News Commentary

How One Person Stood Against Gay Rights

By Harvey Silverglate

BOSTON — During times when things seem to be dull in Boston, the best show in town is often the Massachusetts General Court, less grandiosely known as the Legislature.

In recent months, some of the most vapid debate in the recorded history of legislative bodies was heard (by those who were not sleeping) in the legislative chambers at the State House, and from the results of those debates, it is clear that the low level of the proceedings carried over into the votes on certain pieces of proposed legislation.

One of the ironies of the situation is that the Legislature is top-heavy with lawyers. One would think that this factor would elevate the level of debate on pieces of legislation with constitutional overtones and dimensions. Yet precisely the contrary seems to be the case, for an inordinate number of lawyer/legislators exhibit the most abysmally low level of legal sophistication — far lower, for example, than one would expect to find in an assembly of moderately intelligent and informed lay people.

Take a few recent examples. During the debate on the late lamented gay rights bill, sponsored by non-lawyer Rep. Elaine Noble (D.-Boston), lawyer/Rep. David Locke (R.-Wellesley), took a strong anti-gay position. He even took to the airwaves, remarking on WCVB-TV's program "Briefing Session" that gay antidiscrimination laws would extend legal protection to "unnatural" acts. Furthermore, "if we are going to protect homosexuals, why not protect necrophiliacs and Nazis as well?", reasoned this learned member of the Bar and of the Legislature.

Unfortunately, the good Senator had failed to do his legal homework, for had he done so, he would have found — much to his surprise and dismay, one supposes — that "unnatural" acts are already protected in Massachusetts, as are Nazis. While there is some doubt as to necrophiliacs, there is at least a good argument that they, too, enjoy substantial legal protection. Thus, the effect of the passage of the gay rights legislation would have been, simply, to have guaranteed that citizens would not be discriminated against for certain public job classifications merely because of their status as homosexuals. It was a very limited piece of legislation, with no wider or unforseen ramifications likely, yet it was defeated largely, one must assume, because of mis-information such as Sen. Locke and his ilk spewed forth in what *The Boston Globe* described (with understatement) as "acrimonious and sometimes emotionally charged debate."

For example, Sen. Locke seems to have been unaware, while giving his legal opinions over the air and to his fellow legislators, that his legal conclusions must necessarily take a back seat to the more authoritative opinions of the highest court in the Commonwealth, the Supreme Judicial Court. On Nov. 1, 1974 — nearly three years before the debates over the gay rights bill — the Court decided the case of the *Commonwealth vs. Balthazar.*

Balthazar was accused and convicted of violating the ancient Massachusetts statute making it a crime to commit "any unnatural and lascivious act with another person" and setting forth a heavy maximum penalty of up to five years in the state prison. The Court decided that this statute could not be applied to "private, consensual conduct of adults." Balthazar himself could not take advantage of this landmark ruling, since, as the Court noted, in his case there was evidence that he used force against an unwilling participant to commit an act of fellatio. The Constitution, ruled the Court, does not protect one's use of force in private or in public, but in the absence of force, there is a "constitutional right of an individual to be free from government regulation of certain sex-related activities."

In effect, what the Court appears to have done is to place "unnatural" sexual conduct into a category similar to that of rape. It is the force element, rather than the sexual nature of the conduct, that makes the defendant's conduct criminal. Similarly, engaging in any such sexual conduct in public, rather than in private, or engaging in the conduct with minors rather than adults, would take the conduct out of the constitutionally protected realm.

The technical basis for the Court's decision in *Balthazar* was that in the absence of anything more specific in the statute to define what is "unnatural," conduct which heretofore has been considered "unnatural" by some elements of the population (perhaps the Court had Sen. Locke in mind?) could not now be said to come within the prohibition of such a general, vague statute, where the conduct is between consenting adults in private. The Court specifically refused to say, however, that the Legislature could accomplish the prohibition of specific sexual activities among consenting adults even with a more specific statute. The betting among those who have carefully read the *Balthazar* decision is that no such statute would be constitutional. In any event, no such specific statute has been passed since the *Balthazar* decision, and so "unnatural" acts among consenting adults in private were constitutionally protected in Massachusetts at the very time Sen. Locke was fretting that passing the gay employment rights bill would legalize fellatio throughout the Bay State.

Sen. Locke's voiced concern for the unfairness of protecting gays, while necrophiliacs and Nazis suffer discrimination in public employment, further demonstrated how behind the times his knowledge of the law was.

It is not clear, first of all, precisely what the good Senator was afraid of.

Was he concerned that passage of the gay rights bill would automatically legalize necrophilia and Nazism, as he was afraid it would legalize "unnatural" acts? If that was his worry, then he'd better start packing up and leaving the Commonwealth for less tolerant climes immediately. An examination of our statutes and binding legal court decisions has uncovered no law clearly outlawing necrophilia. (For the uninitiated, "necrophilia" is described in one general legal treatise as follows: "a form of affective insanity, manifesting itself in an unnatural and revolting fondness for corpses, the patient desiring to be in their presence, to caress them, to exhume them, or sometimes to mutilate them, or even in a form of sexual perversion to violate them.")

There are statutes, to be sure, restricting what can be done with a corpse. For example, one may not christen a dead body, nor buy nor sell it, nor desecrate a place of burial. Grave robbing is a crime. There is a statute that defines it as "unprofessional conduct" for an emblmer or funeral director to use "profane, indecent or obscene language in the presence of a dead human body," with loss of license a possible punishment. The Supreme Judicial Court, in a case in 1971, did mention in passing that the prosecution presented a pathologist at the trial who testified that the defendant probably was a necrophiliac, but he was not charged with any perversion.

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He *was* charged with *murdering* the corpse.

If Sen. Locke believes, along the same line, that passage of the gay rights bill would legalize Nazism, then he was clearly off the mark, for there is no law — nor can there be any such law consistent with the First Amendment — outlawing either the Nazi ideology or the Nazi Party. Furthermore, non-violent political and speech activities of self-proclaimed Nazis are clearly protected by the Constitution.

Perhaps the Senator was worried, instead, that passage of the gay rights bill would force the Commonwealth to give equal treatment to necrophiliacs and Nazis applying for public employment. He did not really have to concern himself with any such result, for the current state of the law as interpreted by the highest courts of the Nation and of the Commonwealth is that it is unconstitutional for any government to discriminate against a citizen, in employment situations or otherwise, because of that citizen's political beliefs. Nazism, of course, certainly qualifies as a political belief.

As for necrophiliacs, there is no statutory or case law to be found on the subject, presumably because few, if any, necrophiliacs were rejected for public employment on the basis of their unusual amorous propensities.

Perhaps Sen. Locke meant to imply not that passage of the gay rights bill would necessarily extend similar legal employment rights to Nazis and necrophiliacs, but merely that fairness requires that if we give jobs to gays, we should give jobs to Nazis and necrophiliacs as well. This sort of thinking would be very unusual indeed for the Senator. If indeed we treated people on the basis of fairness, rather than legal compulsion, we would not need a gay rights law at all. Without specific legislation protecting Nazis and necrophiliacs, it is unlikely — regardless of whether a gay rights bill ever becomes law — that known or self-proclaimed lovers of (a) dead bodies and (b) Adolph Hitler will ever have a serious edge in the competition for public jobs.

Having thus analyzed Sen. Locke's publicly-stated reasons for opposing the gay rights bill, one must conclude either that he is not a terribly knowledgeable lawyer or legislator, or that he was being less than frank and that his real opposition was grounded in old fashioned homophobia. If the latter be the case, then Sen. Locke should be castigated for trying to disguise his emotional reactions by peddling his views as sound legal principles.

Storm hit

PROVINCETOWN — A state emergency was declared Monday ning, January 9, when a storm hit East End section of Provincetown.

The high winds, which were u gale force, pushed the already high toward the town. High tides and w 15 to 16 feet high destroyed b property on Commercial Street, e piers along the coast and Rosy straight bar.

The four mile area along the End also suffered severe bulk damage, as the storm demoli beach patios and washed away pa the state highway.

Demonstrators Call for Liberati

BARCELONA, Spain — More than a thousand people participated in a gay liberation march Dec. 4, calling for the repeal of Spain's anti-homosexual "Social Endangerment Law." Led by a contingent of gay men and lesbians representing the Homosexual Liberation Front of Catalonia, the marchers carried huge placards focusing on the repressive legal system. The demonstrators ended their march in front of the municipal court building.

Flags of many colors — lavender, red, black and red-and-black, were carried by the marchers, indicating widespread anarchist and communist sentiment among the demonstrators. Feminist organizations as well as anarchist and communist organizations joined the march and supported its goals. Among those present was a government deputy, Josep Maria Riera, secretary general of the Communist Youth of Catalonia. (Catalonia is the region of Spain of which Barcelo the main city; separatist feelings fo ing on language, culture and left- tradition, are very strong here.)

Demonstrators' chants made fu "machistas," and called for amn for al political prisoners. One c said, "Gobierno escucha, el gai est lucha," which, roughly transl means "Listen government! The struggle is here!"

A newspaper report on the m said that it was not a "closed der stration," with the marchers sho "Vecino, unete" (Neighbor, unite us!) all along the way. The newsp reported that there were no incid concluding that the group disp peacefully "under the watchful e the police in downtown Barcelona

The event was organized by Homosexual Liberation Front of lonia (F.A.G.C.), the same group was responsible for the 4,000-st