

# Cautionary tale

## The Supreme Court is upholding rights that the SJC endangered

by Harvey Silverglate

**T**he US Supreme Court's ruling on Monday that allows a South Boston veterans' organization to exclude gay and lesbian marchers from its annual St. Patrick's Day parade is more than a victory for the First Amendment guarantees of free speech and association. It may also halt a troubling trend in the Massachusetts courts to "protect" certain groups at the expense of constitutional rights.

A prime example of that trend is the Supreme Judicial Court's decision last week in *Bowman v. Heller*.

David Heller did not like Sylvia Bowman or anything Bowman stood for. The dislike was mutual. In 1987, when Bowman was conducting her campaign for the presidency of Local 509 of the Service Employees International Union, Heller used a photocopier to reproduce an image of Bowman's face (taken from her campaign literature) that he'd superimposed onto the bodies of girlie-magazine models in suggestive poses. Heller gave copies of the resulting flyer to five of his co-workers in the Worcester office of the Department of Public Welfare. Bowman sued him for sexual harassment.

Bowman claimed that the distribution of the flyers caused her "emotional distress." Superior Court Judge J. Harold Flannery awarded her a \$35,000 judgment.

libel claim holds only if the plaintiff proves that the defendant published false information. Just as the *Hustler* story was not presented as literally true, neither did Heller's flyer pawn itself off as an accurate depiction of Bowman's body. It was clear that both cases concerned parody, not assertions of fact.

Thus, reasoned Nolan, since *Hustler's* parody of Falwell was found to be constitutionally protected, surely David Heller's parody of Sylvia Bowman should be protected. But the majority of justices ignored the *Hustler* case.

### The PC tido

This latest blow to free speech by the SJC comes 11 months after the same court gave the First Amendment its drubbing in the St. Patrick's Day parade controversy. In that case, the court ruled that the Allied

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**BOWMAN'S WIN** on sexual harassment may be reversed by the Supreme Court.

Heller appealed Flannery's decision to the SJC. He argued that even if speech (the flyers, in this case) were curtailed in the workplace to curb sexual harassment, his parody should be protected under the First Amendment because Bowman was a public figure involved in a union election campaign.

### 'A private satire'

In its June 13 ruling, the court focused on Heller's testimony that he acted in an effort to make the plaintiff "look ridiculous," and that his action was "a private satire among a select group of friends." The SJC said that because the action was private and because there was no public interest in the election, Bowman remained a private individual rather than a public figure. The SJC found that Heller's parody was not protected by the broad free-speech rights that apply to public political events. It concluded that Heller's effort to ridicule Bowman was, in fact, a personal assault on her as a woman, rather than as a candidate.

Justices Joseph Nolan and Neil Lynch dissented. Nolan pointed to a 1985 case, *Materia v. Huff*, in which the SJC found that a candidate in a local union election was a public figure because he "voluntarily thrust himself into the [electoral] controversy. . . ."

Nolan also cited a 1988 case in which the US Supreme Court unanimously held that *Hustler* magazine had a First Amendment right to publish a parody that claimed evangelist Jerry Falwell had been deflowered by his mother in an outhouse. Bowman, like Falwell, tried to skirt the issue of First Amendment rights by disguising her claim as an intentional infliction of emotional distress, rather than as libel, since a

War Veterans Council, which sponsors the annual event, did not have the right to prevent the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) from marching in the parade under its own identifiable banner. The Supreme Court thought otherwise, unanimously ruling that since the veterans were the private sponsors of the parade, their choice as to what themes and messages they wish their parade to convey is no business of the courts or the government.

Both SJC opinions demonstrate that it has been riding the politically correct tide, trying to protect women from sexual harassment and minority groups from discrimination.

Given that, historically, the SJC has guarded individual rights even more strongly than the US Supreme Court has, its turning away from free speech is disturbing. After all, the recent 9-0 vote on the St. Patrick's Day parade case demonstrates that, at the high-court level, the decision wasn't even close.

To the extent that the SJC appears willing to subordinate civil liberties to the well-intentioned effort to root out prejudice and discrimination, Supreme Court Justice David Souter's words, adopted by all of his colleagues on the high court, put that goal to rest: if "the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases, it is a decidedly fatal objective." Any effort "to limit speech in the service of orthodox expression," writes Souter, is the "antithesis" of the First Amendment's free-speech guarantee.

This bodes ill for the SJC's decision in *Bowman v. Heller*, which Heller's attorney, Alan Dershowitz, has already indicated he will ask the high court to review. □