

**S**TEMMING VIOLENCE AND  
INTIMIDATION THROUGH THE  
MASSACHUSETTS CIVIL RIGHTS ACT

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**M**ASSACHUSETTS ADVISORY COMMITTEE  
TO THE UNITED STATES  
COMMISSION ON CIVIL RIGHTS

### **THE UNITED STATES COMMISSION ON CIVIL RIGHTS**

The United States Commission on Civil Rights, first created by the Civil Rights Act of 1957 and reestablished by the Civil Rights Commission Act of 1983, is an independent, bipartisan agency of the Federal Government. By the terms of the act, as amended, the Commission is charged with the following duties pertaining to discrimination or denials of equal protection based on race, color, religion, sex, age, handicap, or national origin, or in the administration of justice: the investigation of discriminatory denials of the right to vote; the study of legal developments with respect to discrimination or denials of equal protection; the appraisal of the laws and policies of the United States with respect to discrimination or denials of equal protection; the maintenance of a national clearinghouse for information respecting discrimination or denials of equal protection; and the investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

### **THE STATE ADVISORY COMMITTEES**

An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 States and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 and section 6(c) of the Civil Rights Commission Act of 1983. The Advisory Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective States on matters within the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters pertinent to inquiries conducted by the State Advisory Committee; initiate and forward advice and recommendations to the Commission upon matters in which the Commission shall request the assistance of the State Advisory Committee; and attend, as observers, any open hearing or conference which the Commission may hold within the State.

# LETTER OF TRANSMITTAL

Massachusetts Advisory Committee  
to the  
U.S. Commission on Civil Rights

## **Members of the Commission**

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Attached is a summary of the presentations made during a March 10, 1988 community forum held by the Massachusetts Advisory Committee in Boston. Though not a typical community forum in that it did not involve the usual range of diverse viewpoints, the session yielded valuable data. The Committee voted 8-0 (with one abstention) at its meeting of September 8, 1988, to submit this report to you in the hope that you will approve its publication.

As you know, several States, including Massachusetts, have enacted laws specially aimed at combating bias-motivated acts. However, as we reported in 1983, Massachusetts began enforcing the State's Civil Rights Act (CRA) which offers protection against deprivations of constitutional rights more generally but which appears to have proven efficacious against bias-motivated acts as well.

When the Advisory Committee examined the CRA in the early 1980s, there was only a limited body of experience with it. Now, 5 years after that review, we are pleased to transmit this update. Among our forum panelists were representatives of a firm which had surveyed relevant law enforcement efforts around the United States for the National Institute of Justice; the Massachusetts Department of the Attorney General; the Offices of the District Attorneys of two Counties; and a special unit of the Boston Police Department.

As governments here in Massachusetts and elsewhere explore ways of combating bigotry, monitoring developments related to the CRA could prove of great value to them.

Sincerely,

Dorothy S. Jones, *Vice Chairperson*  
Massachusetts Advisory Committee

## Massachusetts Advisory Committee to the U.S. Commission on Civil Rights

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**Philip Lawler\***  
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**Reginald L. Johnson**  
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**M. Paula Raposa**  
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Winthrop

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\*Resigned after forum.  
The Committee has two vacancies.

### Acknowledgments

The Massachusetts Advisory Committee wishes to thank the staff of the Commission's Eastern Regional Division for its help in the preparation of this report. The forum and summary report were the principal assignment of Tino Calabria with support from Linda Raufu and Tina James Martin. The project was carried out under the overall supervision of John I. Binkley, Director, Eastern Regional Division.

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## BACKGROUND<sup>1</sup>

In January 1983, the U.S. Commission on Civil Rights released a statement, *Intimidation and Violence: Racial and Religious Bigotry in America*,<sup>2</sup> which counted 12 State legislatures as having had a total of 18 bills aimed at combating bias-motivated incidents. In June 1983, the Massachusetts Advisory Committee issued *Implementing the Massachusetts Civil Rights Act (CRA)*, which examined a law enacted in 1979 that held a promise of unique application to deal with such incidents.<sup>3</sup> However, "as of May 1981, when it had been in effect for more than a year, there reportedly had been only two convictions of violations of the law . . . [offering only] slender experience on which to evaluate the effectiveness of the Massachusetts Civil Rights," wrote the Committee.<sup>4</sup>

Meanwhile, over the next few years, other States began adopting laws specially intended to grapple with one or more aspects of bias-motivated incidents, including laws against crossburnings, the wearing of hoods or masks, the destruction or desecration of places of worship, and the statewide collection of statistics on bias-motivated incidents. In the fall of 1987 Alex Rodriguez, Chairperson of the Massachusetts Commission Against Discrimination, addressed the Committee and identified the Massachusetts CRA as perhaps unique in how that broad law can be applied specifically to racially and religiously motivated bigotry.<sup>5</sup>

For this reason, in September 1987, the Massachusetts Advisory Committee decided to review the status of the Massachusetts CRA to learn how it may have been proven itself in the 5 or 6 years since the Committee first examined it. To assist the Committee, several guests agreed to share their knowledge and views on the topic at a March 10, 1988 briefing in Boston. The agencies represented were Abt Associates Inc. of Cambridge, the

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<sup>1</sup>This summary report is based primarily on the official transcript of the forum which is on file in the Eastern Regional Division office. Other documents are cited where appropriate.

<sup>2</sup>U.S. Commission on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America: a Statement of the United States Commission on Civil Rights* (hereafter cited as *Intimidation and Violence*) (1983).

<sup>3</sup>Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, *Implementing the Massachusetts Civil Rights Act* (1983) (hereafter cited as *CRA*). The CRA itself appears in the appendix.

<sup>4</sup>*Ibid.*, p. 3.

<sup>5</sup>Like Massachusetts, Connecticut, Indiana, Maine, and New York also have legislative penalties and remedies, both civil and criminal, which apply to bias-related incidents. Jeffrey T. Sprung, Glenn A. Fine, Susan M. Gschwendtner, Andrew D. Klingenstein, Tori T. Matton, Donna L. Peterson, Hogan & Hartson, Attorneys at Law, *Striking Back at Bigotry: Remedies Under Federal and State Law for Violence Motivated by Racial, Religious, and Ethnic Prejudice: 1988 Supplement (1988)* National Institute Against Prejudice and Violence, pp. 10-11.

Massachusetts Department of the Attorney General, the District Attorneys' Offices of Norfolk and Suffolk Counties, and the commander of the Community Disorders Unit of the Boston Police Department.

### **A National Overview by Abt Associates Researcher**

As part of a continuing contract with the National Institute of Justice, the research arm of the U.S. Department of Justice, Abt Associates Inc. was requested to conduct an exploratory review of what law enforcement agencies and prosecutors are doing to combat bias-motivated incidents and the problems they encounter in doing so. Peter Finn, one of the two Abt Associates coauthors of the October 1987 report, *The Response of the Criminal Justice System to Bias Crime: An Exploratory Review*,<sup>6</sup> explained that opinions in the report and his presentation reflect only the views of the coauthors and not those of the institute or of the Department of Justice. He noted also that their review was based on comments from 40 respondents and a review of the literature.

Definitions of "bias crimes" vary, Mr. Finn pointed out, but his refers to "an action or words intended to intimidate or injure an individual because of his or her religion, race, ethnicity or sexual orientation." He added that the State of California's statute also includes "disability, age and sex, as well, but to my knowledge, no other statutes" do so.

### **Kinds of Anti-Bias Statutes**

Mr. Finn described three general kinds of statutes enacted around the United States, with the Massachusetts CRA representing a fourth. The first makes criminal offenses out of specific acts. For example, six States make it an offense to engage in a crossburning; 21 make it an offense to desecrate or damage religious property or a cemetery; and 21 States prohibit the formation of paramilitary organizations.<sup>7</sup>

The second kind proscribes acts that are already criminal offenses and specifically prohibits them if they are motivated by bias. They include assault, assault and battery, intimidation, threats, and defacement or destruction of property. The third kind imposes heightened penalties for an offense when the offense is motivated by bias. For example, in Oregon, malicious mischief in the third degree could become intimidation in the second degree if the perpetrator were motivated by bias, with a corresponding increase in the penalty. The fourth kind is the Massachusetts CRA, which broadly proscribes interference with a person's civil rights and which is discussed by others below.

Mr. Finn observed that the three kinds of statutes generally lack three elements: "one, efforts to have data collection mandated; second, attempts to deal with the problem of juveniles; and third, the problem of enforcing these statutes . . . ." Emphasizing that data collection is needed to document the

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<sup>6</sup>Peter Finn, Taylor McNeil, *The Response of the Criminal Justice System to Bias Crime: and Exploratory Review* (1987) (hereafter cited as *Response of Criminal Justice System*).

<sup>7</sup>See also *Response of Criminal Justice System*, pp. 7-8.



prevalence and serious nature of bias crime, he said that law enforcers and prosecutors also need the data to target their efforts.

In this regard, he noted that Maryland enacted a data collection law in 1981<sup>8</sup> as did Pennsylvania in 1986.<sup>9</sup> Connecticut's statute was to go into effect on July 1, 1988,<sup>10</sup> while New Jersey is now developing a statute, according to Mr. Finn. He said that the Maryland and Pennsylvania statutes mandate that the State Police collect data from the local law enforcement agencies of their respective States and that in Maryland the State Police furnish the data to the Maryland Human Relation Commission each month.

With regard to the lack of consideration of juveniles, Mr. Finn referred to New York City data and suggested that

[P]robably a majority of the hate violence offenses are committed by youth, probably male youth, between the ages of 13 and 24 . . . . The issue here is that many people in law enforcement and prosecutor offices and also judges are reluctant to punish young offenders severely or sternly enough to deter the behavior from occurring again.

He speculated that some law enforcement officials believe that the young offenders "don't really understand what they're doing if they paint a swastika on a synagogue or beat someone up on the street because of his or her ethnic, religious, or racial background or sexual orientation." On the other hand, the CRA does deal with juveniles in positive ways, as he knew the other panelists would explain.

### **Institutional Developments**

As to units or activities dedicated to combating bias incidents, Mr. Finn said, "there's what in the report we call a small ground swell among police departments, sheriff's departments, to establish . . . special units," such as are in the Boston Police Department, the New York City Police Department, Nassau County in New York State, and Baltimore County in Maryland. In some other law enforcement agencies, an individual is assigned responsibility for bias-motivated incidents.

Though not to the same extent as police agencies, some prosecutors are also organizing their offices to address bias crimes, Mr. Finn reported, including the Queens County District Attorney's Office in New York City where four assistants handle bias complaints exclusively. Meanwhile, the Attorney General's Office of the Commonwealth of Massachusetts and the District Attorneys' Offices in Norfolk and Suffolk Counties devote special resources to the problem.

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<sup>8</sup>*Intimidation and Violence*, p.23, citing Md. Ann. Code art. 88B, §§ 9-10 (Supp. 1981).

<sup>9</sup>Pennsylvania Advisory Committee, U.S. Commission on Civil Rights, *Reporting on Bias-Related Incidents in Pennsylvania* (1987).

<sup>10</sup>Connecticut Advisory Committee, U.S. Commission on Civil Rights, *Collecting Data on Bias-Related Incidents in Connecticut* (1987) (in transmittal letter dated Sept. 25, 1987).

## **A View From the Commonwealth**

Douglas T. Schwarz, Assistant Attorney General in the Civil Rights Division of the Commonwealth's Department of the Attorney General, stated that the CRA is unique and "fairly broad, particularly in the civil enforcement side . . . in that it protects what it calls rights secured by the Constitution or laws of the Commonwealth or of the United States." Those rights are tied into rights provided by other laws, "So that when we make a complaint, we not only cite the Civil Rights Act, but then we refer to other laws which the Civil Rights Act gives us the ability to protect."<sup>11</sup>

He also explained that it allows the department, with the help of a complainant or the local police, to go to court relatively quickly and, after meeting a relatively low evidentiary standard—compared to the standard that must be met in a criminal case—to obtain injunctive relief.<sup>12</sup> That relief restricts the behavior of a defendant and protects the victim of bias-related crimes or of other violations of the CRA.

An injunction can be prepared rapidly and be used to "calm down potentially explosive situations before they reach the explosive stage," said Mr. Schwarz. The ease with which an injunction can be obtained is due partly to the ability to provide affidavits to a judge rather than "live testimony." In 1982, the department obtained injunctions in two cases involving nine defendants; in 1983, two cases, four defendants; in 1984, eleven injunctions, 53 defendants; in 1985, seven injunctions, 30 defendants; in 1986, eight injunctions, 13 defendants; in 1987, sixteen injunctions, 42 defendants; and as of early March 1988, four injunctions, 13 defendants.

Though there is an uneven growth in the number of injunctions, such growth may not be read as stemming necessarily from an increase in violence; "these numbers might just as well be explained by more activity in our office," Mr. Schwarz stated. As to geographic concentration, the injunctions are concentrated in Boston where "we've been able to use the [CRA] most effectively, largely gain due to the Boston Police Department and the District Attorney's Office cooperation. . . ." While disclaiming any expertise in statistics and acknowledging the difficulty in drawing conclusions or injunctions around Boston "may also be because there simply is more racially motivated contact in Boston."

## **Views From Suffolk County, Massachusetts**

Newman Flanagan, the Suffolk County District Attorney, stated that the increase in his office's activities, regarding bias-related complaints, has been associated with "the implementation of new statutes in the Commonwealth of Massachusetts which I think have gone through the crawling stages and into the walking." He also credited the City of Boston, which instituted the

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<sup>11</sup>A lengthy explication of the CRA appears in: R. Sherman and J. McLindon, *The Massachusetts Civil Rights Acts*, G.L. c. 265, § 37, and *Analysis & Commentary, Lawyers' Committee* (undated) hereafter cited as *Analysist Commentary, Lawyers' Committee*. On file in the Eastern Regional Division office.

<sup>12</sup>For further comments on evidence of intent or willfulness, see also *Analysis & Commentary, Lawyers' Committee*, *supra* note 11, 12-13 and 23-24.

Community Disorders Unit (CDU) of the Boston Police Department even before the CRA was enacted, and former State Attorney General Francis X. Bellotti, who "opened up communications" with the local police and local district attorneys, as having assembled "as nice a team as you can have in this business and [achieving] the success which I think we've had primarily in the city of Boston."

Upon the enactment of the CRA, Mr. Flanagan assigned his first assistant and his chief administrator to cooperate with the State Attorney General's Office, the local police, and the Community Relations Service of the U.S. Department of Justice in matters falling under the CRA, Mr. Flanagan said. He then circulated to the Committee and to Commission staff copies of a booklet, *Civil Rights: A Resource Handbook for the Citizens of Suffolk County*,<sup>13</sup> which was prepared for the April 28, 1987 Suffolk County Civil Rights Conference, attended by about 450 people. In addition to describing Federal and State laws safeguarding civil rights, the booklet identifies public agencies in the Commonwealth and the county responsible for civil rights protection. It also lists private institutions which can play supportive roles.

### **Structuring a Task Force**

Paul K. Leary, first assistant to Suffolk County District Attorney Flanagan, pointed out that 60,000 to 70,000 cases go through the district court every year with another 2,000 cases going through the superior court. Given that volume and the lack of sufficient resources, "some cases aren't given the full attention that they should be," said Mr. Leary. However, with the advent of the new CRA, the Suffolk County District Attorney's Office decided that any case referred to it by the CDU of the Boston Police Department should be given serious consideration. Since the CRA had not been challenged yet, the District Attorney's Office believed that a challenge would come and, therefore, that the office would have to move carefully and ensure that the proof necessary to a conviction would be convincing.

The Task Force set up in Suffolk County in 1980 to cooperate on the CRA included the U.S. Attorney, the State's Attorney General, and the District Attorney, and these individuals assigned their first assistants to handle task force matters. Working closely with them was the chief administrator of the district court. The first step taken was to link up with the Boston Police Department CDU, which was then headed by Francis M. Roache, now Boston police commissioner. There are nine district courts in Suffolk County, and supervisors in each are trained to look for aspects of bias motivation in cases coming into their district court.

Cases would be reviewed by the administrator of the district court and the supervisor in the particular district court where the case was to be brought. If a case warranted direct indictment through the grand jury, then it would be sent to the superior court to be evaluated by prosecutors who are experts in handling civil rights violations. A recent two-part television program spotlighted the case of a Cambodian family in Revere; the case was prosecut-

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<sup>13</sup>Suffolk County District Attorney's Office, *Civil Rights: A Resource Handbook for the Citizens of Suffolk County (1987)*.

ed by the district court whose ruling was later affirmed by the State appeals court, Mr. Leary noted.<sup>14</sup>

For an example of the Task Force's preventive efforts, Mr. Leary mentioned the move of minority families into Charlestown, which involved the Massachusetts Bay Transit Authority Police, the Fire Department, School Department, and the Metropolitan District Commission Police. The Task Force and personnel from these other units:

sat down and we did the so-called missionary work. We had people going out into the community to talk to the rabbis, to talk to the ministers, to talk to the Catholic priests that were there to let the message go out that if there was somebody that was going to violate one's civil rights, it was going to be met swiftly, and it was going to be met harshly. . . . We had a successful move in the Charlestown Housing Project. I only hope that the move in at the South Boston Projects will be as successful. . . .<sup>15</sup>

More than 20 cases have been prosecuted involving incidents in Hyde Park, West Roxbury, Charlestown, Revere, Chelsea, South End and Back Bay. As a result, prison sentences are being served in Walpole State Prison, MCI Cedar-Junction, and the House of Corrections in Deer Island. Some others who have been convicted are on suspended sentences with strict probation, said Mr. Leary.

### **Difficulties in Determining Motivation**

Michael Joyce, chief administrator of the Suffolk County District Court, recalled that when the Massachusetts CRA took effect in 1980, there was no precedent in the law and no one to look to as to how such a law should be implemented. The CRA appeared to be applicable to every case of assault, battery, or robbery "because there was also a violation of someone's civil rights," he stated. But applying the statute too broadly might render it ineffective, explained Mr. Joyce, so consequently the Task Force attempted to be selective and set criteria that would be consistent throughout Suffolk County. For example:

Every time a racial slur was used in a crime, was that a civil rights case? . . . We quickly rejected that. We finally set up a policy that no criminal complaint could be brought in Suffolk County unless it was

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<sup>14</sup>*Commonwealth v. Stephens*, 25 Mass. App. Court 117, 515 N.E. 2nd 606 (1987).

<sup>15</sup>One day after two black women and their families moved into the Mary Ellen McCormack development in South Boston in accordance with a voluntary compliance agreement, the media reported no incident. See Peter J. Howe, "2 Black Families Move to Project as Calm Prevails," *Boston Globe*, July 12, 1988, p. 1, and "Integration of Boston Project Goes Peacefully," *New York Times*, July 12, 1988, p. A-17, col. 1.

run through the Community Disorders Unit and then again run through our particular department to see if it was something consistent. We wanted to bring only those cases where a particular person was attacked because of their race or their creed or their sexual preference. And that was the primary reason for doing it.

Regarding conflicts in which racial or ethnic epithets have played a part, Mr. Joyce recounted a case that occurred several years earlier. It involved a collision involving one car carrying young whites from Charlestown and another car carrying a black family. The subsequent confrontation between the occupants lasted long enough that television cameras came upon the scene, and the case gained some notoriety due to the appearance of a racial element. However, in court the prosecution did not include a charge of discrimination, a development that proved unpopular in the black community and in some of the media.

Another instance described by Mr. Joyce involved a black public defender who had been walking through the Boston Common about 1 a.m. when he was robbed. While the perpetrators were taking the victim's money, they used a racial epithet. At the courthouse the next day, the victim expressed a desire to have the CRA invoked in addition to the armed robbery charge. But because the prosecutor would have been unable to prove that the victim "was set up and robbed just because of his color," the CRA was invoked. Thus, trying to prove motivation is difficult, Mr. Joyce acknowledged.<sup>16</sup>

As the Task Force began implementing the CRA, it found that some police officers on the street showed resistance to the new, strict demands of the CRA. They never had to have a complaint they had drawn up reviewed by their supervisors, but now they were being asked to do that. To avoid implying that police officers were stupid or ignorant regarding such cases, training sessions were organized for new recruits as well as older, experienced officers. Assistant district attorneys were also trained.

"I do not believe for one moment that the attitudes of the people in Suffolk County have changed that dramatically over the past six or seven years," said Mr. Joyce. However, the number of incidents has dramatically declined, and Mr. Joyce voiced a belief that part of the reason for the decline may stem from the growing general awareness that violators will be prosecuted and that incarceration will be sought for those convicted. The sentences will usually be "much greater than [for] the main crime, whether it was a robbery, or whether it was an assault and battery."

### **A View From City Streets**

Sergeant-Detective William Johnston, the commander of the Boston Police Department CDU, noted that he joined the CDU in 1980 when there still was no Massachusetts CRA. He characterized that pre-CRA period as "probably

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<sup>16</sup>Sherman and McLindon write that "The defendant's intent cannot be proved directly because there is no way of directly revealing the operations of the human mind." But they do go on to suggest how intent can otherwise be determined. *Analysis & Commentary, Lawyer's Committee, supra* note 11, at 24.

the most frustrating period of my time as a police officer, going back time and time again to interview these people, to investigate what was being considered vandalism or was being considered a simple assault." He reported recently attending a regional conference on bias-motivated crimes where he heard police officials from other States still without a CRA-type of law, and he concluded that they cannot manage the problem.<sup>17</sup>

For example, Sergeant Johnston explained that a repeated or third act of vandalism may begin to suggest a pattern of terrorism but in the pre-CRA period "we had no mechanism to deal with it, and I think the law has really helped in [such a] case." Even though he does not put much store in statistics as a barometer of racial climate, he does weigh the number of repeat incidents for some understanding of particular cases.

### **Reading Statistics on Bias Incidents**

At present, 7 years after enactment of the CRA, not only has the number of incidents in Boston declined but also the number of repeat incidents, the sergeant said. He added that a review of 452 cases handled by the Boston Police Department between 1983 and 1987 indicated that the majority of incidents does not pit youth against youth but that 40 percent of the victims are over 30 years of age. Furthermore, it showed that the number of cases requiring hospitalization of victims was significant and that 60 percent of the cases involved gangs or multiple perpetrators. Consequently, the data convinced him that "there is a difference when you're attacked because of your difference, whether it be the color of you skin or your religious beliefs or your sexual orientation."

On the other hand, one problem which Sergeant Johnson sees in the present reporting of statistics is a possible ambiguity stemming from how different police officers or different police departments tend to characterize cases. In his own police department, "out of 452 cases, the officer out in the street only identified 19 cases as involving civil rights." On that basis, a police official might conclude incorrectly that "there's no problem in Boston; all we had was 19 incidents in 1983." The media's reading of the data might take the opposite tack, announcing that "Boston again leads the nation in civil rights violations. The State of California has 44, the City of Boston had 452," hypothesized the sergeant.

### **Injunctions and Outreach**

As to the Massachusetts CRA, Sergeant Johnston noted that there are two parts to the law, the civil and the criminal. Before the CRA, an officer could identify some perpetrators and bring them into court for prosecution. "But

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<sup>17</sup>One report of the March 3, 1988 Northeast Regional Conference on Prejudice and Violence, in which Sergeant Johnston served on a panel, indicated that police from New York, New Jersey, and Maryland agreed with the sergeant that "strong legislation, aggressive law enforcement, and sensitivity toward victims were key elements in dealing with hate crimes." "Northeast Law Officers Share Views on Bias Crimes," *Klanwatch Intelligence Report*, April 1988, p. 9. This conference was held in New York City and was sponsored by the Baltimore-based National Institute Against Prejudice and Violence.

there were always those 10 or 15 that were left outside that couldn't be brought into court because we didn't quite have enough evidence. Through the civil portion of the [CRA] law we can now identify them." Furthermore, the use of the injunction, as mentioned earlier by the assistant attorney general, has a positive effect where youths have been involved. "I had family members, mothers and fathers, thanking me for this injunction because they wanted to keep [their children] away from that crowd [of other perpetrators] that was out there," said the sergeant.

On a separate note, Sergeant Johnston alluded to the Task Force's outreach efforts to the growing Asian American communities. In 1980, the Police Department noted there had been a rise in the Asian American population, yet there had been no rise in the statistics reflecting bias-motivated incidents. In conjunction with the Task Force set up to implement the new CRA, the Police Department began to go out to these communities with the CDU's interpreters whose languages include Chinese, Laotian, Thai, and Vietnamese. The CDU "brought the refugee population into the Police Headquarters to show what happens when you call 911. . . . The District Attorney's Office brought the refugee community into the courthouse. . . ." As a result of the orientations, "Through the years, there's been a vast increase in people willing to come to us to address their problems."

### **A View From a Suburban County**

Charles J. Hely, assistant district attorney in the Norfolk County District Attorney's Office, explained that the county is suburban with only a 0.9 percent black population in 1980. Brookline and Quincy are closest in size to being cities, but they have suburban characteristics. Also included are Foxboro, Stoughton, Braintree, and Weymouth, with Newton and Wellesley to the west and the State of Rhode Island to the south. The problem of bias-motivated crimes is not peculiar to Boston, Mr. Hely stated, and he has been trying to convince local police and public officials in Norfolk County that this Massachusetts county has comparable problems.

However, "whether they be police or selectmen, [they] say well, we don't have civil rights offense problems. We don't have any minorities is what the next line is. . . . And so they aren't worried about this as a problem." However, Mr. Hely said, to the defendants whom he has prosecuted, minority persons "stand out right away, and they're perceived right away as an outsider. . . . A black is perceived as from Boston and . . . as associated with crime [or as someone who is] going to change my neighborhood . . . to take some job or some right to some low income housing. . . ." Though Mr. Hely finds it easier and more gratifying to prosecute cases of civil rights violations, he maintained that educating people and winning support for affirmative action and overcoming the wall of segregation between the city and the more affluent suburbs is part of the responsibility of public leaders.

Mr. Hely agreed with earlier speakers that they are fortunate to have the Massachusetts CRA. It offers the prosecution "a lot of clout" and calls attention to the incidents. For defendants, the stigma a being charged with a civil rights crime seems worse than the stigma for some other crime drawing the same sentence. They

are much more afraid of it. They're much more likely to admit an assault and battery, dangerous weapon, and plead guilty and are very quick to deny any racial motivation. And that normally helps our investigations . . . because in their effort to deny the crime, they wind up admitting a lot of things. . . . That kind of stigma and that kind of media attention . . . is very healthy to let the rest of the community know that this not history. It's not something confined to the South. It is not something confined to the city. It's something that all of us share in America. . . .

### **Contrasting CRA With State Intimidation Act**

Mr. Hely's colleague, Norfolk County assistant district attorney James F. Lang, contrasted the Massachusetts CRA with the State's Racial and Ethnic Intimidation Act. The latter provides criminal sanctions for those convicted of committing an assault and battery upon a person or of injuring the personal or real property of a person because of the person's race, religion, color, or national origin. The Massachusetts CRA is not similarly limited in that it does not enumerate a class of protected people. As a consequence, under the Massachusetts CRA perpetrators may be prosecuted for a wider range of offenses, including violence committed against people because of physical or mental handicaps, or because they are exercising their freedom of association or expression of religion or are engaged in lawful activities, such as picketing.

According to Mr. Lang, a further advantage is that the CRA carries no motive requirement. As a matter of course, prosecution is only carried out when there appears evidence of motivation related to the victim's race, religion, sexual preference, physical impairments, and the like; when a case is taken to trial, the prosecutor introduces evidence of such motivation. Yet the prosecutor does not have to prove motivation beyond a reasonable doubt, since motivation is not an element of the crime.

### **A CRA Limitation: "By Force or Threat of Force"**

The one limitation encountered in actual practice is that the CRA states that no person, whether or not acting under color of law, shall "by force or threat of force, willfully injure, intimidate," etc.<sup>18</sup> By way of example, Mr. Lang posited a situation in which there is only one minority family in the neighborhood, and that family's house is vandalized. The prosecutor may be able to prove a racial motive yet may remain unable to prove force or threat of force.<sup>19</sup> In this instance, the CRA is inapplicable, but the prosecutor may fall back upon the Racial and Ethnic Intimidation Act, which does create criminal sanctions for damage to personal property on the basis of race.

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<sup>18</sup>Act for the Protection of the Civil Rights of Persons in the Commonwealth, Ch. 801, § 2, §§ 37, 1979 Mass. Acts \_\_\_, \_\_\_, codified at Mass. Gen. Laws Ann. ch. 265 §§ 7 (West 1988).

<sup>19</sup>For a discussion of "force" and "threat of force," see *Analysis & Commentary, Lawyers' Committee*, *supra* note 11, at 4-5.



A second situation is reflected in the case of a minority person who upon entering a convenience store hears racial slurs screamed at him from the street. Once again, Mr. Lang explained that the Massachusetts CRA is inapplicable because no threats were made only racial slurs. Furthermore, since no personal property damage or physical injury was suffered, the Racial and Ethnic Intimidation Act is similarly inapplicable. In this actual case, the Norfolk County prosecutors resorted to the State Police Accommodations Statute, which also prohibits discrimination.

Mr. Lang acknowledged that the public accommodations statute was initially aimed at shopkeepers discriminating against minorities and that it has fallen into some disuse because incidents of that sort have been on the decline.

We found, however, that because that statute has been construed to include sidewalks as a public accommodation and streets as a public accommodation that we can use that statute to go after this kind of situation where someone is accosted on the street and they are screamed at simply because of their color or their religion. And we had a conviction recently to Dedham District Court for just such an incident under that statute.

Another State statute proscribes defacement, marring, or malicious destruction of churches, synagogues, and the like, said Mr. Lang. As under the CRA, the District Attorney's Office can prosecute a perpetrator under this statute without proving a motive related to religious bigotry. "If someone throws a stone through a window of a church or a synagogue, we don't have to show anything else other than that damage was willfully caused. We don't have to show why they caused it." In the recent arson of a synagogue in Westwood, it would have been difficult to prove beyond a reasonable doubt that religious bigotry was involved because the young perpetrator had made no statements to that effect or left any graffiti on the site, Mr. Lang pointed out. However, by applying this statute, the District Attorney's office linked the perpetrator to the arson and was thereby able to convict him of a civil rights offense.

Having given an overview of the CRA and three other statutes used in combating bias-motivated incidents, Mr. Lang offered an opinion as to how the CRA might be improved. He suggested that altering the statute's language referring to force or the threat of force "to perhaps include intimidation and coercion as the civil injunction language does" might help.

### **A Challenge to the CRA**

Questioned about any challenges to the Massachusetts CRA, Mr. Hely referred to the *Commonwealth v. Stephens* case, mentioned earlier by Mr. Leary, which stemmed from an attack on Cambodians in the town of Revere.<sup>20</sup> According to one white defendant, a Cambodian had insulted him

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<sup>20</sup>*Commonwealth v. Stephens*, *supra* note 14, at 8.

or damaged his car. During the subsequent attack by the whites at the home of the Cambodians, the Cambodians were badly beaten and their apartment destroyed.

When the case reached the Massachusetts Appeals Court on appeal, the defendant claimed that the CRA was vague and unconstitutional, that there had been insufficient evidence for a conviction, and that other motives had been involved in the attack. The appeals court rejected the defendant's claims about the unconstitutional nature of the CRA and that there had been insufficient evidence; instead, the appeals court refused to strike down the CRA and held further that any racial motive need not be the predominant motive. Mr. Hely described the decision of the appeals court as "a very sweeping opinion" and stated that "the courts are behind us, and there's a real strong sense that the judges feel that this is an important piece of legislation. . . ."

### **Comments and Question from Then-Acting Staff Director**

Susan J. Prado, then-Acting Staff Director of the U.S. Commission on Civil Rights, referred to Sergeant Johnston's recollection of the March 3, 1988 Northeast Regional Conference on Prejudice and Violence. She said that she, too, had attended and was impressed by a comment by Morris Dees, the director of the Southern Poverty Law Center. Although Mr. Dees stated that he differed philosophically with the U.S. Department of Justice on affirmative action and other issues, he also told the audience there in New York City that the Department of Justice had the best record of criminal prosecutions of civil rights violations of any administration in 35 years.

Ms. Prado also noted that the Commission on Civil Rights recently passed a resolution calling for Federal legislation mandating the collection of statistics on hate crimes. During the discussion of that proposed resolution, the question arose as to whether such legislation should delineate classes or categories of persons. A dispute arose about the categories, and finally the Commissioners took them out of the final resolution, as approved. The question which she had for the panellists centered on the term "sexual orientation" and arose out of that Commission discussion:

if you are dealing with classes and you want to cite as a class of protected people, homosexuals, then you should say homosexuals. . . . My understanding is [that] one of the criticisms of the term "sexual orientation" [is that] there's a danger in that term because that can be construed to mean anything . . . pedophilia or other forms of child abuse or other forms of crimes of a sexual nature. . . . I'm concerned that this term "sexual orientation" seems to be gaining credence legislatively. . . . I wanted to ask . . . how you interpret that term and how you see it being used.

Mr. Schwartz responded that one benefit of the Massachusetts CRA is that it ties into existing constitutional protection, including "what I loosely referred to as sexual orientation rights under the privacy protections of the Constitution and the associational and expression protections of the Constitution."

He pointed out that in obtaining a preliminary injunction brought under the CRA in a relevant case, his department argued that the legal basis in favor of the of the preliminary injunction lay in the associational and privacy interests of the Constitution. Mr. Schwarz said his department feels "completely comfortable" with the term.<sup>21</sup>

### **Child Sex Abuse Already a Felony**

Mr. Hely added that the broader statute, the CRA, is beneficial as it stands, because there may be groups that are not discriminated against now but may be discriminated against 5 years from now. As long as what an individual is doing lawful or protected by State and Federal law, if that person is being interfered with, the CRA offers that person protection. At the same time, he said that States are more likely to adopt categories such as religious bias crimes or racial bias crimes.

With reference to child sex abuse crimes, Mr. Hely said he is called upon to work on such cases about as much as on civil rights cases, and he does not foresee any major movement toward making child sex legal. As long as sex with a person under 16 years of age—whether or not the act is consensual—remains a felony in Massachusetts, he has no fears that the courts might interpret sexual orientation as permitting sex with a child.

Ms. Prado asked whether it might be better just to employ a term such as "sexuality and the homosexuals" instead of the vaguer term "sexual orientation." She added that practicing homosexual sex is still a felony in numerous States. Mr. Hely responded that "the act is the crime, not the status of being such a person." He added that there is a range in sexual orientation or a range that people show in terms of their attitudes and their sex partners. In any event, he had no problem with a person's being homosexual.

### **Terminology and the Disabled or Handicapped**

Advisory Committee Member Reginald L. Johnson suggested that one ought to review terminology as in the case of the disabled or the handicapped. A review of various Federal and State laws reveals how definitions of the terms differ — so much so that some are now attempting to devise new terminology because there are those who dislike the term "disability" and others the term "handicap." Mr. Schwarz agreed, acknowledging that he was unable to articulate why sexual orientation has become the term of choice and suggesting, "So maybe that would be a good thing to ask someone from that community about."

Returning specifically to disability, Mr. Johnson pointed out that discrimination against the disabled is prohibited under the Constitution of Massachusetts and asked why the CRA does not also include the disabled. Mr. Schwarz responded that the CRA "does, on the basis of Federal law and the constitutional amendment, recognize that you have a right not to be interfered with on the basis of your disability by threat, intimidation or

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<sup>21</sup>In a communique received by Eastern Regional Division staff on September 13, 1988, Mr. Schwarz suggested that this portion conforms with Opinion of the Justices to the Senate, 390 Mass. 1201 (1983), 458 N.E. 2nd 1192 (1984).

coercion under the civil side . . . ." He also stated that, although he did not know of a case in which it has been done, he believed that his department would "feel completely comfortable seeking an injunction under the Civil Rights Act for anyone that was interfered with by threats, intimidation or coercion on the basis of their disability because the right not to be discriminated against on that basis is secured in the Commonwealth."

Sergeant Johnston reiterated that the CRA does not specify a class or group; it protects persons, that is, everybody. He noted that the CRA was employed in a Tourette's syndrome case. The syndrome affects persons who suffer from apparently uncontrollable movement or utterances, but it is not accepted as a disability by everyone. The situation which the sergeant referred to involved a Tourette's syndrome victim who was kept out of a store by the store manager. Boston law enforcement officials went to court on behalf of the Tourette's syndrome victim. In terms of sexual orientation, he added that in Boston's first case, he himself initially thought there were insufficient grounds on which to act, but he applauded the district attorneys for calling and recommending going forward.

### **Losing the "Prize"**

Mr. Finn commented on the opposite situation—when police arrests are not followed up in court action taken by prosecutors. He said that "when prosecutors don't follow up, police may lose interest" and stop making arrests. "The only worse thing probably is when the complaining witness refuses to testify," according to Mr. Finn. Sergeant Johnston added that, while watching the recent television program on the history of the American civil rights movement "Eyes on the Prize," his children spoke of the events depicted as if they were part of ancient history. The sergeant stressed that the events were contemporary and that "the prize" could easily be lost if the police, prosecutors, presiding judges, politicians, or the press fail to act.

John Eastman, Director of Public Affairs and Congressional Liaison for the U.S. Commission on Civil Rights, added one more group to the sergeant's list, "the people." Mr. Eastman asked Mr. Schwarz about the success which the Attorney General's Office has had in bringing injunctions against youth involved in bias incidents. Philip Perlmutter, Committee Chairperson, added a question about recidivism among such youths. Mr. Schwarz deferred to Sergeant Johnston, who spoke of a Dorchester assault case in which an injunction was used. Two of the youths violated the injunction by sitting on the victim's steps and were sentenced to ten days in jail. In a different situation, a youth violated an injunction and served 60-days in jail; the youth had been cheered on during the original bias incident, but the sentence "quieted down the whole neighborhood," according to the sergeant.

Mr. Schwarz then explained that the Department of the Attorney General has actually had to proceed about 10 times for contempt of an injunction or violation of an injunction. The injunction itself can be very specific, forbidding communications with the victim who had been threatened, giving geographic restrictions to keep defendants out of particular areas or prohibiting two or more from congregating on a particular street or within 100 feet of a specific address, which "is a good way to address gang-type

activities.\* Another element is the witness intimidation clause, which warns defendants of the consequence of intimidating the original victim or witnesses. In answer to Mr. Perlmutter's question about recidivism, Mr. Schwarz stated that there appears to be little.

## **Summary**

Panelist at the March 10, 1988 forum were invited to update the Committee on developments related to the Massachusetts CRA, a State law which offers protections against deprivations of constitutional rights more generally but which appears to have proven efficacious against bias-motivated acts as well. Among the eight panelists were representatives of a research firm which had surveyed relevant law enforcement efforts around the United States for the National Institute of Justice, the Massachusetts Department of the Attorney General, the Offices of the District Attorneys of two Counties—one county predominantly urban, the other, rural—and a special unit of the Boston Police Department.

Some advantages in using the CRA stem from how rapidly injunctions can be brought against defendants, the ability to proceed without having to prove motivation, the CRA's universal coverage which is not limited to designated classes, and the fact that it already has withstood a court challenge. The Boston Police representative contrasted his frustrations prior to implementation of the CRA with his relief at the ease with which incidents can presently be investigated. The chief administrator of a district court voiced his belief that a decline in local incidents is due in part to a growing awareness that violators of the CRA will be prosecuted, incarceration sought, and sentences made more severe.

The Committee has voted unanimously to propose holding a new forum to examine the Massachusetts CRA from the viewpoint of the victims of incidents and also to inquire whether the CRA can have potential bearing on the problems of bigotry on college campuses.

