MacDonald** ('99) practices patent and trademark

law in Saugus . . . **David Colby** ('09), a detective in the Portsmouth, NH Police Department, was named police prosecutor for that department . . . **Cindy Gilman** ('96) practices family law in Manchester, NH . . . In November 2010, **Merlene Aitken** ('00) was named interim Associate Athletics Director for Compliance at North Carolina A & T. She will maintain her position as Associate Athletics Director/Senior Woman Administrator . . . **Brian DuPerre** ('99) is Chief Privacy Officer and Senior Legal Counsel of the UnitedHealthcare Segment in Hartford, CT and has become an expert on HIPAA and related healthcare privacy issues . . . **John Barooshian** ('94) is Of Counsel to the Boston firm of Cooley Manion Jones where his practice focuses on complex civil litigation and tax matters . . . **Kristen Lambert** ('03) is the Vice President of Healthcare Risk Management at Allied World Assurance Company in Boston. She is the co-author of the recently published *Massachusetts Elder Law, 2nd Ed.*, by LexisNexis. Kristen authored the chapter on practicing guardianship and conservatorship under the new Massachusetts Uniform Probate Code.

In Memoriam

Wendell Crawford ('00) passed away in January at age 75. Wendell's daughter is Susan Crawford Donato ('03), and his former daughter-in-law is Chris Winton Henderson ('01). ■



Members of the Diversity Alliance gathered at the Spirit of Justice Awards in the fall

Destined to be a Judge

By Margaret Byrnes

When he turned down the opportunity for a judgeship in his early thirties, people warned him: “lightning will never strike in the same place twice.” They were right. For Associate Justice of the Massachusetts Appeals Court, Judge Joseph Trainor, it struck three times.

Born in Lawrence and raised in Lowell, Justice Trainor’s path to the Appeals Court has been anything but conventional. After graduating from Saint Anselm College, he was offered the opportunity to study philosophy through a fellowship program. However, the military decided that it had a better educational program for him, as he was selected in the draft’s first-time lottery system. Shortly after returning home from service, he began working for the Massachusetts Legislature—which, if you took his Legislative Procedure and Bill Drafting course offered here at MSLAW, you would know is officially named “The Great and General Court,” and why.

After receiving his J.D. from Suffolk Law, which he achieved while maintaining a full-time work schedule for the Massachusetts Legislature, Justice Trainor held a variety of positions, many in the legislative and executive branches of Massachusetts government, until his first appointment to the bench. “They were all a little unconventional, but nevertheless, all the law,” he added.

In 1978, he was appointed Staff Director and Counsel to the Joint Judiciary Committee, a position that required him to simultaneously perform administrative duties, such as directing the staff and maintaining the law library, and legal duties, such as reviewing prospective legislation for constitutional issues in many areas of law, including adoptions, foster care, and DYS legislation. He also reviewed proposed constitutional amendments. Subsequently, from 1978-1980, he served as the Court Administrator of the Juvenile Court Department, where he was responsible for the overall administration of the Massachusetts Juvenile Court system.

From 1980 to 1985 and again in 1991-1992, Justice Trainor was General Counsel and Budget Director to the House of Representatives Committee on Ways and Means, where, among numer-

ous duties, he was primarily responsible for preparing the House version of all state budgets during those time periods. Then, as General Counsel to the Massachusetts Bay Transportation Authority, he oversaw and negotiated all aspects of the development of a Boston landmark: the TD Banknorth Boston Garden.

Justice Trainor also spent several years working as a business consultant, in both the private and public sector, and even established his own consulting firm, Trainor and Company.

On why he turned down his first opportunity to become a judge, Justice Trainor admitted: “I honestly did believe I was too young to be a judge.” His second opportunity at the bench arose while he was serving as Assistant Secretary for Human Resources and Chief Personnel Administrator of the Executive Office of Administration and Finance. This time, he was not only prepared, he was motivated by his personal experiences to accept appointment to the Middlesex Juvenile Court in Lowell. “This was a significant judgeship for me because it held out some hope to disadvantaged kids. I wanted to sit in Lowell because I thought that was where I could do the most good,” he explained. The day after he was appointed, he was named the first judge of the Court.

Justice Trainor was appointed to his current position as Associate Justice of the Appeals Court in 2001. Looking back on his journey to the bench, he said: “What prepares you to be a judge is the sum total of your life experiences. Even though this was not a conventional way, every bit of it had to do with the law. People don’t understand. They think the law is prosecuting cases in the district and superior courts. That’s a small part of the law. The law is contracts, and real estate law, and labor law; and with the MBTA, air rights leases and construction law. As a matter of fact, there was nothing but the law in all my jobs. People forget that legislation is law.”

It is therefore no surprise that Justice Trainor’s



Case Note: No More Exemption from Premises Liability for Snow and Ice

By Constance Rudnick, Esq.

***Papadopoulos v. Target Corp.*, 457 Mass. 368, 930 N.E.2d 142 (2010).**

MSLAW alumnus Paul Moraski recently had the opportunity to participate in a case that changed Massachusetts tort law presumably forever. In *Papadopoulos v. Target Corp.*, 457 Mass. 368, 930 N.E.2d 142 (2010), the Supreme Judicial Court overruled more than 100 years of case law that limited recovery for injuries incurred on snow and ice to those attributable to “unnatural accumulations” of those substances. Paul, who assisted Attorney Emmanuel Papanikolas in the case, says that the change was one whose time had come. “We have come a long way since the SJC decided *Woods v. Naumkeag Cotton Co.*, 134 Mass. 357 (1883).¹ Since 1883, there have been drastic changes in the way that snow removal is handled. Back in 1883, there were no snow plows, snow blowers, chemical ice melt, bulldozers, and countless other examples of how modern man does battle with snow and ice. The Massachusetts rule was antiquated and needed to be changed in order to protect our citizens. In every other area of tort law, the standard of ‘reasonable care’ is used. Having a special standard for snow and ice made no sense.”

No matter how outdated the existing law may have been, the road to making new law was icy in its own sense. Applying prevailing law, a superior court judge entered summary judgment for Target, and the Appeals Court summarily upheld that ruling in a memorandum decision. Lawyers more faint of heart might have conceded defeat and gone on to the next case. But not Paul and Emmanuel. They looked at the precedent and determined that not only was the standard for

snow and ice liability at odds with virtually every other aspect of premises liability tort law, but Massachusetts courts had clearly been grappling (unsuccessfully, they concluded) with ascertaining when “natural” accumulations become “unnatural.” So they applied for, and were granted, further appellate review by the SJC.

At oral argument before that court, Attorney Papanikolas emphasized that the *Woods* standard was out of touch with Massachusetts premises tort law, in which liability turns on the reasonableness of the possessor’s conduct. Relying, *inter alia*, on the longstanding principal of *Mounsey v. Ellard*, 363 Mass. 693, 707-708 (1973), another historically important case in which the SJC abolished the then long-standing rule that imposed liability on landowners depending on the status of injured party vis-à-vis the land, Papadopoulos’ lawyers argued that reasonableness should also be the standard in snow and ice cases. Paul said: “We emphasized to the Court that our snow and ice law was out of step with a landowner’s duties in other respects. For example, Target has a duty to repair defective walkways, fix cracks in their parking lot, clean up spills in their stores, but no concrete duty as to snow removal. We also argued that the current law is simply not good public policy by raising the hypothetical of an elderly tenant, who, too frail to clean up after a snow storm, and too scared to venture out on snow and ice covered stairs, chooses to remain housebound for a week.”

The defendant pressed the Court neither to abandon then existing law, nor to adopt the so-

¹ The SJC actually questioned whether Massachusetts snow and ice law emanated from *Woods*, which, in reality, turned on the

landlord’s failure to construct the stairs (on which the ice accumulated) with a railing. *Id.* at 373.

called “Connecticut Rule,” which requires a landowner to act with “reasonable care” with respect to his or her property, but gives the proprietor time to act following conclusion of the weather event before considering whether the response was “reasonable.”² Arguing that the age of these cases cut against the plaintiff’s argument that the “modern trend” is towards application of a reasonableness test in snow and ice cases, defense counsel suggested that a change in the law would unduly burden property owners, open the floodgates of litigation, and was unnecessary.

The Court adopted the plaintiff’s invitation and reasoning. Noting that the natural/unnatural dichotomy is so unique that it is referred to in other jurisdictions as the “Massachusetts Rule,” the Court traced the evolution of the standard, first reviewing the law as it applied to the obligation of landlords to maintain the premises for their tenants:

Our case law in premises liability claims involving snow and ice for many years proceeded on two separate legal tracks, with tenants entitled to relief only where the landlord was negligent in depositing or otherwise causing hazards or obstructions of artificial snow or ice on a passageway within the common area of the premises, and invitees entitled to relief where the property owner acted unreasonably in failing to keep the walkway on the property in a safe condition.

Id. at 374-375. Even after *King v. G & M Realty Corp.*, 373 Mass. 658, 661 (1977), in which the court jettisoned the “common-law distinction between a property owner’s duty of care with respect to a tenant and an invitee, and imposed on a landlord a general duty to keep the common areas of a leased premises in a reasonably safe condition,” Massachusetts courts retained the “natural/artificial” distinction by holding that natural accumulations of snow and ice are by definition not “defects,” and therefore not actionable. *Id.* at 376-377.

Rejecting this argument as “not based upon

proper considerations,” the SJC in particular criticized its underlying basis. “Implicit in this rationale is that a dangerous condition on one’s property can be a defect only if it is created or caused by the property owner. We do not accept this rationale where a property owner knows or has reason to know that a banana peel has been left on a floor by a careless customer; we have long held that the property owner has a duty to keep the property reasonably safe for lawful visitors regardless of the source of the danger.” *Id.* at 378. The Court then went on to reject the “natural/unnatural” distinction based on contemporary legal theories:

Nor do we find the two justifications for the natural accumulation rule offered by contemporary authorities persuasive. First, it is suggested that the rule reflects a judgment that hazards created by accumulations of snow and ice are in general equally open and obvious to a visitor as to a property owner, and that a property owner owes no duty because a visitor charged with such knowledge can be counted on to look after his or her own safety.... A property owner, however, is not relieved from remedying an open and obvious danger where it “can and should anticipate that the dangerous condition will cause physical harm to the [lawful visitor] notwithstanding its known or obvious danger.” (Internal cites omitted.)

Id. at 378-379. It would not be unreasonable in New England, the Court noted, to conclude that travelers would continue across an open and obvious accumulation of snow and ice, rather than retreat and circumvent (if possible) the hazard. Besides, it said, the “open and obvious” doctrine has nothing to do with the “natural/unnatural” distinction.

Second, the SJC repudiated the notion that, given our notoriously inhospitable New England climate, it would be unreasonable to impose on landowners the duty to clear their premises of snow and ice. The Court followed the Supreme Court of Rhode Island, which said:

We believe that today a landlord, armed with

not adopting the proposition that a landowner may wait until the end of a storm before commencing to clear snow in fulfillment of his or her legal obligation. *Id.* at 384 n. 17.

² See, e.g., *Reardon v. Shimelman*, 128 A. 705 (Conn. 1925); *Kraus v. Newton*, 558 A.2d 240 (Conn. 1989). At the conclusion of the *Papadopoulos* case, the SJC expressly stated that because the facts did not raise the issue, it was

an ample supply of salt, sand, scrapers, shovels and even perhaps a snow blower, can acquit himself quite admirably as he takes to the common passageways to do battle with the fallen snow, the sun-melted snow now turned to ice, or the frozen rain. We fail to see the rationale for a rule which grants a seasonal exemption from liability to a landlord because he has failed to take adequate precautions against the hazards that can arise from the presence of unshoveled snow or unsanded or salt-free ice found in the areas of his responsibility but yet hold him liable on a year round basis for other types of defects attributable to the workings of mother nature in the very same portions of his property.”

Id. at 380, quoting *Fuller v. Housing Auth. of Providence*, 108 R.I. 770, 773, 279 A.2d 438 (1971).³ Next, the SJC noted the difficulties Massachusetts courts have had in applying the “natural/unnatural” accumulation dichotomy.

This distinction has proved difficult to apply, because virgin snow that falls on a heavily trafficked walkway, driveway, or parking area is soon changed by the tramping of feet, the rolling of tires, and even the passage of time. Consequently, [in *Aylward v. McCloskey*, 412 Mass. 77, 587 N.E.2d 228 (1992)] the court suggested that large ruts in the snow created by tire tracks and footprints frozen in ice in a parking lot constituted an unnatural accumulation that could form the basis for liability.

Id. at 381. That the distinction is truly unworkable was highlighted in a series of Appeals Court cases cited by the SJC which seemingly held that even snow shoveled or moved into piles by machine and/or man is not *per se* an unnatural condition, which, if creating an unreasonable danger, can form the basis for suit.⁴ “If this interpretation of our precedents is correct, it would at a minimum contravene the general rule of tort law that, once a person acts to mitigate a potential hazard to

another, he will be liable for harm resulting from a failure to exercise reasonable care, even where no preexisting duty to act was owed.” *Id.* at 383.

Thus, the Court concluded:

We now will apply to hazards arising from snow and ice the same obligation that a property owner owes to lawful visitors as to all other hazards: a duty to ‘act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.’...This introduces no special burden on property owners. If a property owner knows or reasonably should know of a dangerous condition on its property, whether arising from an accumulation of snow or ice, or rust on a railing, or a discarded banana peel, the property owner owes a duty to lawful visitors to make reasonable efforts to protect lawful visitors against the danger.

Id. at 383. The *Papadopoulos* case was remanded to the Superior Court where it will eventually be tried. As Paul said, “The jury can now consider whether Target’s snow removal efforts were reasonable, considering the layout and construction of the parking lot, the piling of the snow in this particular parking lot, whether there could have been a safer place to pile the snow and whether it was reasonable to stack the snow on a narrow median, next to a handicap parking space. In common sense terms, the jury gets to hear the facts and then decide. When the law is wrong or antiquated, it must be changed or modified. We do not just keep laws on the books because they are old; laws must always fit within the framework of our current society.”

The moral of this story is clear: you never know when, as a lawyer, you will have the opportunity to make major changes in law that affects the public on a daily basis. When you see that opportunity, and it is the right thing to do, grab it.

³ This logic has formed the basis for developing snow and ice liability law in other states as well. See *Mucsi v. Graoch Associates Ltd. Partnership No. 12*, 144 Wash. 2d 847 (2001); *Langhorne Road Apartments, Inc. v. Bisson*, 207 Va. 474, (1966); *Rossow v. Jones*, 404 N.E.2d 12, (Ind. App. 1980); *Geise v. Lee*, 84 Wash. 2d 866 (1975).

⁴ Contrast *Barrasso v. Hillview W. Condominium*

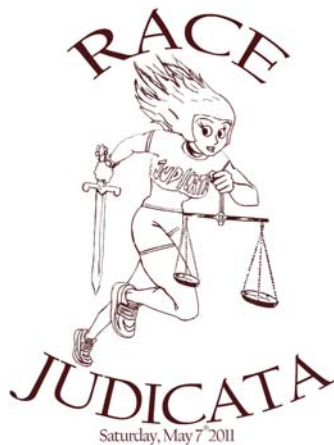
Trust, 74 Mass.App.Ct. 135, 137-138 (2009) and *Reardon v. Parisi*, 63 Mass. App. Ct. 39, 46 (2005) with *Goulart v. Canton Hous. Auth.*, 57 Mass. App. Ct. 440, 443 (2003).

As Attorney Moraski would say, that's a lawyer's job. ■

ly personal injury and criminal law, mostly on the trial level, but he handles some appeals.

In early 2010, Paul opened his own office in Salem (MA), where he practices predominant-

Massachusetts School of Law 2nd Annual Race Judicata



**5K Road Race/Walk at MSLAW
Saturday, May 7, 2011 • 10 a.m.**

Cookout on the back patio immediately following the race. Bring the family!

Gender-based awards in the following categories:

**1st Overall • 1st Faculty/Staff • 1st Alumnus • 1st Student
Under 20 • 20-29 • 30-39 • 40-49 • 50-59 • 60+**

Proceeds to benefit *Old Ernie's Pay it Forward Fund: Enhancing educational opportunities in honor of legendary track coach Ernest J. Perry, Sr.*

**\$20.00 entry fee before May 1 • \$25 if received after May 1
T-shirts guaranteed to all early registrants**

To download an entry form, go to <http://mslaw.edu/racejudicata>. For more information, contact holly@mslaw.edu or tom.odonohue@gmail.com.

Sanctioned by USA Track & Field

Massachusetts' New Anti-Bullying Law: Too Much, Too Quick, Too Soon?

By Dean Graziano¹

*"Let us not be content to wait and see what will happen, but give us the determination to make the right things happen."*²

Horace Mann

I. Introduction

This article will examine and provide an overview of the current Massachusetts law regarding bullying in schools, including the onus the law places on Massachusetts schools to implement intervention and prevention plans in accordance with the statute. Part I is an overview and history of the law, and Part II focuses on the problems with the Massachusetts law, in part, by using hypotheticals to analyze and evaluate potential conflicts between the law and constitutionally-protected rights. Finally, Part III will underscore the main flaws with the Massachusetts bullying law, and suggest ways to improve on the existing law to meet the stated goals and intent of the legislature.

A. Overview of the new law found in Mass. Gen. Laws, chapter 71, §§ 37H, 37O

In March of 2010, the Massachusetts House of Representatives introduced a bill titled "An Act Relative to Bullying in Schools" ("the Bill"). In just two short months, the Bill went through the Massachusetts Legislature ("Legislature"), which voted unanimously in favor of the Bill. On May 3, 2010, Governor Deval Patrick signed it into law, making Massachusetts the 42nd state to enact anti-bullying legislation.³ The major thrust of this law

was to impose several duties and legal obligations on school districts across the Commonwealth, by requiring schools (all public and certain private and charter) or school districts to submit intervention/prevention plans, pursuant to which the schools must demonstrate how they will deal with the intervention, prevention and resolution of bullying within each school.⁴

According to the statute, school plans must:

- Be developed in consultation with a collaborative of teachers, school staff, professional support staff, parent volunteers, community representatives, and law enforcement, which addresses the intervention, prevention and resolving of bullying within the school, and submitted to the Massachusetts Department of Elementary and Secondary Education (DESE) on or before December 31, 2010;
- Contain a clear and concise procedure and policy which sets forth how school staff and students shall report bullying;
- Set forth procedures for school administrators to report bullying to local law enforcement regarding particular situations which may be a violation of criminal laws;

¹ Dean Graziano, is a 2011 J.D. candidate at the Massachusetts School of Law. For more than 20 years, he was an educator, certified in three New England states. In 2007, he received a National Teaching Award [American Star of Teaching] by the United States Department of Education. The views presented in this article are his own.

² Jonathan Messerli, Horace Mann: A Biography (1972).

³ At the time Massachusetts signed the law, Montana, New York, South Dakota, Hawaii, North Dakota, and Wisconsin did not have bullying laws.

⁴ Mass. Gen. Laws, chapter 92 of the Acts of 2010, codified in M.G.L. c. 71, § 37O.

- Include investigatory procedures employed by school administrators to report and discipline bullies (as that term is defined in the statute);
- Provide for ongoing professional development of school personnel in the areas of bullying prevention;
- Provide K-12 grade curriculum in bullying prevention and biannual reporting to DESE.

According to the statute, bullying is:

the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school. For the purposes of this section, bullying shall include cyber-bullying.⁵

Massachusetts went one step further than other states had by also including a definition of cyber-bullying. Massachusetts and New Hampshire are the only New England states to have a cyber-bullying definition within the law as well. Because of recent cases regarding bullying, and the abundant utilization of electronic means as a form of bullying, the definition touches upon not just e-mail and blogs, but Facebook, Twitter, and MySpace to name a few. Cyber-bullying is defined in the statute as:

bullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds,

data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.⁶

B. The Massachusetts Legislature Reacts

While hailed as a “model” in anti-bully legislation,⁷ the Massachusetts legislation was reactive, not proactive. The Legislature’s serious consideration of an anti-bullying statute in the spring of 2010 followed the tragic death of two youngsters whose suicides came after long periods of bullying. On April 6, 2009, after almost an entire school year of being bullied, Carl Walker-Hoover, a Springfield, Massachusetts middle school student took his life. Carl was an 11-year-old boy who loved sports, was a boy scout, and had a strong commitment to his faith, attending church every Sunday.⁸ As he entered sixth grade in a new school, The New Leadership Charter School, Carl began experiencing month upon month of constant verbal assaults, including a myriad of anti-gay names, and even a death threat from a female student.⁹ Enduring constant verbal attacks for so long, Carl hanged himself with an extension cord to finally silence his pain. That same night, his mother, Sidreaner Walker, a P.T.O. member, had

⁵ M.G.L. c. 71, § 37O(a). This definition is consistent with the definition of that term in laws of other New England states.

⁶ M.G.L. c. 71, § 37O.

⁷ See, e.g., Emily Bazelon, *Bullies Beware*, Slate,

Apr. 30, 2010.

⁸ Alison King, *Mother calls for change after son's suicide*, NECN-Comcast Network, Apr. 9, 2009, www.necn.com/Boston/New.../2009/.../1239313440.html.

⁹ *Id.*

planned to take Carl to the meeting to address the year-long harassment. Carl's mother had been in contact with the administration at the New Leadership School, regarding both the on-going bullying of her son and the students who may have been involved, but was unable to receive any answers or information concerning the direction the school would take to address this situation.¹⁰

Fueled by Sidreaner Walker, the press quickly began to air stories urging stricter anti-bullying laws in Massachusetts. On November 17, 2009, ABC-TV news ran the story, "Anti-bullying efforts gain in Massachusetts," which mentioned that Massachusetts was one of only eight states which did not have any anti-bullying laws on the books.¹¹ That meant 42 states had bullying laws in existence by 2009.¹² The *Boston Globe* front page article of Sunday, November 15, titled "Support swells for anti-bullying legislation" helped fuel the fire for the Legislature to respond as soon as possible to this "newsworthy" topic.¹³

January 14, 2010, was anything but a happy New Year in another Massachusetts community. Just 12 miles away from Springfield, in South Hadley, Massachusetts, another Massachusetts school student committed suicide as a result of verbal, physical, and "cyber-bullying."¹⁴ Phoebe Prince was a 15-year-old high school freshman, who came to America with her family to experience the American Dream and the endless opportunities that she would not have in Ireland.¹⁵ She was bright, good looking, and appeared to fit right into her new school, particularly when she began dating a senior at her school. It was as a result of these latter factors that she became the main target

of six South Hadley High School students, mostly teenaged girls, who incessantly bullied Phoebe, both on and off school grounds.¹⁶

After an onslaught of attacks including verbal, physical, and cyber-bullying via Facebook, MySpace, and Twitter, January 14, 2010 was Phoebe Prince's last stand. She returned home from school and hanged herself, still in that day's school clothes: a powerful statement as her final solution to the incessant bullying she had endured. On the day Phoebe took her life, her harassers got the last word; they posted "Accomplished" on her Facebook page.¹⁷

Again, the press and public demanded something be done. The *Irish Central* ran an article titled "Tragic Death of Phoebe Prince Hastens Need for Bullying Legislation."¹⁸ Within the month, *People Magazine* ran a story: "Suicide in South Hadley-Bullied to Death."¹⁹ The press had repeatedly made it clear that Massachusetts needed to join the 42 other states with Anti-Bullying legislation, and the Massachusetts legislature wasted little time enacting such a law. On March 11, 2010, a new draft, addressing both bullying and cyber-bullying in schools, was printed and circulated to members for their consideration.²⁰ In fewer than three months, the Legislature voted unanimously to approve another version of the bill, and on May 3, 2010, Governor Deval Patrick signed it into law, in the presence of Sidreaner Walker and her family.²¹ Governor Patrick remarked that "bullying is not a normal piece of childhood, emotional and physical abuse is more than, as they say, kids just being kids."²²

¹⁰ Carl Walker-Hoover's Mom Speaks out on Bullying (The Ellen DeGeneres Show, NBC television broadcast Apr. 25, 2009).

¹¹ James Vaznis, *Support swells for anti-bullying legislation*, *Boston Globe*, Nov. 15, 2009, at A1.

¹² Ann Marie Dorning, *Anti-Bullying Efforts Gain in Mass. Families of School Bullying Victims Say Internet Makes Harassment Easier* (ABC News television broadcast Nov. 17, 2009).

¹³ Order New England states passed bullying laws: New Hampshire 2000; Connecticut 2002; Rhode Island 2003; Vermont 2004; Maine 2005.

¹⁴ See text accompanying note 6 *supra* for the definition of cyber-bullying.

¹⁵ Erik Eckholm & Katie Zezima, *6 Teenagers Are Charged After Classmate's Suicide*, N.Y.

Times, Mar. 29, 2010.

¹⁶ *Id.*

¹⁷ April Drew, *Bully writes 'accomplished' on Phoebe Prince's Facebook page on day of death*, *Irish Voice Reporter*, Apr. 2, 2010.

¹⁸ Jane Walsh, *Tragic Death of Phoebe Prince Hastens Need for Bullying Legislation*, *Irish Central*, Jan. 26, 2010.

¹⁹ Liz McNeil, *Suicide in South Hadley--Bullied to Death*, *People Magazine*, Feb. 22, 2010.

²⁰ Peter Schworm, *State bill targeting bullying approved*, *Boston Globe*, Apr. 30, 2010.

²¹ Noah Bierman, *Grieving family by his side, governor signs legislation*, *Boston Globe*, May 4, 2010.

²² *Id.*

C. A Substantial Burden on the Schools

When Governor Deval Patrick signed the Massachusetts Anti-Bullying Bill, that school year was coming to a quick end. Although the Commonwealth had just endured two tragic deaths stemming from acts of bullying, it seemed as if the future was looking brighter for school children across Massachusetts. The timeline established for schools to comply with the law's affirmative mandates showed the Legislature meant business. The statute required all schools and districts to submit an intervention and prevention plan to addressing bullying within their schools by December 31, 2010. According to the statute:

(d) Each school district, charter school, non-public school, approved private day or residential school and collaborative school shall develop, adhere to and update a plan to address bullying prevention and intervention in consultation with teachers, school staff, professional support personnel, school volunteers, administrators, community representatives, local law enforcement agencies, students, parents and guardians. The consultation shall include, but not be limited to, notice and a public comment period; provided, however, that a non-public school shall only be required to give notice to and provide a comment period for families that have a child attending the school. The plan shall be updated at least biennially.²³

In addition, the statute required schools to provide professional development for all staff members on strategies that were "developmentally appropriate . . . for immediate, effective interventions to stop bullying incidents . . . [and] internet safety issues as they relate to cyber-bullying."²⁴

Massachusetts DESE forwarded a model prevention plan to all schools around August 31, giving schools not even four months to put together teams of planners, who in turn had to create a plan

to meet this deadline.²⁵ The DESE plan, titled "Model Bullying Prevention and Intervention Plan," offered at best, minimal frameworks that a school district should follow. While the state provided a model plan, the local school districts were left to customize their own plans. The model plan made clear what had only been suspected by reading the statute: the Legislature left most of the implementation details to the schools or school districts to deal with the logistics on their own. Clearly, a result of such broad-based delegation would be massive inconsistencies in the contents of the various plans from school to school, district to district.

With respect to professional training, the law provided that DESE "shall identify and offer information on alternative methods for fulfilling the professional development requirements of this section, at least one of which shall be available at no cost to school districts, charter schools, approved private day or residential schools and collaborative schools."²⁶ However noble this requirement may be, it did not take into account two critical factors: first, it did not take into account the actual cost (even if schools opted for the no-cost alternative) of adding this subject to development curricula, and second, professional development calendars are usually in place before the end of the school year, and DESE's model was not circulated until August, leaving precious little time to instruct teachers and staff on their responsibilities under the new law. In addition, schools must provide annual, written notice of relevant student-related portions of the plan to students and parents via school handbooks and the school website.²⁷ If any substantive changes were to occur within a school year, the school would have the burden of disseminating that information to the school community, and it would be liable for all costs related to these requirements as well.²⁸

Notwithstanding the brevity of time within which schools had to comply, it appears all, or almost all, did. At first, critics wondered if all

²³ M.G.L. c. 71, § 37O(d).

²⁴ *Id.* See Massachusetts Department of Elementary and Secondary Education, *Model Bullying Prevention and Intervention Plan*, Aug. 24, 2010.

²⁵ Mitchell D. Chester, *Bullying Prevention and*

Intervention Resources -- Model Bullying Prevention and Intervention Plan under M.G.L. c. 71, § 37O, Aug. 24, 2010.

²⁶ M.G.L. c. 71, § 37O(d).

²⁷ M.G.L. c. 71, § 37O(e).

²⁸ *Id.*

schools and school districts would meet the deadline.²⁹ Those involved in the process assured the press and the public that the deadline would be met. Three hundred and ninety of the 393 districts and schools submitted their plans on time.³⁰

D. Already on the Books: The Relationship of the Anti-Bully Statute to Pre-existing Massachusetts Law

At the time the anti-bullying statute was enacted, Massachusetts already had in place laws to prevent and penalize bullying and statutes that served as a basis for both criminal and civil remedies to deal with bullying and cyber-bullying. These include amendments to the crimes of stalking (c. 265, § 43), and, in particular, the criminal harassment statute (c. 265, § 43A), that included acts or threats conducted by electronic communication, including instant messaging. In addition, Massachusetts also updated the crime of making annoying telephone calls (c. 269, § 14A), to include contacting another person by electronic communication.³¹

Finally, Massachusetts, like most other states, has anti-hate crime legislation, which criminalizes acts intentionally engaged in so as to deprive persons of constitutionally-protected rights, including those afforded under the equal protection clauses of the state and federal constitutions.³²

The new anti-bullying law does theoretically create a new “crime;”³³ however, it largely does so by fine-tuning already existing criminal laws that arguably would have covered bullying. However, it certainly widens the potential pool of those legally responsible for curtailing bullying in the

schools. Not only does the law take aim at bullies, but it also places responsibilities on certain school personnel to report such incidences.³⁴ It is important to remember that neither school administrators nor school boards are exempt from lawsuits. In *Davis v. Monroe County*, the Supreme Court held that an action may lie against school authorities “for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.”³⁵ In essence, if a school fails to respond to bullying *after* it is made aware of the incident, it may be held liable. Therefore, administrators may be quick to “pull the trigger” to avoid possible litigation. But to do this, they need guidance from their state legislators and the Department of Education so that they draft a policy and procedure that will be held up in court. Education, technology, and privacy lawyers disagree about what should (or must) be in a policy. Because of these differences, it’s no wonder so many administrators and educators are just throwing their hands up in frustration. If legal minds cannot come to a consensus, how will they?

II. Hypothetically Speaking: Does the Massachusetts Anti-Bullying Law Create More Problems Than it Solves?

A. The Statute Provides Insufficient Guidance and Specificity

As mentioned earlier, many of the details of carrying out the legislation are left to the individual schools and school districts. However, some of the

²⁹ See, e.g., Jenna Russell, *Schools slow on bullying strategy*, Boston Globe, Dec. 26, 2010; Derrick Jackson, *On anti-bullying law, no excuse for slow pokes*, Boston Globe, Dec. 28, 2010

³⁰ *Nearly all Massachusetts schools meet anti-bullying deadline*, The Herald News, Jan. 3, 2011. Whether those plans actually complied with the law is another question entirely. See Sarah Schweitzer, *Some schools’ antibullying plans incomplete*, Boston Globe, Feb. 2, 2011, at B1. Some quoted in the article blame these failures on the short time period for compliance.

³¹ M.G.L. c. 258E (as added by St. 2010, c. 23): Harassment Prevention Orders, effective May 10, 2010, amended by St. 2010, c.112, § 29- 31; M.G.L. c. 265, § 37: Violations of Constitutional

Rights; M.G.L. c. 265, § 43: Stalking; M.G.L. c. 265, § 43A: Criminal Harassment; Punishment: Annoying Telephone Calls, M.G.L. c. 269, § 14A.

³² M.G.L. c. 265, §§ 37 and 39.

³³ The anti-bullying legislation amended the following statutes: M.G.L. c. 265, § 43, amending the anti-stalking law; c. 265, § 43A, amending the criminal harassment law; c. 268, § 13B, amending the prohibition on intimidation of witnesses or jurors; c. 269, §14A, amending the anti-annoying phone calls law.

³⁴ It does not appear that the law itself imposes penalties on those who fail to comply.

³⁵ 526 U.S. 629, 632 (1999).

language of the statute itself is so broad as to create dilemmas if not outright problems with effective implementation of this well-meaning effort.

First, consider the statutory definition of bullying:

‘Bullying’ [is the] repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture, or any combination thereof, directed at a target that: (i) causes physical or emotional harm to the target or damage to the target’s property; (ii) places the target in reasonable fear of harm to himself/herself or of damage to his/her property; (iii) creates a hostile environment at school for the target; (iv) infringes on the rights of the target at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school. Bullying includes cyber-bullying.³⁶

Since the statute focuses, *inter alia*, on the effect of the speech or expression on the target, it allows exceptionally sensitive (or vindictive) students to file complaints with the administration for acts or expression that really do not rise to an appropriate level. A child who is repeatedly told by another child or group of children that he or she cannot join in a playgroup during recess can suffer severe emotional harm by the rejection, but this conduct would probably not be considered bullying under any proponent’s definition of that term.

Second, the reporting requirements place significant burdens on school personnel. The statute mandates that the teacher, administrator, or staff person who first learns of the offense must report the incident to the individual named in the plan as the person to whom all reports shall be made.³⁷ While this may be understandable, the fact that the individual at the top of the ladder **must** report

incidents of bullying to law enforcement “if the [individual] believes that criminal charges may be pursued” is problematic. How is a principal or other school official supposed to know if “criminal charges may be pursued?” Pursued by whom? By the victim? That criminal sanctions may be pursued by someone does not mean that a crime has been committed or that the already stretched resources of local law enforcement ought to be burdened to follow up on reports of incidents that do not or should not rise to the level of criminal activity. Last, does the mandated reporting deprive a school principal of the discretion to treat incidents internally, depending on what the principal perceives is the severity of the event?³⁸

Further, the current Massachusetts anti-bullying law may actually hinder the educational experience. Assume the following:

Scenario 1

David, a very bright junior at XYZ High School in Western Massachusetts, enters his third period class, Current Events. The class is comprised of students with varying ranges of academic abilities, many of whom are vocal and somewhat opinionated during class discussions. In the class is a female foreign exchange student from Morocco who is a Muslim. After watching a clip on the news regarding the building of a mosque at Ground Zero, discussion erupts.³⁹ David begins the discussion by explaining that he lost a first cousin on 9/11, and that the mosque in question is reprehensible to the conscience of America. Others quickly chime in about the events of September 11, 2001, and the discussion becomes almost out of control. David, glaring at the foreign exchange student, screams, “Why do you hate us

³⁶ M.G.L. c. 71, § 37O(a) (emphasis added).

³⁷ Reporting requirements apply to “any member of the school staff, but not limited to teachers, administrators, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to extra-curricular activities, or paraprofessionals.” M.G.L. c. 71, § 37O(g). However, failure of any of these “front line” individuals to report does not result in any consequences, at least pursuant to the statute.

³⁸ It is important to remember that while the statute imposes a duty to report, it prescribes no consequences for the failure to do so.

³⁹ See Jeff Jacoby, *A mosque at ground zero*, Boston Globe, June 6, 2010: “IS GROUND ZERO the right place for a major new mosque and Islamic cultural center? Cordoba House is a 15-story, \$100 million development to be built just 600 feet from where the World Trade Center stood; the plans include the mosque, a 500-seat auditorium, swimming pool, restaurant, and bookstore. The prospect of an Islamic center so close to Ground Zero is, not surprisingly, controversial. Many relatives of Sept. 11 victims are strongly opposed. One group, 9/11 Families for a Safe & Strong America, calls Cordoba House ‘a gross insult to the memory of those who were killed on that terrible day.’”

so much? Maybe if we did that to your country, you would see our point!"

One may argue that David's statements met at least some of the criteria for bullying as defined in the statute. If the "attacks" are repeated, and the female student presses the issue, the teacher must report she or he believes bullying took place. If the discussion carries out into the hall or lunchroom after class, other teachers might also hear about it. Would they have an obligation to report David for bullying? If the exchange student says she is going to the police, does the principal have to report the incident to law enforcement? What has really just occurred here? It's a Current Events class where classroom participation is weighed into the grading. Will David and others be stifled in expressing their guaranteed First Amendment rights, based on this law? In other classes, where student input and peer assessments take place, must one tread lightly for fear of being labeled a bully? In essence, this bullying law may have a chilling effect on an open forum within classrooms, by restraining free speech and student participation.

It is important to note that the Massachusetts anti-bullying statute covers student-to-student action, not acts or statements by a school staff member.⁴⁰ In the above scenario, imagine a student who may have a different viewpoint from a teacher being silenced. Or consider the possibility that a coach or advisor repeatedly may utilize degrading, demeaning or hurtful language, in essence being a bully as that term is defined in the statute, in order to "motivate" his athletes. In these latter situations, it is not the what, but the who that matters.

B. The Effect of Free Speech and Due Process on the Massachusetts Anti-Bullying Law

Considering the following:

Scenario 2

Mary, Betty, and Dan are friends and seniors at Jurisprudence High School, in Central Massachusetts. Dan has begun dating Diane, whom

Mary and Betty dislike. After school, Mary and Betty meet up with some other friends, including Cathy, who also dislikes Diane, off school grounds at a local restaurant as this was the last day of school heading into the holiday vacation. While there, Mary takes out her new iPhone with video capability and starts recording Cathy who goes on a tear about Diane. All during the 19-minute tirade, both Mary and Betty are heard in the background "egging on" Cathy to insult Diane. Specifically, Cathy calls Diane a "slut," who "goes after" every boy in the school, likes to "rat" on fellow students, and is a lousy athlete. In addition, profanity is used throughout a majority of the video. Almost within the hour, the video has been streamed through YouTube, and a majority of students at Jurisprudence High School have heard or seen the video. Also, school administration and some faculty heard and reviewed the content at different times over the vacation. There were no threats of violence in the video. Nonetheless, Mary, Betty, and Cathy are reported and considered cyber-bullies, because the likely consequence of the video would be harmful to Diane and the school environment. When vacation ends and school resumes, the school takes swift and severe disciplinary action against them. Based on the facts, the three women have likely violated the definition of cyber-bullying in Massachusetts.⁴¹ Did their actions materially and substantially disrupt the education process or orderly operation of the school?⁴² How will the Courts determine what standard to use in this scenario?

Finally, consider the following set of circumstances:

Scenario 3

Russell, an eighth grade boy is above average in size for his grade. He is six feet, five inches and 175 pounds. He is very intimidating in physical education classes, and is a natural as the nose tackle on the Pop Warner football team. He is always being teased about his enormous size, where his classmates liken him to a "giant," "skyscraper," or "Russ the bus." The name-calling continues on a

⁴⁰ M.G.L. c. 71, § 37O.

⁴¹ M.G.L. c. 71, § 37O: "Bullying shall be prohibited...on or off school grounds...if the bullying ...sub-

stantially disrupts the education process or the orderly operation of a school."

⁴² *Id.*

regular basis, often on and off throughout a day. Sometimes Russell does not seem offended, but, at times, he has become enraged by the taunting from his classmates. One day, four children called Russell a host of derogatory names, focusing on his height and weight. Russell told them to “knock it off or I will!” The students kept up the name-calling, and Russell shoved one student into the other very hard, enough to knock them both over, causing scrapes and bruises. A teacher who heard about the events from witnesses, acting in accordance with school policy promulgated to comply with the statute, interviewed witnesses and students involved in the altercation, reaching the conclusion that Russell assaulted the two students. The conclusion was influenced substantially by the discrepancy in sizes between Russell and the two boys. Is the principal required to report the event to law enforcement? Does that mean that the Department of Children and Families (DCF) would be justified in intervening? While this situation may seem harmless enough to some, are these acts bullying under the new Massachusetts law?

The first question would be whether any of the above scenarios constitute bullying under the statute. Then, one must ask what are the rights of the students accused of bullying? Under the present law, there is no school-based appeal process for accused students. Their due process rights are not addressed in the law⁴³ or in the model plan.⁴⁴ There should be a distinction between bullying and teasing, which is commonplace both in and outside of school. But can school-age children discern the distinction, and does that make a difference? The law does not take into account the age and maturity of the bully or the targets, nor does it address the difference between younger and older students’ abilities to discern and deal with a difference. Unfortunately, a subjective standard most likely will be used to differentiate between the two, thus creating inconsistencies in reporting

what is bullying. The statute’s ambiguous and potentially overbroad language makes these questions all the more salient. Bullying is defined under this law as any repeated use of a written, verbal or electronic expression or a physical act or gesture, which causes physical or emotional harm to the victim.⁴⁵ So, as the law is written now, a student who clearly calls a fellow student a “dummy” at the school bus stop, or on the bus itself, may be deemed to have engaged in bullying behavior and would potentially be subjected to school discipline and criminal liability.⁴⁶ Parents and school administrators may become part of the bigger problem—overreacting and over-reporting bullying based on a child’s feelings versus real physical or emotional harm which may or may not have occurred. As one may imagine, inconsistency and subjectivity will open the door to administrative follow-up on every report in an effort to avoid school liability.

Finally, section 37O(d) provides, “The bullying prevention and intervention plan shall afford all students the same protection regardless of their status under the law.” Although the law protects students who may be United States citizens or illegal aliens, it does not mention the many other classes who, as studies and experience have shown, are primary targets of bullying and its serious effects.

III. Brief Description of the Law on First Amendment in the Schools

Ever since the 1969 Supreme Court decision *Tinker v. Des Moines School Dist.*,⁴⁷ courts have held that students may exercise a degree of free speech within a school setting. But the Supreme Court has spent the better part of the last 40 years refining and, in effect, retracting the rights to free expression that students have in and out of school.⁴⁸

Most commentators and educators conclude that the Court now places student speech into three categories. The first is that established in

⁴³ The Massachusetts anti-bullying statute does not include any appeal process or manner in which students accused of bullying may appeal their case. See M.G.L. c. 71, § 37O.

⁴⁴ See Massachusetts Department of Elementary and Secondary Education, *Model Bullying Prevention and Intervention Plan*, Aug. 24, 2010.

⁴⁵ M.G.L. c. 71, § 37O(a).

⁴⁶ M.G.L. c. 71, § 37O(j).

⁴⁷ 393 U.S. 503 (1969).

⁴⁸ This article contains only a brief description of First Amendment considerations vis-à-vis student speech. For a more complete analysis, including references to the constitutional issues arising from anti-bullying statutes, see, e.g., Diane Heckman, *Just Kidding: K-12 Students, Threats and First Amendment Freedom of Speech Protection*, 259 Ed. Law Rep. 381 (2010); Kathy Luttrell Garcia, *Poison Pens, Intimidating Icons, and Worrisome Websites: Off-*

Tinker, and is denominated the “material disruption” rule. “A student may express his opinions, even on controversial subjects, so long as doing so does not (1) materially and substantially interfere with the requirements of appropriate discipline in the operation of the school; (2) collide with the rights of others; (3) the facts reasonably lead school authorities to anticipate substantial disruption of, or material interference with, school activities as a result of the student’s speech.”⁴⁹ The new Massachusetts law incorporates part of *Tinker*’s language by defining bullying as expression or acts that create a substantial disruption to the school’s operation.

The second category of student speech was articulated in *Bethel School District v. Fraser*.⁵⁰ In *Fraser*, a student gave a sexually explicit speech to an audience of several hundred fellow students. The Supreme Court held that sexually explicit, lewd or vulgar speech lent no value to the educational experience and therefore was not protected by the First Amendment. The third category was recognized in *Hazelwood School District v. Kuhlmeier*,⁵¹ which addressed a student’s right to express him or herself when the vehicle used for the expression belongs to or is sanctioned by the school. In upholding the school principal’s right to censor from the school newspaper two student-authored articles on teen pregnancy and divorce, the Supreme Court emphasized that when the speech communicated appears to be “school sponsored,” then the institution has the right to ensure that it is not wrongly perceived as the speaker. Therefore, any speech that does not further legiti-

mate pedagogical concerns is not protected by the First Amendment.

Finally, some commentators and educators have concluded that the recent case of *Morse v. Frederick* has created a fourth category, that of speech that “advocates illegal drug use.”⁵² In *Morse*, Frederick, a high school student, attended a rally when the Olympic torch passed through town, carrying a large sign that said “Bong Hits 4 Jesus.” Frederick displayed the banner on public property. Students had been allowed but not required to attend the event, at which some school personnel were present. The Court found that the event was “school sponsored,” and the principal had the right to conclude that Frederick’s message could reasonably be construed as advocating illegal drug use, something that is contrary to the mission of our educational institutions. Therefore, Morse had the right to discipline Frederick.⁵³

Whether student speech is viewed as falling into three or four categories, one thing is abundantly clear: a student’s free-speech rights should be viewed “in light of the special characteristics of the school environment.”⁵⁴ With the advent of e-mail, texting, social networking, and other electronic forms of communication, the likelihood is that some of the contested expression will occur or be communicated outside of school property, after school hours.⁵⁵ Is it desirable, legitimate, or constitutional for schools to be able to police expression or conduct under those circumstances?

It is certainly possible that First Amendment challenges to the Massachusetts law could be brought, maybe successfully. Probably because

Campus Student Speech that Challenges Both Campus Safety and First Amendment Jurisprudence, 23 St. Thomas L. Rev. 50 (2010); Adam Speraw, *No Bullying Allowed: A Call for a National Anti-Bullying Statute to Promote a Safer Learning Environment in American Public Schools*, 44 Val. U. L. Rev. 1151 (2010); Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 Vand. L. Rev. 845 (2010).

⁴⁹ See *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969). Justice Abe Fortas stated in the majority opinion, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506. Students’ First Amendment rights are protected if there is no disruption in the school. In *Tinker*, two students, brother and sister, wore black armbands to school in protest of the Vietnam War. Various School officials asked them to remove the

armbands—they refused. The incident occurred just prior to a new school policy, in an attempt to avoid protests. The students were suspended under the new rule for not removing their armbands. The Supreme Court reversed the lower courts because the students’ expression constituted political speech thus, the students’ conduct was “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on [their] part.” *Id.* at 508.

⁵⁰ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 677-78 (1986).

⁵¹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

⁵² *Morse v. Frederick*, 551 U.S. 393 (2007).

⁵³ *Id.*

⁵⁴ *Tinker*, 393 U.S. at 506.

⁵⁵ M.G.L. c. 71, § 37O(b).

most of the state laws are fairly new, few reported decisions addressing the issue exist. As set forth, *infra*, some refinement of the Massachusetts law should be undertaken, preferably by the DESE in conjunction with educators rather than the court system, particularly when violation is a criminal offense, carrying incarceration of up to 2 ½ years in jail as punishment.⁵⁶

IV. What's Needed to Make the Massachusetts Anti-Bullying Law More Effective

A. Consistency, Clarification, and Reasonable Compliance

Although the time for submitting school plans has passed, the DESE and local schools and school districts should continue to work on refining and modifying how schools implement the statute.⁵⁷ Until there is a consistent model within the state,

providing clear-cut objectives and budget allotments to schools, the prevention of bullying will not be deterred, and the legislature's goal of reducing the likelihood of another bullying-induced student tragedy will suffer. The key—plain and simple—is consistency. At an educator's workshop to discuss the Massachusetts bullying law, held at the Massachusetts School of Law in November, teachers reiterated that message.⁵⁸ There is already a significant burden placed on schools within the state to perform in a variety of arenas: MCAS, SATs, and various standardized test scores relate to No Child Left Behind accountability.⁵⁹ If schools must make public test results, then why should they not be required to put their anti-bullying efforts in the public domain?

The issue of whether Congress should enter into this area is also on the table. A bill currently in the Senate, S. 3739—Safe Schools Improvement Act of 2010,⁶⁰ would amend the Safe and Drug

⁵⁶ M.G.L. c. 43A, § 265.: a) Whoever willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of criminal harassment and shall be punished by imprisonment in a house of correction for not more than 2½ years or by a fine of not more than \$1,000, or by both such fine and imprisonment. The conduct or acts described in this paragraph shall include, but not be limited to, conduct or acts conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, any device that transfers signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communication.

⁵⁷ Given Sarah Schweitzer's article, *supra* note 30, it appears schools have more work to do just to comply. For example, Schweitzer notes that many plans did not set forth the internal discipline that will be imposed in bullying cases.

⁵⁸ Mass. School of Law Diversity Alliance, The New Massachusetts Anti-Bullying Law: What you need to know to meet the deadline!, Nov. 19, 2010, available at http://www.youtube.com/watch?v=jG4CcIY_xAc.

⁵⁹ See Mass. Dept. of Education, MCAS Overview, www.doe.mass.edu/mcas/overview.html. The U.S. Dept. of Education has provided the following summary of the No Child Left Behind law:

The NCLB Act will strengthen Title I accountability by requiring States to implement statewide accountability systems covering all public schools and students. These systems must be based on challenging State standards in reading and mathematics, annual testing for all students in grades 3-8, and annual statewide progress objectives ensuring that all groups of students reach proficiency within 12 years. Assessment results and State progress objectives must be broken out by poverty, race, ethnicity, disability, and limited English proficiency to ensure that no group is left behind. School districts and schools that fail to make adequate yearly progress (AYP) toward statewide proficiency goals will, over time, be subject to improvement, corrective action, and restructuring measures aimed at getting them back on course to meet State standards. Schools that meet or exceed AYP objectives or close achievement gaps will be eligible for State Academic Achievement Awards. Executive Summary, www2.ed.gov/nclb/overview/intro/execsumm.html.

⁶⁰ Latest Major Action: 8/5/2010 Referred to Senate committee. Status: Read twice and referred to the Committee on Health, Education, Labor, and Pensions. "SUMMARY AS OF: 8/5/2010--Introduced. Safe Schools Improvement Act of 2010 - Amends the Safe and Drug-Free Schools and Communities Act to require: (1) states to use grants for safe and drug-free schools to collect and report information on the incidence of bullying and harassment; and (2) local educational agencies (LEAs) and schools to use sub grants to prevent and respond to incidents of bullying and harassment. Requires such LEAs or schools to: (1) notify parents and students

Free Schools and Communities Act by adding bullying and harassment prevention programs, in an attempt to have nationwide reporting of bullying and harassment in schools, and mandate a reporting system for parents or guardians to report such incidences. With a newly elected Congress, we will have to wait and see if this bill will survive.⁶¹

There are several key areas of the Massachusetts anti-bullying law which need to be clarified for this law to have its intended effect with little or few legal challenges. As stated above, the definition of bullying is problematic. It appears to prohibit incidences of conduct or expression that the reasonable person would not consider bullying. "There is still debate about what constitutes bullying, because right now any conflict that takes place is getting labeled as bullying," as Tom Scott, head of the Massachusetts Association of School Superintendents, has said.⁶² In order to avoid possible liability, will a school official be more likely to decide that bullying did occur than did not, or will the possibility of criminal charges be an impetus to overreact? In short, the law is potentially overbroad. "The statute is so vague that when they give the statute to their lawyers to advise them of what to do, the lawyer – if they are looking out for the school's liability – is going to always say, 'Call the police!'"⁶³

The fact that the statute reaches acts or expressions which occur outside the school campus may also pose some trouble. And the terms "reasonable fear" and "repeated," both found in the definition of bullying, are extremely vague and subject to an individual's interpretation.

Additionally, the law fails to identify potential targets of bullying and omits any language which specifies particular target groups, such as those based on sexual orientation and/or gender identi-

ty. Thus, the law fails to address the rights of the most at-risk school children. In 2009, GLSEN, the Gay, Lesbian and Straight Education Network, conducted a study which found that out of 7,261 middle and high school students, "9 out of 10 LGBT students (86.2%) experienced harassment at school in the past year, two-thirds (66.6%) felt unsafe at school because of their sexual orientation and about a third (33.3%) skipped a day of school in the past month because of feeling unsafe."⁶⁴ Remember that 11-year-old Carl Joseph Walker-Hoover hanged himself last April after enduring anti-gay bullying both in and outside of school. If the law is not amended to specifically include targeted groups, then educators should be instructed on the vulnerability of certain classes of children who are most likely to be targets of the offensive conduct or expression.

Additionally, the question of accountability still remains. Who will be held responsible if bullying goes unreported, or if a school fails to adequately meet its obligations under the law? Will civil suits against the town or its personnel be legally available? Or will residents' only recourse be to call upon the governing body (school committees or mayors or city councils) to remove those who fail to comply, if that is possible, and ultimately to vote the body out of office?

Finally, a major flaw in the Massachusetts anti-bullying law requires "that the procedures shall provide for immediate notification pursuant to regulations promulgated under this subsection by the principal or person who holds a comparable role to the local law enforcement agency when criminal charges may be pursued against the perpetrator..."⁶⁵ The Massachusetts legislature and the Courts of the Commonwealth have understood the importance of due process protection of

annually of conduct prohibited in their school discipline policies, that now must include bullying and harassment; and (2) establish grievance procedures for students and parents to register complaints regarding such conduct." See H.R. 2262, The Safe Schools Improvement Act of 2009, www.washingtonwatch.com/bills/show/111_HR_2262.html.

⁶¹ The 2010 mid-term elections changed the control of the House of Representatives to a Republican Party majority. At least one author has advocated that Congress should use its spending authority to enact national anti-bullying legislation. See Adam Speraw, *No Bullying Allowed: A Call for a National Anti-Bullying*

Statute to Promote a Safer Learning Environment in American Public Schools, 44 Val. U. L. Rev. 1151, 1188 et seq. (2010).

⁶² Monica Brady-Myerov, *Will Schools Over Report Bullying Because of the New Law?*, WBUR.org, Nov. 19, 2010, available at <http://www.wbur.org/2010/11/19/criminalizing-bullying>.

⁶³ *Id.*

⁶⁴ Gay, Lesbian and Straight Education Network, *2009 National School Climate Survey*, available at www.glsen.org/cgi-bin/iowa/all/news/record/2624.html.

⁶⁵ M.G.L. c. 71, § 370(g).

its citizenry for more than 224 years. The anti-bullying law poses a due process violation for at least two reasons:

- (1) The subjective standard and lack of consistency from the law itself whereby school administration have too much discretion without procedural protections for the offender[bully];
- (2) the failure of the law to protect a juvenile's liberty interests by affording the juvenile a hearing prior to reporting the matter to law enforcement.

The Massachusetts anti-bullying law may impinge on the fundamental rights of students who are reported to the principal school administrator for alleged bullying. The law is silent as to an appeal process or even a plan of action for those merely accused of bullying. Once reported, the victim will have little if any options to attend school, whether it is the one which reported him or her, or one into which he or she attempts to transfer. In the case of the students from South Hadley, Massachusetts, who bullied Phoebe Prince, lawyers representing the accused bullies have told the press that they "are either suspended or seeking an alternative education."⁶⁶ Let us assume for the moment that a student accused of a criminal offense as a result of alleged bullying is found not guilty, what would be his or her options? The investigation and report, as well as internal discipline, if any, would presumably stay in his or her school file which will be viewed by post-secondary institutions such as colleges, businesses, and the military. Thus, the student could become limited in options as to secondary schooling and beyond. It would be unrealistic to believe that if a child's name made the news, details and descriptions regarding any such reporting the child would receive fair treatment.

My own 20-plus years experience as a teacher in three New England states leads me to believe that an issue such as this cannot be adequately handled under the gun. Schools and educators should have been afforded adequate time to address this complicated issue and to deal with it appropriately. The same thought and care that schools put into increasing test scores ought to be committed to this equally important issue.

Conclusion

While state legislatures, such as that in Massachusetts, should be applauded for taking aggressive steps towards eradicating bullying, and preventing traumatic consequences to victims, anti-bullying laws in general, and the Massachusetts law specifically raise many issues. Consistency in plans for enforcement and enforce-



Professor Paula Colby-Clements, Dean Graziano, and Professor Paula Kaldis at the Anti-Bullying Conference

ment among schools and school districts, refining or defining overbroad terms and definitions within the statutes, and ensuring that a students First Amendment and Due Process rights are respected while the evil is eradicated are just some of the hurdles facing Massachusetts educators as they maneuver through this new landscape. ■

Dean Graziano is a former educator of 23 years certified in three states. He was a department chair and curriculum specialist for social studies in Somers, Connecticut, from 2004 to 2008. He also served on the Massachusetts MCAS performance setting panel, and in 2007, he was awarded the American Star of Teaching by the U.S. Department of Education. He is a candidate to receive his J.D. from the Massachusetts School of Law this year.

⁶⁶ Cathy Hayes, *Bullies in Phoebe case face uncertain future in School*, Irish Central, Aug. 11, 2010.

MSLAW Events

“Creating Intentional Families”

By Paula Kaldis, Esq.

On October 25, 2010, the MSLAW Diversity Alliance hosted Brian J. Tessier, who spoke to the group about LGBT (Lesbian, Gay, Bi-and Transgender) Adoption. Tessier, a graduate of MSLAW, addressed the group about the fundamentals of working with diverse client populations and those required in sensitively dealing with LGBT populations. Tessier discussed the general adoption process and the issues faced by a lawyer when dealing with an LGBT client in that process.

Brian cautioned the audience to be sensitive to what prospective LGBT parents may be feeling as they move through the process of creating what he calls “Intentional Families.” Tessier also spoke about the continuing distinctions that LGBT individuals and families, as opposed to heterosexual parents, face as they venture into the relatively new world of adoption and surrogacy. For example, in situations where a surrogate mother is used to carry the fertilized egg to term, the questions of (1) whether the state recognizes co-parent adoption for a same-sex couple, and (2) how that rule dovetails with the general presumption, in effect in most states, that a child born during a lawful marriage is the child of that marriage. Brian also spoke about the option of international adoption, and how the laws of different countries affect the rights of an LGBT person in the U.S. to adopt.

Tessier went on to outline the process of domestic adoption using a foster care scenario as

the basis, as November was National Adoption Month, and, as of that date, there were more than 115,000 children waiting to become part of a family in the United States. “While much of the adoption process in this scenario may not require legal representation, there are issues of family law involved contingent on the circumstances and the law of the state,” Tessier said. Overall, the message Tessier presented to the audience was that there is not a reason in this day and age that someone who

desires to be a parent should not be allowed to become one so long as the proposed relationship is beneficial to both the parent and the child.

Brian Tessier received his bachelor's degree in psychology from St. Michael's College and his law degree from the Massachusetts School of Law in 2000. Brian has had a most diverse career, both before and since law school. Most recently, Brian served as the Senior Contract Manager at Fidelity Investments, where he was responsible for multi-national negotiations and developing the contract architecture, compliance reporting, and training

across the enterprise. In addition to his private practice, Brian's experience also includes serving as the Expatriate Coordinator with BankBoston where he managed worldwide immigration and international HR assignments. As a litigator in private practice, Brian concentrated in domestic and family law and was active on behalf of children and victims of domestic violence.



Brian, with his sons Benjamin (8) and Bryce (4)

continued on next page

Brian continues to consult with foundations and corporations on a variety of management and legal-related matters. He currently devotes a significant amount of time as the President and CEO of We Hear the Children, a private foundation established by Tessier, to advocate and provide support to children's causes related to adoption, diversity, and education. Brian founded We Hear the Children in 2010 after a long career in the private sector. Active in the community, Brian has served on the Board of Directors with the Women's Crisis Center in Newburyport, Massachusetts, as Legal Advisor for the Gay Men's Domestic Violence Project, and as a member of the Fidelity Investments and BankBoston GLBT Advisory Panels. Brian now sits on the National Advisory Council for the Human Rights Campaign, All Children-All Families Foundation.

A long-time advocate of single parent and gay adoptions, Brian is a single adoptive parent of two boys. He actively works with pre-adoptive parents, schools, and foundations for the benefit of children. He twice opened court proceedings for National Adoption Day. In 2009, the Commonwealth of Massachusetts recognized Brian as Adoptive Parent of the Year. He continues to write about his experiences as a single adoptive father. Brian is the author

two books: *The Greatest Wish* and *The Intentional Father*. Brian can be reached through his organization's website, www.wehearthechildren.org, where Brian tells more about his story, interests, and charitable works. ■



Diversity Alliance President Jason Prokowiew, Brian, Matthew Eliadi, and Assistant Dean Paula Kaldis

Welcome Back BBQ



Jacob Descheneaux, Kellie Tiller, I-Eesha Simmons, and Takeem Ragland



SBA co-president Chantelle Hashem works the grill



MSLAW students "dig in."



James Hester, Andrea Faris, and Shane Goulet

Golf Tournament

More than 50 golfers came out to support the Shadow Fund at the 4th Annual MSLAW Golf Tournament. Veteran golfers Dan Rea and Mike Macklin from WBZ joined us again to continue their support for the tournament on a picture perfect fall day.

The top scoring foursome of Nick Nardone, TJ Valentine, Herb Aikens, and Andy Wade each took home a 42" flat screen television. The second prize winners didn't fare so badly either, as each received a 22" flat screen TV. The third place finishers earned \$100 gift certificates to the pro shop.

This tournament featured a new competition: a nail-biting putting contest, which generated much interest. And as always, all participants, volunteers, and guests enjoyed a delicious meal while organizers Denise Eddy and Michelle Hebert coaxed participants to take part in the silent auction bidding.

All of the golf committee members would like to thank those who participated or contributed to the tournament's success this year. ■



Assistant Dean Sullivan and Nightside's Dan Rea



Putting contestants look on in suspense



Professors Olson (left) and Kitaeff (right)



Proud winners of 42" flat screen TVs

PLATINUM SPONSORS: The Andover Animal Hospital, The Massachusetts School of Law

GOLD SPONSOR: Law Offices of Gerard J. Levins, P.C.

SILVER SPONSORS: BarBri Bar Review, Century Bank

HOLE SPONSORS: Office Suites at Jefferson Park, John Morris Esq., Kevin Foley, Esq., The Massachusetts Association, PMBR, The Party Connection, Flagship Press, The Levitt Law Group, Business & Financial Law Group, Bulldog Communication, Jennifer, Wilbur & Delilah Bowman, Law Offices of Copani, Tarlow & Cranney, MCLE, Staybridge Suites

CONTRIBUTIONS: Affairs for All Occasions, Antonetta Cotone, ATT Retail- Framingham, Brian's Bailout Balls, Cabot Creamery, Enterprise Bank, Jane Krieger, Brian & Laura Lussier, Massachusetts School of Law, Micromash, Pine Hill Golf Course, Kate Richardson, Lynne Snierson, Starbucks-Southbough, Diane Sullivan, Esq., TD Bank- Methuen, Texas Roadhouse-Methuen, TFC (ret) John MacDonald, Trooper Kevin Coughlin, The Irish Cottage, WBZ News Radio 1030, Wells Fargo, Professor Judith Wolfe

continued from page 13

favorite aspect of teaching at MSLAW is interacting with somewhat unconventional law students, as many have come to embark on second careers and often carry with them a variety of unique life experiences. In fact, before his legal career took off, Justice Trainor intended to become a professor. Now, having achieved that goal, he looks

forward to each class and hopes to be teaching for a long time to come.

When he's not reading trial transcripts and appellants' briefs, Justice Trainor is something of an outdoorsman. He has been breeding dogs for more than 30 years, including hounds, English cocker spaniels, and, for the past 15 years, clumber spaniels, a breed favored by many British mon-

archs. An avid hunter and fisherman, Justice Trainor also keeps carriage horses and rides carriage on his properties, one of which is the historic Amos Allen Homestead, built in 1766 in Greenfield, Massachusetts.

Though his path may be unconventional, his advice is simple: "Whatever your goal is, it's just a matter of doing a good job." ■

MSLAW Teams Up for Crisis Center



Back row from L-R: Tom Hebert, Patti Hebert (with Liam), Director of Alumni Relations Michelle Hebert, Financial Aid Administrator Kathy Perry, Professor Holly Vietzke, Rob Lynch. Middle row: Victoria Hasleton, Taylor Hebert. Front row: Kira Chick, Henry Hebert.

On October 17, an MSLAW contingent of three faculty and staff and their families participated in a 5K road race and walk in Newburyport. Spearheaded by Director of Alumni Relations Michelle Hebert, who is a volunteer for the Rapid Response Team for the Jeanne Geiger Crisis Center, which serves victims of domestic violence, the group raised \$920 for the center. Professor Holly Vietzke and her husband Rob Lynch ran the race, while Hebert and Kathy Perry walked the course, accompanied by friends and family.

MSLAW in Lone Star State of Mind

Trial advocacy teams will travel to Texas for nationals



Third-place finishers (l-r) James Ezeigwe, Candice Robinson, Morjietta Derisier, and Jamal Johnson

For the fourth time in five years, the MSLAW trial advocacy team has qualified for the national competition of NBLSA's Thurgood Marshall Trial Advocacy Competition. MSLAW's four teams advanced to the quarterfinals of the Northeast region of the event held in Connecticut two months ago, beating teams from schools such as Harvard University, Seton Hall University, and New York University. Of the 33 law schools in New England, New York, and Northern New Jersey, six of the eight teams in the quarterfinals were from MSLAW and Harvard.

As luck would have it, the quarterfinals matched two MSLAW teams against each other, and the other two MSLAW teams against Harvard's teams. MSLAW and Harvard again met in the semifinals, where Harvard prevailed in both, creating an all-Harvard final. MSLAW finished

third in the competition overall, earning a trip to Houston, Texas, where two of its teams will compete with the other 12 winners from the remaining four regions in the Nationals Finals. Congratulations once again on another great success! ■



Lawyers Speak on Right to Stay Silent

More than 75 lawyers, law students, and law enforcement professionals congregated at MSLAW on Saturday, November 13th for a series of presentations and discussions on *Miranda* and false confessions. The morning long program was sponsored by MSLAW and its Student Chapter of the American Constitution Society.

MSLAW/ACS Faculty Advisor Professor Peter Malaguti and Judge Peter Agnes, Associate Justice of the Superior Court and long-time MSLAW Adjunct Professor, welcomed the participants. The program was largely an outgrowth of an article authored by Judge Agnes on recent Supreme Court cases which have arguably detracted from the effect and purpose of *Miranda*: to advise suspects in the inherently coercive atmosphere of police interrogations of their rights not to be questioned. The first panel, which

who has distinguished himself as an outstanding criminal defense attorney. John used his well-seasoned cross-examination skills to inquire of the police panelists on such topics as who performs interrogations in their departments, how their interrogators are trained, in what kind of environments interrogations are conducted, and what techniques they consider permissible or off limits. John and Paul, who are on opposite sides of many cases, also showed their quick wits and partisan approaches as they exchanged hypothetical situations as to what circumstances were or were not coercive.

The second panel, moderated by Professor Connie Rudnick, was comprised of Williams College Professor Alan Hirsch, who is an expert on false confessions, and State Trooper Jon Provost (MSLAW '09), who, as a member of the Detective

Unit of that organization, was involved in numerous interrogations over the years. Professor Hirsch explained the phenomenon of false confessions, that is, how someone who has not committed the crime would confess to having done so, and targeted the interrogation techniques most likely to give rise to such confessions. Jon stressed that the so-called "professional techniques" taught in most law enforcement training academies should be but one resource in the interrogator's arsenal, and that different circumstances call for different and fluid approaches to eliciting a confession from a suspect.

Judge Agnes moderated the final panel, which addressed the effect on *Miranda* and confessions

at trial. Panelists were Defense Attorneys Ron Ranta of Danvers and Denise Regan, Senior CPCS Trial Counsel. Assistant District Attorney Jerry Shea of the Essex District Attorney's Office represented the prosecution. The panelists actually agreed on many issues. In particular, they felt that while the *Miranda* doctrine is being narrowed at the federal level, Massachusetts has retained most



Adversaries in the courtroom, the panel (comprised of MSLAW alumni John Morris, Sgt. Ron Sellon, Chief Lisa Holmes, and Chief Paul Tucker) is instructive in the classroom

addressed issues related to interrogations and *Miranda* in practice, was comprised of Salem (MA) Police Chief Paul Tucker (MSLAW '00), W. Newbury Police Chief Lisa Holmes (MSLAW '00), and Sergeant Ron Sellon (MSLAW '09) of the Mansfield, Massachusetts police department. The moderator was MSLAW Alumnus ('02) and Adjunct Professor John Morris, of Salem (MA),

of its essential elements as a matter of state constitutional or common law, and the *Thompson* case from the Supreme Court's last term is not likely to be followed by the SJC. Everyone agreed that the defense has a more difficult time in trying a motion to suppress, primarily because cross examining police witnesses is challenging at



painstaking review of all the police reports is necessary for both sides. Defense counsel would like to see the *DiGiambatista* holding extended to require recording of all custodial interrogations where feasible and that the opt-out provision for defendants should be eliminated. Not surprisingly, Jerry Shea thought the SJC decision should be left as it is. On the question of knowing use of false statements, all panelists agreed said that there is no good reason to allow this and that the SJC has correctly said it should

best. And, because the defense almost never puts the accused on the stand, and rarely offers affirmative evidence at the suppression stage, District Attorneys are not tasked with having to prepare to cross those witnesses. Also, all agreed that

not be used as an interrogation tactic.

Feedback from the audience was positive, and ACS hopes this will be an annual event. ■

School is in Session at History College

By Lynne Snierson

An extraordinary adventure in higher education was begun when the American College of History and Legal Studies, which was created by the Massachusetts School of Law, welcomed its first class of students during the fall semester.

The ACHLS offers students education at the junior and senior year levels and focuses on the teaching of United States history so that its graduates will know what has occurred in this country's past. Students may finish their bachelor's degrees affordably while receiving a rigorous education that prepares them to vie with anybody in today's competitive marketplace.

Moreover, the college provides early admission into MSLAW for qualified students after their junior year and allows them to combine their senior year of college with their first year of law school. That gives students the opportunity to earn their B.A. and their J.D. while saving both time and tuition.

MSLAW Dean Lawrence Velvel, who devel-



oped the idea for the ACHLS more than five years ago, wanted to emulate the successful model he and the trustees established at MSLAW. "We want people who are not affluent and who haven't had the privilege of gilt-edged, Ivy League educations," Velvel said. "We understand how to create an inexpensive school for people who haven't had all the breaks in life. Why not extend it to undergraduate education?"

The high quality but low cost education which

students receive at the ACHLS equally prepares those who choose to enter fields other than law. Students who decide not to go on to MSLAW have the opportunity to focus their studies in one or more of four concentrations during their senior year: the history of civil rights, the history of urban growth and immigration, the history of American foreign relations, and the lessons of American history.

The distinguished faculty, which includes Founding Professor and Dean Michael Chesson, Professor Andrea DeFusco-Sullivan, and Professor Ruth-Ellen Post, do not lecture. Instead, they use a combination of the Harkness Discussion method employed at Phillips Exeter Academy and the Socratic Method used in the MSLAW classroom so that all the students make a vital contribution, continually participate, and remain engaged. The student-to-faculty ratio is among the lowest in the country, and thus the small classes allow for close interaction with the professors, who are always accessible.

The education provided by the ACHLS stresses critical thinking and analysis so that students become better writers and more fluent public speakers. Furthermore, the ACHLS is very affordable at a time when the cost of higher education is increasing dramatically. Tuition is only \$10,000 per year, and partial scholarships are available.

"I currently teach at another university (Boston College) where the tuition exceeds \$50,000 per year. Even among the best colleges in the Northeast, the small class size and personalized attention that ACHLS students enjoy is unparalleled," said DeFusco-Sullivan. "I am gratified that Dean Velvel and Dean Chesson are committed to preserving the specialized attention each student receives, even as we grow as a college."

The ACHLS, located in Salem, New Hampshire close to Interstate 93, is currently



accepting applications for the fall 2011 semester from students who will have completed at least two years of college with a minimum of 60 credits. This remarkable opportunity is tailor made for community college transfers and for those who attended a four-year institution but never completed their bachelor's degrees.

For more information about this revolutionary

concept in higher education or to schedule a campus visit, go to www.achls.org, e-mail info@achls.org, or contact Associate Dean Maureen Mooney at 603-458-5145. ■

Lynne Snierson is the former public relations director for ACHLS.

My Family Challenge

By Paula Kaldis, Esq.

On August 21, 2009, my four-year-old god-daughter/grand niece Alexis was diagnosed with leukemia. Several of us—including my niece and her husband, my daughter, my sister (Alexis' grandmother) and brother-in-law, my mother, and me—lived at Boston Children's Hospital for four months, while "Lexi" went from bad to worse, undergoing tests, chemotherapy, radiation, and looking for a bone marrow donor. Her dad would go back and forth to work during this time. Her older sister, Anna, age 6, lived with my sister, her grandmother. And my niece Christy, who is Alexis' mother then pregnant with baby Zoe, stayed through it all. She just couldn't go home until Alexis was ready to go. On November 20, Lexi underwent a bone marrow transplant and was finally discharged on December 16. Zoe was born on December 28!

Christy and all of us were so thankful for Lexi's progress and wanted to somehow give back but just didn't really know how. Then, after her bone marrow transplant, Lexi had her first appointment at the

Jimmy Fund Clinic in the Dana Faber Cancer Institute. There were pictures everywhere about the Pan Mass Challenge. So Christy, my daughter Victoria, my cousin Jennifer, and I formed a team, "Lexi's Fight," and joined the PMC in helping to raise money for cancer research so hopefully one day, this disease will be a thing of the past.

So in August 2010, we rode our bicycles 168 miles from Wellesley to Provincetown! Together we raised \$16,000.

We are planning to do the ride again in 2011. When people hear how many miles we ride, they

ask me how can we make it. And our answer is always the same: Alexis is the most amazing person, and the strength she has taught us is what gets us to the finish line.

Victoria, Christy, Jennifer, and I thank you for your support! Those of you wanting to

help us on our next ride, contact me at pota@msslaw.edu. ■



Christy, Victoria, Paula, and Jennifer

Student Spotlight

An Interview with Eversley “Teddy” Linley

By Paula Kaldis, Esq.



Did you always want to go to law school?

The desire had been in the back of my mind for as long as I can remember. During the summer of 2008, as I was completing my Ph.D. in Political Science/Public Administration at the University of Idaho, I realized that [that was as good a time as any to attend.] One driving force behind pursuing a legal education was the significant benefit that an education in law would provide both to myself and to other family members' interests. I also contemplated taking a year off from everything until I found the resolve. In the end I chose to attend law school as soon as possible.

Why Idaho? How did someone from the Islands find himself at school in Idaho?

I went to the University of Idaho on a track scholarship. I had had the good fortune to run successfully in international competition, including competing in the Olympics. Idaho was neither madness nor desperation. The school's track program appealed to me. I had several contacts there, I welcomed a great adventure, and the phrase "go west young man" had great appeal. I began with a bachelor's degree in Architecture, and then liking the winters so much, I stayed on for a Master's in Regional and Urban Planning and finished with a Ph.D. in Political Science/Public Administration.

How did you choose MSLAW?

I began my search for a law school on the Internet, skeptically typing two words into Google's search box: "NO LSAT." MSLAW was the first web site that popped up. Doubtful at first, recognizing that Google hits can be scams, I investigated further and quickly learned the quality of the mission. I applied and the rest is history.

So...you left Idaho and headed to Massachusetts.

Big change?

The transition from a university campus with more than 12,000 students and numerous facilities to a single law building took some adjustment. At first I was not sure if this transition was possible for me, and I had second thoughts. Over time, however, MSLAW turned out to be the right size and fit for me.

What was your first reaction to MSLAW and law school?

Initially, I was overwhelmed. During my first three weeks, I had doubts many times over, because there was so much that was new and different. This new education in the law seemed an entirely different approach compared to the graduate work that I was used to. But over time, as the weeks went on I came to realize that law school tied my undergraduate and graduate work together, providing both illumination and personal validation, both at the same time.

You graduate this spring. What do you remember most about the past three years?

Certain memories stand out in my mind: Professor Malaguti's 3½ hour property final, the rhythmic "Any, any, any ..." of Dean Coyne's hearsay rule, Professor Cagle's story of a torts claim based on a horrific surgical error on a baby boy, and the notorious waiting in line overnight and into the wee hours of the morning to register for certain classes before they close out. I won't ever forget the mock trial experience that proved to me that MSLAW students could go up against "the best of the best" in the courtroom and come out winners. I admire, and will always remember, the intensity of Professor Sullivan in UCC, Devlin's raucous persona in Contracts and Wills and Trusts, the experience of Furi-Perry's Bar Essay Writing and

continued on next page

continued from previous page

Analysis, the craftiness of Professor Martin, Paula Kaldis' rigorous Appellate Brief, and Professor Sharaf's Practice of the Business of Law.

What fears do you have about your future as a lawyer?

In Professor Sharaf's class, a dismal statistic stood out: lawyers and dentists have the highest level of depression among professionals. This is something I ponder and vow never to succumb to. Spending thousands of dollars and going into debt pursuing a legal education and ending up depressed is neither a rational nor logical result. I've learned that choice plays an important and significant role in maintaining one's sanity and in reaching a positive result. How well one balances his or her profession and personal lives is vital to one's success.

How would you respond to the typical question of "What drives you?"

Positive input and motivation from my parents and the very notion of someone saying, "you can't do it," drives me to achieve whatever challenge lies before me. That's what drives me today through law school.

How has law school changed you?

I reflect on my prelaw school days and how I would be annoyed when friends associated with the courts would always seem to turn every conversation to the law and legal issues. Now, after two and a half years engrossed in this field, I "get it." Studying the law is entirely addictive. It's all encompassing and consuming, and the more you learn and uncover, the more you realize how much more there is to explore. In critical ways, a legal education changes your way of thinking, your perspective, your vocabulary, your ordinary dialogue, and even your perception of life. MSLAW represents a remarkable diversity: of cultures and creeds, of classes, of ages, and of ethnicities—all under the same roof and all directed to the pursuit of becoming practitioners of the law.

Do you have any other law school experiences you would like to share?

Over the last two years and half years, I have had

the opportunity to work as a part-time Instructional Resource Center Assistant in the Law Library at the law school, under the guidance of Arvi Schott and Judith Wolfe. This is an experience that has been both educational and enlightening. Working behind the library reserve desk has provided me with many thought-provoking experiences and observations; the ambience includes the nervousness, intensity, and anxiety that builds as it gets closer and closer to mid-terms or finals; there is the glaze and confusion on the faces of first semester 1Ls, and the intensity of 3Ls in their final semester. And of course, there is the need for direction to the bathroom by potential applicants 10 minutes into taking the written entrance exam! Finally, I will always be grateful to professors Ed Becker and Kathrin Bowles-Dudich for their help, support, and meaningful discussions that have assisted me throughout this experience.

Do you have any regrets?

Surely, in not taking the plunge sooner, but I also realize that timing is everything. Now, everything I do, whether it is driving in my car, purchasing something or the occasional interaction with someone, a legal train of reference comes into play. As it should, law school changes you for the better. Certainly it's not for everyone, but we must make that determination ourselves.

How is law school different from graduate school?

[I liken] my life in law school to a fish swimming upstream against a heavy, flowing tide. In order to make progress forward, it's imperative to swim hard and fast to avoid being washed away by the heavy current. It's no picnic, but it is empowering and rewarding in a way that only a serious law student can explain. The structure of the law focuses my viewpoint.

What is your future after law school?

Eventually, I hope to venture into the area of international law, possibly in the areas of contractual, immigration, or diplomacy. My immediate goal, of course, is to graduate and pass the bar. As rewarding as this educational experience has been, I'm looking forward now to the rest of the ride. ■

Upcoming Events

Conferences

Fifth Annual Animal Rights Day

April 23, 2011, 8:30 a.m.

This popular event will feature agility and police dog demonstrations, an update on animal cruelty cases and practicing animal law, a service dog presentation, a horse rescue presentation, and activities for children, including an Easter Egg hunt, arts and crafts, and a visit from Curious Creatures. The free event includes lunch and is open to the public. Register at animallaw@mslaw.edu or call (978) 681-0800.

Legal Education Seminars

Introducing & Excluding Evidence at Trial

March 21, 9:30 a.m. to 4:30 p.m.

Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

Latest Techniques for Middle Class Estates

April 1, 8:30 a.m. to 12:30 p.m.

Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

Mental Health Litigation Certification

April 11 - April 15, 9:00 a.m. to 5:00 p.m.

Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

Elder Law BASICS Plus

May 4, 9:00 a.m. to 12:00 p.m.

Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

Family Law Judicial Forum

May 4, 4:00 p.m. to 7:00 p.m.

Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

Other

Second Annual Race Judicata Road Race

Saturday, May 7, 2011

See ad on page 17 for more details.

Fifth Annual MSLAW Golf Tournament

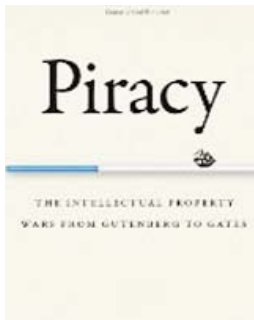
Monday, October 10, 2011

Books of Our Time

MSLAW continues to produce television shows highlighting recently released books on a variety of topics of interest to the general public. Since our last issue, Dean Velvel and Professor Vietzke have hosted a number of shows focusing on sports and sports figures.

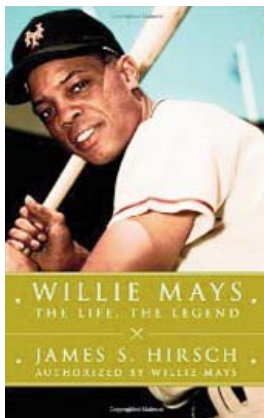
Piracy: The Intellectual Property Wars From Gutenberg to Gates

Adrian Johns



In *Piracy: The Intellectual Property Wars From Gutenberg to Gates*, author Adrian Johns explains how the current battles over intellectual piracy—and the host of issues that the Internet and technological advances present—have historical precedent, rooted in copyright conflicts from as far back as the 17th century and the invention of the printing press.

Johns points out that to effectively navigate the intellectual property waters today—which can be seen in genetics, algorithms, biotechnology, software, entertainment, and even fashion—it is crucial to first understand the history and evolution of piracy laws.



Willie Mays: The Life, The Legend

James S. Hirsch

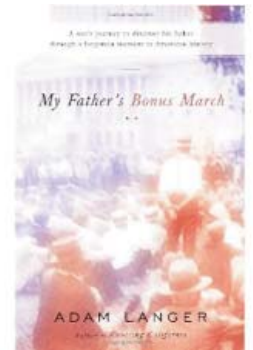
Author James S. Hirsch gets a rare look at one of the greatest baseball players of all time in *Willie Mays: The Life, The Legend*. Through interviews with numerous relatives, friends, teammates, coaches, and Mays himself, Hirsch sheds some light on the media-shy superstar and describes in great detail a career that spanned three decades,

despite Mays' serving in the army, dealing with segregation, and spending multiple summers

playing in the Barnstorming League, when most Major League Baseball players were recovering from the rigorous demands of the baseball season.

My Father's Bonus March

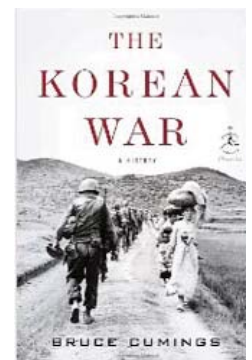
Adam Langer



Shortly after his father passed away, Adam Langer decided to delve into the origins of his father's fascination with the Bonus March on Washington during the Great Depression. It struck Langer as odd that his father, who was never a soldier himself, would take such great interest in an event that is largely omitted from most history books. *My Father's Bonus March* is a personal reminiscence of the author's father while at the same time discussing the importance of a forgotten historical event.

The Korean War

Bruce Cumings



In *The Korean War*, author, University of Chicago professor, and historian Bruce Cumings exposes the unknown truth behind the war that killed three million Koreans, including the relevant history leading up to and reasons for the war and how American ignorance of these factors led to the combat that can appropriately be compared to Viet Nam. Cumings explains how the actions of the U.S. and South Korea have caused the conduct of the North Korean government over the last two decades up to and including recent events. He dates the origins of the conflict to the 1870s, with rivalries in Japan, Russia, Great Britain, Germany, and the U.S. and escalating in 1905 when Japan wanted to take over Korea, with Great Britain and the United States' approval.

For copies of any of the book shows, call MSLAW at (978) 681-0800. ■

MSLAW Professor Prevails in New Hampshire's High Court

By Kurt Olson, Esq.

Having considered the facts and record submitted on appeal, we conclude that oral argument is unnecessary in this case. (Citations omitted). We affirm.

With these two terse sentences on November 8, 2010, the New Hampshire Supreme Court determined that the trial court had not erred in deciding that Mackenzie L's parents' rights ought to be terminated. The Court thus found that the maternal grandparent's Petition for Termination of Parental Rights was properly granted by the court below, and the grandparents ought to have custody of the young girl. Professor Kurt Olson represented the Petitioners/Appellees, the maternal grandparents, before both the trial and the New Hampshire Supreme Court. One of the important lessons to derive from this case (aside from the obvious result) is that essentially, procedural decisions of a trial court will likely be upheld on appeal, particularly when the result is just—at least in New Hampshire.

The biological father, Respondent/Appellant, had argued three issues before the Supreme Court: (1) the trial court had erred in allowing the grandparents to amend their petition to allege different grounds for termination under the statute, (2) the trial court had erred by depriving the father of constitutional and statutory rights in granting the grandparent's motion to amend without proper notice to the father, and (3) the trial court had clearly erred in applying the abandonment standard under the statute. First, the grandparents had countered that both the New Hampshire legislature and courts interpreting the statute have granted litigants broad discretion to freely amend petitions. Second, the grandparents had argued that the trial court had not deprived the father of any rights because notice of the grandparent's amended petition had been sent to the father more than a month prior to the trial court's grant. Third, the grandparents had disputed the father's characterization of the trial court's misapplication of the abandonment standard; they argued that the high Court had affirmed termination petitions in other cases where parents had been more involved in

the lives of their children than Respondent had been here.

The Supreme Court disposed of all of father's arguments in a three-page opinion — one of the last authored by Chief Justice John Broderick. First, the Court found that even if the trial court had erred in granting the grandparent's motion to amend before receiving a timely objection, it would affirm the trial court in any event because the father's objection did not state a valid basis to deny the motion. Second, the Court rejected the father's argument that he did not receive a fair hearing and was thus deprived of constitutional and statutory rights. The Court noted that the father had failed to preserve this issue for review because he did not contend that he needed more time to prepare to oppose the amended petition, and he never requested a continuance from the trial court. Third, and finally, the Court denied the father's attempt to characterize the trial court's decision on abandonment as a misapplication of the statutory standard. On the contrary, the Court found that the trial court had engaged in a thorough review of the record and had determined that the father had not had contact with his daughter for fifteen months — a time period far exceeding the statutory threshold for abandonment. The Court agreed with the trial court's finding that the father's attempts to justify his lack of contact with his daughter did not "ring true."

The Supreme Court's decision ended what had been described by the maternal grandparents as a long nightmare during which they were always in a state of limbo about when, where, or how the father would decide he wanted contact with his daughter. As the high Court wrote, "The [trial] court concluded that the fight over the child is more important to the respondent than the child is to him, and that it is not in the child's best interest to continue with the current scenario." ■

At trial, Professor Olson represented grandparents who sought custody of their daughter's child. Because of confidentiality issues, the facts of the case cannot be revealed.

