

THE DEFENDER



IN THIS ISSUE:
FROM THE EXECUTIVE DIRECTOR (PAGE 2)
SHARING ACLU STORIES (PAGE 2)
LEGISLATIVE PREVIEW (PAGE 3)
BOOK REVIEW (PAGE 3)
SCIENTISTS SHOW DNA CAN LIE (PAGE 4)
FOCUS ON POLICE ACCOUNTABILITY (INSERT)

JANUARY 2010

FETAL BILL TO BE CONSIDERED

The chair of the Vermont Senate's Judiciary Committee, Sen. Richard Sears, has been working on a bill for

this legislative session that could broach the issue of legal rights for a fetus – an action possibly leading to a broader discussion of reproductive freedom issues, despite disclaimers to the contrary.

The bill is the result of an auto accident in Bennington in 2009. A pregnant woman riding in a car hit by another driver lost the twins she was carrying.

The woman wanted the crash to be charged as a double fatality, but a 1989 Vermont Supreme Court case, *State v. Oliver*, held that a fetus is not a person for purposes of prosecution under criminal statutes.

The Vermont Right to Life Committee, which has long advocated to restrict reproductive choices, originally took up the woman's cause. It has tried to have a "fetal homicide law" considered before, but failed.

Sears has focused on the new bill himself and insists it will be crafted in such a way as to keep reproductive freedom out of the discussion.

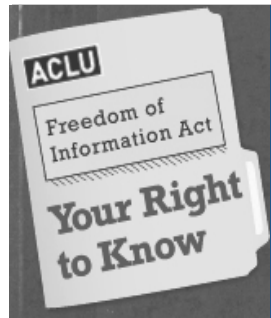
The bill is unnecessary. Nineteen years ago the Legislature addressed the very issue of fetal deaths caused by car accidents.

It did so by amending the motor vehicle laws regarding

"grossly negligent operation of a vehicle." The amendment was the direct result of the *State v. Oliver* case and provided for stiffer criminal sanctions when "serious bodily injury" occurs in an accident.

The effect of the change was to broaden the offense to cover fetal deaths, because a woman is almost always seriously injured when she is involved in a crash severe enough to harm a fetus she may be carrying.

The bottom line is that under existing law, the state can bring a charge of grossly negligent operation and seek the same penalty as it could if there were a separate law covering fetal deaths. It has, indeed, done so against the driver who hit the Bennington woman, charging her with three felony counts that together carry a possible 45-year sentence.



WHO KNOWS WHAT?

Want to know what the government knows about you? File a FOIA request. Learn how at www.acluvt.org

Photo courtesy of Alison Redlich.



Poet Galway Kinnell of Sheffield reads from a work by Pablo Neruda at "An Evening Without... Giving Voice To the Silenced." The Norwich event was held during Banned Books Week and co-sponsored by the ACLU-VT and PEN New England. Kinnell and 12 other Vermont writers read from works that had been banned or whose authors had been barred from entering the United States.

FROM THE EXECUTIVE DIRECTOR

Allen Gilbert, Executive Director

Arash of officials' keeping public information private – or not easily available – has drawn attention to the weakness of Vermont's open meeting and public records laws.

The weakness is that there's no effective enforcement mechanism to make sure that the laws are followed.

There's a misdemeanor fine attached to violations of the open meeting law, but the statute is so vague that it's hardly ever enforced. One of the last times it was enforced was in the 1970s. A Montpelier official was charged and convicted of improper warnings of meetings. But the governor at the time, Thomas Salmon, pardoned him, effectively removing any teeth the penalty statute might

have had.

For both the open meeting law and the public records law, the only effective remedy is a lawsuit brought in Superior Court.

The problem with this remedy is that the "someone" – an involved townsperson, a persistent news reporter – has to put up the money to bring the lawsuit. That means a \$250 filing fee, plus the cost of hiring a lawyer.

If the court finds the law was broken, the court has the discretion to award fees and costs to the prevailing plaintiff. But state judges rarely, if ever, do that. The only spoil of the victory is learning that you were right.

In the past, many of the challenges to the state's open meeting and public records laws were brought by newspapers. Newspapers were

willing to pay the money to make sure that the laws were followed. Newspapers saw it as part of their job to hold government accountable.

Now, with newspapers facing severe financial difficulties, publishers are less inclined to press an open meeting or public record complaint in court.

If Vermont truly cares about transparency in government, courts should be required to award fees and costs when citizen plaintiffs or others win open meeting or public records cases.

It would be a small price to pay for transparency in our government.

SHARING ACLU STORIES

Morgan Kelner has been a supporter of the Vermont ACLU since 2005. But when she first heard of the organization in 1977, she had a very different view.

This was the year that the ACLU filed suit against Skokie, Ill., to stop the enforcement of town ordinances outlawing neo-Nazi parades. Within her Jewish community, everyone was talking about the case. Many felt outrage and did not see the issue as one of free speech, but rather saw the marches as a violent action

that should not be allowed. Morgan shared this view. So her first introduction to the ACLU was from this angle.

However, an older woman in her community presented her with another perspective. She told Morgan that the ACLU had to protect the rights of the marchers so that everyone's rights could be protected. Morgan found the idea difficult to accept at first but she began to understand how necessary it was. It was a much more complex way of looking at things.

It took Morgan years to reconcile the two different

views, and it still remains an emotional issue for her. The feeling that one's community could be targeted brings up a great need to feel safe. But alongside that is the powerful concept that by protecting everyone's rights, we will all be protected. She sees the same challenge repeated with other issues, such as the rights of sex offenders. ACLU's commitment to civil liberties requires us to think things out in a different way, she finds.

To share your story, contact Dorie Wilsnack, 223-6304 x113.

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LEGISLATIVE PREVIEW

Since this is the second year of a biennium, legislators face bills held over from last year as well as new bills that may be introduced. Here are some issues with civil liberties implications:

Reproductive freedom rights. As noted on page 1, a “fetal bill” could be a wedge to a wider discussion of reproductive freedom issues. Likely efforts could be a parental notification bill or similar restrictive legislation.

Campaign finance reform. Vermont is still without a replacement for the campaign finance law rejected by the U.S. Supreme Court four years ago. Past attempts have ended with gubernatorial vetoes.

Financial disclosure. Despite the state’s desire to limit the role of money in

campaigns, Vermont is one of only a few states not to require financial disclosure statements by candidates for statewide elected office. We hope to see legislation introduced to change that.

Marijuana decriminalization. A bill that would substitute a civil penalty for criminal charges against someone possessing an ounce of marijuana or less was introduced in the House last year. Two years ago the Senate passed a bill that prescribed diversion for first-time offenders. Successful consideration in the two chambers could face a gubernatorial veto, however.

Racial profiling. The state continues to rely on voluntary efforts by police to collect “stop data” that would show whether profiling occurs in the state. We hope

legislation is introduced that would mirror the federal “End Racial Profiling” law under consideration in Congress. Profiling is wrong and counter-productive; simply put, it’s bad policing.

Computer use in Senate. In 2008 the Senate Rules Committee banned the use of laptop computers, BlackBerries, Palm Pilots, or other electronic equipment anywhere in the chamber. Reporters are exempted, but members of the public in the galleries can view only “hard” copies of bills and must use pen and paper to take notes. Adoption of the protocol effectively inhibits citizens’ rights to hold government accountable and is odd as Vermont works to become the first “e-state.” We feel that the rule should be changed.

BOOK REVIEW

Arc of Justice: a Saga of Race, Civil Rights, and Murder in the Jazz Age, by Kevin Boyle, Henry Holt and Company, 2004

Five years ago Kevin Boyle received the National Book Award (nonfiction) for his story of Dr. Ossian Sweet, grandson of a slave, who, following his move into an all-white Detroit neighborhood in 1925, was accused of murdering a white man in the crowd outside his home.

The case was picked up by the NAACP and the ACLU. Clarence Darrow, fresh from the Dayton, Tenn., *Scopes* trial, was lead defense attorney. The presiding judge, Frank Murphy, was to end his career on the U.S. Supreme Court.

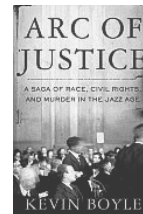
Detroit was then the fourth largest city in the country. The automobile industry had attracted workers from around the country. Racial tensions increased, and the city’s Ku Klux Klan had 35,000 members.

The charged climate and murder trial raised a number of legal issues, including proper interrogations, selecting a jury of peers, use of firearms, and restrictive covenants in home mortgages. Boyle has written a very readable account of an eye-opening chapter in our history.

ACLU-VT and Ilsley Public Library, Middlebury,

will host a series of discussions of books that raise federal constitutional issues. This free series will begin Wednesday, Feb. 18 with *When the Emperor was Divine*, the “Vermont Reads” 2009 selection of the Vermont Humanities Council. *Arc of Justice* will conclude the series of four discussions. To register, contact the library at info@ilsleypubliclibrary.org or 802-388-4095.

— Reviewer David S. Clark is the director of Ilsley Public Library, Middlebury, and as a member of ACLU’s board of directors is active in public education.



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4

JANUARY 2010



**ROBINSON GIVEN
CURTIS AWARD**

Beth Robinson was honored for her work on the marriage equality bill at the ACLU annual meeting. Other awards: Irving Adler, *lifetime achievement*; Antonio Pyle, *cooperating attorney*; Jennifer Ciarlo Pacholek, *development*; Mitch Pearl, *volunteer*; Joseph Carlomagno, *youth activism*

Will Hunter

SCIENTISTS SHOW DNA CAN LIE

In the last legislative session, much was made of the perceived infallibility of DNA evidence in criminal investigations. The perception that DNA “doesn’t lie” helped drive a dramatic expansion of DNA collection.

The new collection mandate is broad – anyone arraigned on a felony (and some misdemeanors) must be “swabbed” to produce a DNA sample. State crime lab officials said they couldn’t handle the extra work until new facilities were built. So, this summer, a \$12-million expansion of the state’s crime lab in Waterbury began.

Ironically, during the same week that the expansion project got underway, *The New*

York Times reported that scientists in Israel had shown DNA evidence can be fabricated.

The Israeli scientists told the *Times* “that if they had access to a DNA profile in a database, they could construct a sample of DNA to match that profile without obtaining any tissue from that person.”

Dan Frumkin, lead author of the paper reporting the discovery, said the process was relatively simple. “You can just engineer a crime scene. . . . Any biology undergraduate could perform this,” he told the *Times*.

DNA has never been 100-percent foolproof, despite popular percep-

tions. It’s a probability, not a certainty, if a “match” is found that the DNA belongs to the same person.

Now, however, with the news that DNA can be fabricated, a “match” may simply be the result of false evidence. DNA can lie.

The state’s new DNA lab could eventually generate as many lawsuits as it does credible “matches.”

