COMMUNITY PERSPECTIVES ON THE MASSACHUSETTS CIVIL RIGHTS ACT

MASSACHUSETTS ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS

This summary report of the Massachusetts Advisory Committee to the United States Commission on Civil Rights was prepared for the information and consideration of the Commission. Statements and viewpoints in the report should not be attributed to the Commission or to the Advisory Committee, but only to individual participants in the community forum where the information was gathered or to the other sources cited.

A SUMMARY REPORT **MARCH 1991**

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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

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The Massachusetts Advisory Committee submits this summary report to advise the Commission about the status of the Massachusetts Civil Rights Act (CRA). It summarizes the transcript of a forum conducted by the Advisory Committee in Boston on April 5, 1990. However, many statements appearing in this report have been supplemented or clarified through reference to related documents and to comments received in November and December 1990 from the U.S. Attorney/District of Massachusetts, the U.S. Department of State, the Massachusetts Department of the Attorney General, and the Boston Police Department. It has also been updated through references to recent print media accounts. The forum itself—involving 10 panelists and other speakers from community organizations and private agencies—was a followup to a March 10, 1988, forum addressed by State and local law enforcement officials and a researcher who had coauthored a study for the U.S. National Institute of Justice.

During the April 1990 forum, the Advisory Committee heard from 11 speakers, 5 of whom were attorneys, affiliated with organizations serving blacks, Hispanics (including Central American refugees), Asian Americans, and Jews. They generally praised the goals and successes which the Massachusetts CRA has attained, but emphasized that more public education is needed to apprise local residents, young and old, of the value of the CRA.

In particular, many undocumented workers as well as legally admitted refugees and immigrants do not avail themselves of the CRA, according to at least three forum speakers. Several noted a lack of knowledge of the CRA among law enforcement officers, the offices of district attorneys, or the judiciary in some jurisdictions. It was also asserted that public employees may occasionally discourage victims or potential plaintiffs from utilizing the CRA.

In addition, charges were made that certain police measures taken in some Boston communities, such as a so-called "stop-and-search" practice, may be unconstitutional and contribute to the feeling of residents of those communities that they live in a state of siege. The thrust of these charges, however, was later commented upon by the Massachusetts Department of the Attorney General and the Boston Police Department, who offered differing perspectives and information regarding the issue. Then, in December 1990 the Massachusetts Department of the Attorney General concluded that some Boston Police Department officers had engaged in improper and unconstitutional conduct (as footnoted in the appropriate sections of this report). A few forum speakers suggested that existing law, and the CRA in specific, might well be used in class actions to mitigate whatever repressive measures may affect Boston residents.

The Committee unanimously voted to submit this report and trusts that the report may further contribute to the growing literature on how to combat bias-related incidents.

Sincerely,

Dorothy S. Jones

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

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

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Winthrop

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*Resigned after forum.
The Committee has two vacancies.

Acknowledgements

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BACKGROUND

In December 1988 the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights published *Stemming Violence and Intimidation Through the Massachusetts Civil Rights Act (CRA)*,[1] a report that summarized a September 1987 forum held in Boston. During the forum, the Advisory Committee heard from a coauthor of a national study, *The Response of the Criminal Justice System to Bias Crime: An Exploratory Review*, and from public officials representing the Massachusetts Department of the Attorney General and the district attorneys' offices of Norfolk and Suffolk Counties as well as from the commander of the community disorders unit of the Boston Police Department.

In the course of the forum, some advantages of using the CRA[2] were listed: how rapidly injunctions can be brought against defendants; the ability to proceed without having to prove motivation; the CRA's virtually universal coverage, which is not limited to classes designated by race, gender, and the like; and the fact that the CRA had withstood a court challenge. The Boston police representative contrasted his frustrations prior to the implementation of the CRA with his relief at the ease with which incidents can presently be investigated. The chief administrator of a district court attributed a decline in local incidents in part to a growing awareness that violators of the CRA will be prosecuted, incarceration sought, and sentences made more severe.

The Advisory Committee has maintained its interest in this subject and voted to hold a followup forum to examine the CRA from the perspective of the community and the victims for whom the CRA was intended. On April 5, 1990, such a forum was held in Boston. The 11 speakers included representatives from 10 agencies or organizations. Five speakers were attorneys, and among the 11 speakers were at least 2 individuals each from black, Hispanic, Asian American, and Jewish communities. Also speaking was a high school senior involved with students from 14 schools who had established an alliance to combat racism and prejudice. Each forum speaker has had an opportunity to review and comment upon an early draft of this report, as have offices of the U.S. Attorney for the District of Massachusetts, the U.S. Department of State, the Massachusetts Department of the Attorney General, and the Boston Police Department.

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[1]Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, *Stemming Violence and Intimidation Through the Massachusetts Civil Rights Act* (1988).

[2]See appendix for "An Act for the Protection of the Civil Rights of Persons in the Commonwealth" (codified at Mass. Gen. Laws Ann. ch. 12 §§ 11H–VI, ch. 265, § 37 (West 1990)).

I. PANEL OF ATTORNEYS

Lawyers Committee for Civil Rights

Sherry Leibowitz, director of the Project to Combat Racial Violence of the Lawyers Committee for Civil Rights Under Law of the Boston Bar Association, stated that she found the September 1987 forum presentations by the ABT national researcher and the State and local law enforcement officials to be "quite helpful and informative."[3] She added that the CRA, as discussed by the 1987 forum participants, has remained the same, and that the "merits and benefits of the [CRA] are unquestioned." She believed that the CRA has been held up as a model for the Nation but wished to touch upon minor problems associated with the implementation of the CRA.

Fulfilling her responsibilities at the Lawyers Committee for Civil Rights has afforded Ms. Leibowitz experience representing victims of racial violence. She indicated that some of these cases had not been successfully or easily prosecuted before the victims came to the lawyers committee:

> cases where perhaps there is not just one type of criminal involvement, where perhaps the victim of racial violence is then subject to a cross-complaint . . . , where perhaps there are issues involving the civil rights actions of the police officers. So what I am describing are . . . cases which really challenge the effectiveness of the act.

Observing that great strides have been made in helping the law enforcement sector to become aware of the CRA, Ms. Leibowitz said that the awareness of police departments is somewhat spotty. Not all police departments have been fortunate enough to have a unit such as the Boston Police Department's community disorders unit, a model for the Nation, nor do many departments have police officers experienced in civil rights. And yet, according to Ms. Leibowitz, the response of the first responding officer is key to the success of the civil rights prosecution; it is that officer's assessment that is largely going to determine "whether the evidence will be promptly and effectively gathered and preserved, or whether it will be forever lost."

"Winnable" Cases Have Been Lost

Ms. Leibowitz reported that "winnable" cases have been lost because the responding officers were not aware of the CRA and did not ask the right questions or lost evidence of motivation. She said that, if the statements

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[3]This quote is taken from the transcript of the Advisory Committee's Apr. 5, 1990, proceedings in Boston. Unless otherwise noted, all quotes and statements in this report are from this transcript, which is on file in the Commission's Eastern Regional Division office in Washington, D.C. Statements and viewpoints in this report should not be attributed to the Commission or to the Committee, but only to individual participants in the forum or to the other individuals or sources cited in the appropriate footnotes.

initially collected did not include evidence of racial motivation but such evidence was discovered later in the course of an investigation, it could appear that someone may have encouraged the victim to file a civil rights case, and then the case, which should have been won, would be lost.

She added that there is also some need to raise the awareness of prosecutors, observing that on the one hand, the Advisory Committee's September 1987 forum included prosecutors of two counties who appeared to be in the lead in applying the CRA, as demonstrated by their approach and by the numbers of cases in their offices. On the other hand, stated Ms. Leibowitz, she learned from a high ranking district attorney in a different county that few cases were prosecuted there under the CRA: "We mainly handle street crime," the prosecutor explained.

According to Ms. Leibowitz, that discussion "indicated such a profound lack of awareness of what racial incidents were, what the Civil Rights Act was, and what the mission of that office should accomplish that I was stunned. But I don't think that this is unusual. . . . [I]t reflects the variability of priority among prosecutors." She pointed out that another prosecutor stated publicly that his office engages in selective prosecution when it comes to the CRA. Ms. Leibowitz explained that prosecutors may exercise such discretion in bringing complaints so that not too many cases are lost and, consequently, that people do not begin to believe that they can escape conviction or sanctions under CRA charges.

Beyond the Experimental State

Ms. Leibowitz also pointed out that being too selective may send a message to victims that CRA cases are not going to be treated like other serious crimes. In contrast, she wished to suggest that "we can close the so-called experimental stage of the Civil Rights Act, and we can begin to take more risks and begin to prosecute more vigorously." For example, she said that when prosecuting crimes of rape, there exists the possibility that the defendant may argue that the victim in effect consented to a sexual act, and, thus, the prosecutor cannot be sure of winning the case. And yet

> you do not find, by and large, many rape cases not being brought in . . . because there may be an issue of consent, because there may be a case that is lost. The modern trend for prosecutors is, if there is probable cause, . . . to bring a charge. . . . [F]or them to be more selective, to screen out more CRA cases, leads to a perception in the community that prosecution can be arbitrary and random, that it can be governed by political concerns more than other concerns.

Regarding the CRA and the district courts, Ms. Leibowitz asserted that improvement is needed in these courts and explained why. The lawyers committee once set out to study the performance of the courts, but data were not available. The courts do not maintain records based on the types of cases and do not monitor the progress of each case from the time the complaining witness comes into court to the end of the case. On the other hand, from the files of the lawyers committee and from cases of other advocates consulted, Ms. Leibowitz assembled anecdotal information that suggested to her that "in

a very systematic way, numerous complainants are being discouraged from filing complaints in the district court under the Massachusetts Civil Rights Act."

Complainants Diverted from Using CRA

According to Ms. Leibowitz, complainants may not know that there is a CRA, and when they speak to court personnel, such as an assistant clerk, they may not be informed of their right to seek a CRA complaint. If they already know about the CRA or somehow become engaged in discussing it, they may be discouraged from pursuing complaints under the CRA.

Ms. Leibowitz further asserted that charges of racial violence in the community or criminal prosecutions brought under the CRA could be perceived as tarnishing the community and are discouraged by some court clerks who apparently feel that CRA violations are not appropriate for the courts; thus, complainants are instead "referred to mediation, contrary to their wishes. They are, in effect, made to feel like their cases are not serious and do not deserve the protection of the court."

Ms. Leibowitz expressed deep concern because there are people who do "not go to the court system in any other way, other than through the entry of a criminal complaint or an application for a criminal complaint." Although she acknowledged that she has little data on which to gauge the extent of the problem, she maintained that it is an issue about which "we have word, statewide, in a systematic way." She added that she has "actually heard an assistant district attorney indicate that his office does outreach to try to prevent civil rights complaints from being issued by court personnel."

Though there are district attorneys who appear to act aggressively in administering the CRA—as the Advisory Committee's December 1988 report showed and as Ms. Leibowitz agreed—other district attorneys do not, according to her. For this reason, she cautioned that "while it's laudable to try to coordinate civil rights prosecutions through the district attorney's office, it blocks an important access point for citizens to get civil rights prosecutions" in some jurisdictions.

She observed that judges, too, need to be further educated about the CRA. She asserted that some have been inconsistent in their application of the CRA; for example, a judge may refuse to "issue injunctions where there is a stay-away order in a related criminal case, feeling that these are duplicative, [when] in fact, they are not. They serve different functions . . . , are key to the effectiveness of the act . . . , [and] there is a need to obtain them promptly."

Injunctions Sought by Private Parties

Ms. Leibowitz described one case in which an injunction was sought by a private party in a racial violence context, marking the first time to Ms. Leibowitz' knowledge that an injunction was obtained by a private party solely under the CRA. Though the injunction was obtained without the involvement of the attorney general's office, she hoped that bypassing the attorney general's office would not result in replacing the leadership role of that office in bringing such injunctions. She stated that the attorney general has

resources that most private parties and even private attorneys do not have. Nevertheless, she also thought that there have been many instances in which it would have been valuable to have obtained an injunction by a private attorney on behalf of a private party.

For example, Ms. Leibowitz indicated that some victims appear to be reluctant to work with the attorney general or other law enforcement officials. Other victims residing elsewhere may find it inconvenient to work through the attorney general's office in Boston. Some, because they are undocumented in the U.S., may well choose to work through a private attorney or a public attorney rather than through law enforcement officials. In other cases, they might prefer to hire a private attorney and then seek attorney fees after obtaining an injunction, in effect imposing an additional penalty on a defendant. Finally, on occasion, injunctions are needed quickly, and it may appear necessary to have a case processed and into court in days; moving that quickly is not always possible within a governmental structure where approvals at several levels must be sought, suggested Ms. Leibowitz.

She charged that there have been cases in which the injunctive or criminal proceedings have been unnecessarily derailed because of a lack of coordination. For example, a criminal case may finish before the request for an injunction is heard, rendering that injunction moot even though there had been a valid reason for one. Such coordination problems might be avoided by having a private attorney help with the necessary coordination. A case in point is in situations in which the attorney general's office is expected to interface with the local district attorney's office; not being a member of either staff, a private attorney might be able to play a coordinating role.

Ms. Leibowitz' final recommendation was that the CRA be utilized in cases involving suspected abuse by police officers.[4]

Anti-Defamation League of B'nai B'rith

Sally J. Greenberg, an attorney and adviser to the Eastern States of the Anti-Defamation League of B'nai B'rith, began by noting the absence of the Massachusetts attorney general's office and of any representative of the gay and lesbian community which, she said, has been the target of civil rights violations across the State. She then explained that she has had many opportunities to compare the CRA with statutes, both civil and criminal, of other States and described the CRA as unique in its breadth and scope. For example, unlike the laws in other States, the Massachusetts CRA requires no proof of motive or of intent to deprive anyone of his or her rights based on race, religion, ethnic origin, or sexual orientation, according to Ms. Greenberg. Instead, the CRA only requires proof that force or the threat of force was wilfully used to deprive another of his or her constitutional rights.

Bias is difficult to prove, Ms. Greenberg asserted, when no words are spoken at the time of the incident, and yet the CRA can often be invoked in such cases. However, on other occasions, the CRA may not easily be called upon. Referring to a Marblehead case of 1989, she said that a Jewish

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[4]See further discussion regarding allegations of abuse on p. 12 and pp. 14-16 below.

community center and synagogue were defaced with anti-Semitic graffiti, and yet the prosecutor determined that the CRA was not usable since there was no force or threat of force that could be used as part of the evidence. Consequently, General Laws chapter 265, section 39, aimed at whoever commits an assault or battery upon a person or damages the real or personal property of another for the purpose of intimidation, was employed in arguing that the victim was intimidated on the basis of the victim's religion.

When Ms. Greenberg is called about an incident, she first looks at the facts and examines them in the context of the CRA, the State Ethnic Intimidation Statute, or the Institutional Vandalism Statute. She then telephones the local police department and the district attorney's office to inform them of the ADL's interest in having the crime charged as a violation of the CRA. Agreeing with Ms. Leibowitz that many police departments are not sufficiently familiar with the CRA, Ms. Greenberg said that, if a particular police department is not familiar with it, she goes to the district attorney's office to ensure that the case does not "fall through the cracks."

Police Chief Avoids Charging CRA Violation

While some police departments may be unfamiliar with the CRA, others may avoid using it, according to Ms. Greenberg. She cited a newspaper article about how a police chief had discovered the perpetrators of a number of anti-Semitic incidents in a suburb north of Boston. Referring to a subsequent letter from the police chief to the editor of the newspaper, she reported that the police chief wrote that he would not charge the alleged perpetrators. He was instead going to put them through his own version of a training program on civil rights issues. According to Ms. Greenberg,

> Here we have an instance in which we have the [CRA] law . . . and a police chief literally telling us . . . that he wasn't going to use it, and wasn't going to enforce it for the very purpose it was enacted.

Citing a related letter to the editor, she noted that the district attorney characterized the incidents as constituting "more than simple vandalism," and the district attorney wrote that his office will work with the police chief to determine appropriate penalties and counselling needs. Ms. Greenberg added that the district attorney said that, "It is our intention to ensure that the offenders understand the consequences and impact of their anti-Semitic behavior. Acts of anti-Semitism, racism, and other civil rights violations brought to our attention, have been, and will continue to be, treated as priorities." Ms. Greenberg's interpretation of this letter was that "the district attorney's office said to the chief of police, 'you must send us all of the evidence that you have, and we will make the decision.'"

CRA Civil Component and Injunctions

Ms. Greenberg also called the civil component of the CRA "a valuable yet underutilized tool." She stated, for example, that she has sat on panels and heard police officers say that they did not know they could make use of the civil component of the CRA or that, working with the attorney general's office,

they could obtain an injunction against the perpetrators of hate crimes. Violating such an injunction would put the perpetrator in contempt of court and subject to imprisonment.[5]

Thus, injunctions are particularly useful in cases of harassment, Ms. Greenberg pointed out. For instance, in a Wellesley case, two young men allegedly committed 25 separate acts of anti-Semitic and racist graffiti in Wellesley and Dover during the 1989 High Holy Days. The graffiti were painted on the garage door of a Jewish family, in front of a shopping center, and on the driveway of a man of Greek ancestry.

Literal Elements: "Threaten," "Coerce," "Intimidate"

However, said Ms. Greenberg, one defendant is in appeals court challenging the right of the attorney general to bring an injunction, arguing that his actions did not constitute threats, coercion, or intimidation—the elements of violations named in the CRA. The defendant bases his argument on the fact that the victims' affidavits did not refer to his alleged actions by employing the actual words: threatens, coerces, or intimidates. The defendant further argues that an injunction requires proof of the likelihood of irreparable harm, but, since the Wellesley incidents, there has been no substantial risk that he or his codefendant might repeat these acts. Ms. Greenberg said that the ADL would be filing an *amicus curiae* brief, arguing that the spree of incidents in Wellesley had the effect of intimidating specific victims, the larger community, and the community as a whole.

Thus, Ms. Greenberg noted, the CRA suffers from not yet having been fully tested in the courts. She also stressed that a supplement needs to be developed for the CRA in the form of a hate crimes–reporting statute.[6] Lacking knowledge of the number of incidents and where they take place puts advocates at a disadvantage since it remains difficult to determine where to target their efforts. Despite the CRA's present limitations, it does complement

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[5]A description of a recent CRA injunction in a case brought by the Massachusetts attorney general appears in an account by Bob Kievra, "Racial Intimidation Injunction Issued," *Worcester Telegram & Gazette*, Sept. 29, 1990. Four men were enjoined "from harassing, intimidating, threatening, and coercing the victims or any other person because of race, color, or national origin. The order also prohibits the defendants from communicating with or knowingly approaching within 100 feet of the victims." A violation could result in a fine of up to $5,000 and a prison sentence of up to 2 1/2 years. Should a victim be injured, the fine could be $10,000 and a jail sentence could be up to 10 years, according to the article.

[6]Two weeks after the forum, the Federal Hate Crime Statistics Act became law. Under the law, the FBI is expected to instruct local law enforcement officials on how to report such crimes, as explained in "Federal Hate Crime Statistics Act Signed Into Law," *Forum*, the newsletter of the National Institute Against Prejudice & Violence, June 1990, p. 5. See also "President Signs Hate Crime Statistics Bill," *Law Enforcement Bulletin*, Anti-Defamation League of B'nai Brith (New York City), Issue No. 5, Spring 1990, p. 1. Last month, reactions to a new State law requiring the collection of data on incidents, which became effective on January 1, 1991, were reported; according to one newspaper account, "Most police in Western Massachusetts say they welcome [the law] . . . despite their contention that there are few such incidents in their communities." Fred Contrada, "Police Welcome Hate Crime Reporting but Incidents Few, Say Officials," *Springfield Republican*, Jan. 6, 1991, p. A-1.

other statutes in Massachusetts and ought to be adopted in other States, Ms. Greenberg concluded.

Asian American Resource Workshop

Andrew Leong is an attorney with Greater Boston Legal Services and a board member of the Asian American Resource Workshop. After complimenting the two opening speakers for describing what can be done with the CRA and what its limitations are, he emphasized the need for education about the CRA. He argued that no matter what law may be on the books, a law is only helpful to the extent that people are aware of it and make use of it. Maintaining that this is especially true of linguistic minorities, the first-generation immigrant community, Mr. Leong explained that immigrants from Asia grew up believing that so long as you do good and do not harm others, you will become successful. However, after arriving in America, they face racism on almost a day-to-day basis.

And yet, Mr. Leong said that he encounters resistance among Asian victims of racism in terms of filing complaints. Many Asians did not come from societies with an adversarial legal system, and, not knowing what to expect here, fear going to court. Asians, according to Mr. Leong, tend to think "why is it that the defense attorney can call me a liar, but my own attorney cannot even ask me a leading question?" They need to be educated about what to expect, and yet, Mr. Leong said, he sees very little of such education in the schools.[7] When incidents occur in the schools, principals do not want to highlight them and so claim that the incidents simply involve youngsters who are fighting.

Mr. Leong asserted that instead of truly dealing with the problem, school officials will usually dismiss these acts as "isolated incidents which do not reflect the general school atmosphere. Yet youngsters who are in conflict will engage in racial epithets, as adult perpetrators may do, since this is a part of human nature." For this reason, advocates have to advise students that "there are laws out there, and if you are going to . . . participate in a crime [involving] a civil rights violation, there are going to be serious ramifications for you," said Mr. Leong.

Judicial, Correctional Systems Not Understood

Mr. Leong also referred to a recent case in the South in which a Chinese who had been mistaken for Vietnamese was killed by a man whose brothers had fought in Vietnam where they were killed. As a result, the Chinese victim died at the hands of the defendant who was later convicted—but not convicted

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[7]An example of a new program for middle school students is described in Kathryn Marchocki, "Interfaith Program Targets Racial Strife," *Boston Sunday Herald*, Feb. 24, 1991, p. 12.

of a civil rights violation. The defendant was given a 35-year sentence; however, with time off for good behavior, he could be released in 8 years.[8]

Mr. Leong asked how he could explain this to his clients—that despite the murder of a Chinese victim who had been mistaken as Vietnamese, the convicted murderer could be on the streets in 8 years to repeat his crime. Mr. Leong pleaded for assistance in educating linguistic minorities about the law including the CRA, the legal system with its plea bargaining, and the correctional system with its time off for good behavior.

Centro Presente

Christina DeConcini is the legal coordinator for Centro Presente, a nonprofit, multiservice organization that works with the 30,000 Central American refugees in the greater Boston area. This group is unique in that they make up "almost completely an undocumented population," and, thus, their relationship to the CRA is "virtually none," she said. Their status has led them to fear coming forward as complainants to describe the acts of violence and discrimination that they encounter daily.

Many of them are represented by Ms. DeConcini, who explained that they start by being afraid to return to their home countries out of a fear of persecution there on account of their "race, religion, nationality, membership in social groups, or political opinion." Ms. DeConcini characterized the 1980 Refugee Act as:

> a humane and ideologically neutral law on its face, providing safe haven in the form of political asylum for a person who is fleeing persecution. However, its applicability is what is truly a civil rights violation on the Central American population, as well as others.

She explained that application of the law is nationally biased in that a person who flees a country deemed friendly by the U.S. State Department has less of a chance of gaining asylum here than another person fleeing one considered "an enemy or [a] communist country."[9] For example, someone

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[8]See "Jim Loo Murder——On the Road to Justice," *The CAAAV Voice: Newsletter of the Committee Against Anti-Asian Violence* (New York), Spring 1990, p. 1; "Loo Case: 'Vincent Chin' in North Carolina," *Outlook*, the newsletter of the Asian American Legal Defense and Education Fund (New York), Summer 1990, p. 2; and "1990: Anti-Asian Violence," *APAC Alert*, the monthly newsletter of the Asian Pacific American Coalition USA, Oct. 1990, p. 1. *APAC Alert* also mentions alleged incidents against Southeast Asians in North Quincy.

[9]Commenting on the asylum process, David T. Hopper, Director of the Office of Asylum Affairs at the U.S. Department of State, points out that "under U.S. law the Department of Justice has primary responsibility for the adjudication of asylum applications" and that "The State Department's role . . . is to respond to requests made by the Immigration and Naturalization Service (INS) and the Executive Office for Immigration Review (EOIR), both parts of the Department of Justice, for advisory comments on individual asylum applications. . . . INS and EOIR make all decisions in individual asylujm cases and they are not bound by the Department's views. . . . It should be emphasized that asylum applications are considered on a strict case-by-case basis. . . . Foreign policy considerations do not enter into the office's assessment of whether an applicant has a well-founded

(continued...)

fleeing El Salvador—which is currently being funded by the U.S. at about $1.5 million a day, according to Ms. DeConcini—has about a 3 percent chance of gaining asylum here, while someone fleeing a nation governed by a communist regime may enjoy a much higher chance.[10] She cited data from the U.S. General Accounting Office indicating that refugees claiming torture as the reason for flight from El Salvador found asylum in the U.S. at a 4 percent rate, whereas refugees claiming torture in Poland found asylum here at an 80 percent rate.[11] She said that such adverse, disparate treatment by the U.S. Government explains in part why Central Americans fear coming forward about CRA violations.

Governor's Executive Order on Services for Refugees

On the other hand, Ms. DeConcini pointed out that the Massachusetts Governor's Executive Order No. 257, which outlines the refugee policy of the Commonwealth, recognizes the contributions made by the many refugees in Massachusetts and declares the Commonwealth's willingness to provide a safe haven for them. She noted that:

> the most important part of this Governor's Executive Order is the nondiscriminatory clause [which] specifically states that no State agency can deny State services to a person based on their immigration status, or lack thereof.

Ms. DeConcini stressed that "when you institutionalize [discrimination], I think it is a far more dangerous thing than when it is on a case-by-case basis. . . ." Nonetheless, she also noted that the executive order is currently under severe attack at the State House by several pending bills that would basically undo it. She believed that, were it to be overturned, "you virtually are not only legalizing discrimination, but also telling State agencies delivering State services that they cannot deliver these to people, unless the person can show that they have documented status."

Ms. DeConcini speculated that the results could prove dangerous to undocumented refugees inasmuch as they might then become even more

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[9](...continued)
fear of persecution." David T. Hopper, letter to John I. Binkley, Director, Eastern Regional Division, Dec. 7, 1990.

[10]Bill Frelick of the U.S. Committee for Refugees writes that, instead of the merits of the claims of an asylum seeker, other factors come into play including "the alien's country of origin, and its relations with the U.S. government (coming from Nicaragua rather than El Salvador, or Cuba rather than Haiti) . . . ." Bill Frelick, *Refugees at Our Border: the U.S. Response to Asylum Seekers*, The U.S. Committee for Refugees (Washington D.C.), Sept. 1989, p. 15.

[11]See also "500,000 Immigrants Granted Legal Status," Jay Mathews, *Washington Post*, Dec. 20, 1990, p. A-1, and "Who Gets Asylum?," *Washington Post*, Dec. 23, 1990, p. C-6. In "Who Gets Asylum," the editorial writer claims that "It is probably not surprising that [the U.S.] government is more likely to find human rights violations being committed in countries that are adversaries than it is to embarrass friendly countries by labeling them as persecutors. But the law is clear: political considerations should play no part in the determination, and each case should be judged individually."

afraid to summon the police or call upon the district attorney for fear that such authorities could require evidence of immigration status from them or they could be turned over to the U.S. Immigration and Naturalization Service. She also voiced concern over such possible further institutionalization of civil rights violations against the refugee population and the further silencing of an already frightened shadow community.

Panel I Discussion Period

During the Panel I discussion period, Committee member Philip Perlmutter asked three questions: What sanctions should be meted out to youngsters say age 8 to 14 years, who might engage in ethnic insults, and are any sanctions codified? He also inquired whether incidents of this sort should be reported in the first place.

Ms. Greenberg replied that such incidents are not often reported, but that they ought to be since the law should deal with the merits of an incident. For example, if name calling is an ongoing problem affecting a constantly harassed student, it should be reported. She further believed that:

> we are in dangerous waters if we decide that even a minor incident of name calling may not be reportable. I think it should all be reportable. Perhaps one instance may not be actionable, but two and three and four . . . that's where—unless we "nip the problem in the bud"—we may not be able to track the problem and deal with it effectively . . . . My policy is always to report any incident, no matter how minor, because it may be representative of a larger problem.

She also agreed with Mr. Leong that incidents among youngsters do occur and noted that they even take place in junior high schools where many students learn or begin to reinforce bigoted ideas. However, again like Mr. Leong, she knew of little in the way of education about civil rights being introduced in the early grades or in junior high schools.

Creative Sanctions

Ms. Greenberg pointed out that the judge in a Marblehead case sentenced a young teen to a combination of restitution of about $660 for his part in the damage to the synagogue and work in a homeless shelter and at the Jewish community center where he had also done damage. There were other components to the sentence that, she said, represented in total a very creative approach to sanctions that are not susceptible to codification. On the other hand, she pointed out that judges have forums and meetings in which they discuss complex issues such as sanctions.

Ms. Leibowitz remarked that she knew of no way that the number of unreported cases could be ascertained but believed that such cases are numerous. Any undercount problem would be affected by cultural differences among those minorities that tend to be victimized. In some cultures, working problems out person-to-person is the norm, and turning to the law enforcement system is not to be used as the first resort. It is also affected by the existence of undocumented workers in some minority communities who tend to avoid authorities. Ms. DeConcini added that she has not yet met a Central

American refugee who would consider coming forward under the CRA; the majority decline to call the police, even when their houses have been broken into, out of fear that the police will turn such refugees over to the district attorney's office.

Reporting Bias–Related Incidents

Morris Jenkins, director of Dorchester's Urban Mediation Project, observed that many persons of color regard the judiciary as racist since it lacks people of color as either judges or lawyers; for this reason, there are many people of color who will decline to report incidents. His project experience has led him to estimate that only 1 out of 10 persons is willing to report to the judiciary. Ms. Leibowitz added that there is a widespread perception that the police violate the civil rights of people of color, as in the October 1989 Charles and Carol Stuart case,[12] and such police violations have pernicious effects in communities of color, including making people reluctant to report to the police.[13]

Ms. Leibowitz pointed out that the State Hate Crimes Reporting Act which is pending in the legislature would attempt to arrive at some estimate of how many cases go unreported. An indirect way of achieving that would be to compare the number of cases registered with the criminal justice system in a central State repository with the number of incidents that do not rise to the level of crimes but that become known to community organizations and individuals. She was hopeful that enactment of the pending legislation would eventually lead to reliable data.

As to the punishment that should be meted out to 8– through 14–year–olds, Ms. Leibowitz suggested that such discussion teeters on the limits of what the criminal justice system can impose. One answer is that any sentence can be imposed up to the statutory maximum. In a juvenile case, the maximum is usually commitment to the department of youth services until the person achieves the age of majority. Beyond that, punishment depends on the creativity of judges, as Ms. Greenberg had noted, using restitution and community service.

Mental Health Issue v. Criminal Justice Issue

Ms. Leibowitz reported that there once was interest in treatment programs for racial violence offenders. However, some involved in law enforcement

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[12]See, for example, Christopher B. Daly, "Boston Slaying Remains a Mystery," *Washington Post*, Oct. 31, 1990, p. A-8, written a year after the incident; Christopher B. Daly, "Pregnant Woman's Murder Shakes Boston's Image," *Washington Post*, Nov. 2, 1989, p. A-3, written when it was alleged to the police that a black assailant had shot a pregnant woman; and William R. Levesque, "Legislator: 'Atmosphere of Racism' Exists in Bay State," *Herald News*, (Fall River), Feb. 9, 1990, written when there was some evidence to suggest that the pregnant woman's husband, who had made the police report, had killed her.

[13]Commenting on the Stuart case, Wayne A. Budd, United States Attorney for the District of Massachusetts, points out that "Initially, we had requested those who had complaints concerning police conduct to advise this Office. . . . [N]one were received. . . ." Wayne A. Budd, letter to John I. Binkley, Dec. 4, 1990, (hereafter cited as Budd Letter), p. 1.

feared that treatment might end up as the only punishment and not as a supplement and that an offense would become treated as a mental health issue exclusively and not as a criminal justice issue. She herself believed that, if incarceration is in order, it should be imposed; then, after the perpetrator has completed incarceration, he or she might well benefit from involvement in a program in the community.

Judges have asked Ms. Leibowitz what programs are available for young offenders. Only a few exist, such as interracial groups of youngsters organized in some communities. Ms. Leibowitz also cautioned that it is difficult when a group of youngsters of various races and backgrounds are working together and an offender is placed into the group, and then the youngsters are in effect expected to rehabilitate the offender. As for attacks by one minority person upon another, Ms. Leibowitz remarked that her colleagues with lawyers committees elsewhere have told her that it occurs, particularly in California. The files of the community disorder unit (CDU) of the Boston Police Department contain reports of some, but such attacks do not often happen locally.

Mr. Leong added that conflicts between minority groups occur in New York, as Spike Lee depicted in his movie, *Do the Right Thing*, in which tensions arose between an Asian shopkeeper and the black residents of the neighborhood served by the shopkeeper. To reduce tensions, Mr. Leong stressed that education is needed "to let both sides understand each other, that there may be differences culturally and linguistically, but that both of us are minorities and are in the same game together."[14]

Regarding possible bias in the court system, Mr. Leong noted that earlier in the day he attended a press conference of the Supreme Judicial Court of Massachusetts at which the State supreme court justice announced that a racial bias study of the court system will be undertaken to examine how judges and lawyers handle minority clients and victims.

Status of Training for Police

Advisory Committee member Doris Arrington remarked that only recently, her church held a meeting involving judges, probation officers, and law enforcement officers on how the community could work its way through the criminal justice system. She urged other communities to organize such programs. Another Advisory Committee member, Andre Ryerson, inquired whether police officers receive training on the CRA. Ms. Leibowitz replied that there is supposed to be training, but because of funding problems, there no longer is a Criminal Justice Training Council to do training. Ms. Greenberg added that the training had been inadequate at best, with 2 hours on civil rights violations and 2 hours on how to avoid being sued for a civil rights violation. The ADL and other organizations have taken it upon themselves to

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[14]"In Spike Lee's movie, *Do the Right Thing*, set in Brooklyn, a Korean shopkeeper averts a confrontation with black residents of the neighborhood by shouting in desperation, 'Me no white. Me no white. Me black.'" See Laurie Goodstein, "Embattled Korean Grocers Wait Out Racially Charged Boycott," *Washington Post*, May 15, 1990, p. A-3, in which Ms. Goodstein recaps the movie scene in her article.

do police training, as have the Massachusetts Commission Against Discrimination and the district attorney's office; from this experience, Ms. Greenberg and others discovered that some police are surprised to learn that there is a CRA.

As to an earlier suggestion of institutionalized discrimination relative to questions of immigration and legal status, Mr. Ryerson said that immigration is a Federal matter and that any immigration problem should be solved at the Federal level. He stressed that "It is inappropriate for States to establish their own status for immigrants." With regard to the punishment of youngsters, he recommended that the names of youthful offenders be published in the newspapers in an attempt to change behavior.

Ms. DeConcini responded that the Governor's executive order which she referred to earlier does not confer legal status on anyone; it only seeks to ensure that all people are entitled to State services regardless of their legal status. Commenting on Mr. Ryerson's recommendation about publishing the names of youthful offenders, Francisco Navarro of La Oficina Hispana stated that he did not believe such a measure would result in a favorable change but would amount to a different form of repression.

II. PANEL OF LAY ADVOCATES

NAACP, Boston Branch

Louis Elisa, president of the NAACP's Boston branch, explained that he would address the CRA from the perspective of the civil rights guaranteed under the U.S. Constitution, the decisions of the U.S. Supreme Court, and the acts of Congress. He maintained that those rights are constantly being violated and that the Massachusetts CRA has not effectively addressed the violations, especially because civil rights are typically or narrowly considered as being mainly about race, color, and gender.

He explained that in Boston's communities of color people live under a state of siege, feeling that they cannot leave their homes, shop, or attend church or synagogue as they choose. Many cannot utilize city resources, such as public transportation or education, keep a job because they do not feel comfortable in the workplace, or be free in their persons. In that sense, their civil rights are being denied them, Mr. Elisa contended, that is, their civil rights are being violated. At the same time, Mr. Elisa, who once was a police

officer, charged that to a large extent, the violations that have to be investigated are left in the hands of the people who are now violating those rights.[15]

Local Stop–and–Search

For example, over the past year, the Boston Police Department has condoned a stop–and–search policy that puts blacks at risk, according to Mr. Elisa. It is sanctioned by area commanders and allows the police to stop and search any person who they believe to be a member of a gang. The policy violates these persons' right to be free from search and seizure and is in violation of the *Terry* v. *Ohio*[16] decision of the Supreme Court, which, he said, held that the police must have at least reasonable ground for suspicion.[17] He then noted that under the CRA, that is, the Massachusetts General Law, Chapter 12, Section 11 H, the attorney general may bring a civil action for injunction or other appropriate equitable relief to protect persons against any interference by threat, intimidation, or coercion of the rights secured by the Constitution.

Mr. Elisa then charged that: "[T]here are cases that have been brought to the attention of the U.S. attorney, as well as to the attention of the attorney general of the Commonwealth, and there has been no action taken to enjoin the police or to prevent the continuous behavior, which threatens the peaceful enjoyment of people of color in the city of Boston, of their constitutional rights."[18] He cited an article by Peter Canellos of the *Boston Globe* who had

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[15]It should be noted that in December 1990, the Massachusetts Attorney General reported on allegations of police harrassment on the part of Boston Police Department officers. According to a *Boston Globe* account, the Attorney General "documented more than 50 instances of alleged police harrassment, including 18 alleged strip-searches," and a City Councilor is quoted as saying that "At first the police said there was no stop-and-search policy and no practice. Clearly this report shows it was a policy, in effect if not written, and was a practice." Peter S. Canellos, "Black Leaders Find Hope for Reform in Shannon's Report on Hub Police," *Boston Globe*, Dec. 19, 1990.

[16]392 U.S. 1, (1968).

[17]Commenting on Mr. Elisa's assertion, Joseph C. Carter, superintendent and chief of the Bureau of Special Operations of the Boston Police Department, notes that the terms "stop and search" and "search-on-sight" are "commonly used misnomers for constitutional 'stop and frisk' threshhold inquiries permitted under *Terry* v. *Ohio*." He states that "An officer may not, however, stop every person whom he sees, but he may briefly detain a person with respect to whom he has a reasonable suspicion that the person has, is or is about to commit a crime. . . . Since the stop is based on less than probable cause, it must be brief and must not turn into a custody situation normally associated with arrest. . . . [A] frisk is limited to a pat-down of the outer clothing and the area within the immediate control of the person. The purpose of a frisk is to discover weapons . . . [and], like the initial stop, is based on a standard which is less than probable cause." Joseph C. Carter, letter to John I. Binkley, Dec. 14, 1990 (hereafter cited as Carter Letter), pp. 3-4. See also "Boston Police Department and Constitutional Rights," Commissioner's Memorandum Number 89-76, Oct. 12, 1989, and "Boston Police Department's Values and Policy Regarding Protection of Civil Rights: Special Order Number 90-38," Oct. 4, 1990.

[18]Commenting on Mr. Elisa's assertion, Wayne A. Budd, U.S. Attorney for the District of Massachusetts, points out that "except under the most *extraordinary* of circumstances, the

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written about 15 cases involving young persons between the ages of 15 and 25. Some interviewed by Mr. Canellos reportedly believed that their rights were violated since they were stopped for something other than reasonable grounds of suspicion. Although they were not arrested, they "were just victimized, in a sense, emotionally vandalized," said Mr. Elisa.

Targeting Gang Members and Associates

In further support of his argument, Mr. Elisa referred to statements by Judge Mathers in *Commonwealth* v. *Phillips and Woody*.[19] According to Mr. Elisa, the judge in this case stated that as early as March 1989 and no later than May 1989, Boston police, at a level below that of the commissioner, began the systematic application of a policy affecting Roxbury. A secret list of area gang members, initially 150 in number but now 750, was drawn up, and the deputy police superintendent announced that "all known gang members and their associates, whether known to be gang members or not, would be searched on sight," he said.[20]

Mr. Elisa characterized this "announcement . . . [as] in effect, a proclamation of martial law in Roxbury for a narrow class of people—young blacks, suspected members of a gang or perceived by police to be in the company of [someone] thought to be a member," and added that the policy in Roxbury continues.[21] He said that the court ordered that the charges against the two men in the *Phillips and Woody* case be dismissed but noted that the policy has not been abated and that, indeed, in the cities that he has visited on the East Coast and the West Coast, the same kind of policy also goes unchallenged.[22] He predicted that, unless such policies are ended, the Nation will

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[18](...continued)
United States Attorney or for that matter the Attorney General of the United States, is without authority to enjoin the behavior of local police. . . ." He adds that "I would be very much interested in . . . the names of persons who have filed complaints of a civil rights nature with this Office and who have not received a response." Budd Letter. See also Marjorie Heins, chief, Civil Rights Division, Massachusetts Department of the Attorney General, letter to John I. Binkley, Nov. 23, 1990, (hereafter cited as Heins Letter), in which Ms. Heins reports that "We are currently prosecuting one MCRA civil lawsuit against 13 Boston police officers."

[19]No. 0802-75-6 (Mass. Dist. Ct. Sept. 17, 1989) (order).

[20]The search-on-sight issue is more recently discussed in Peter S. Canellos, "Civil Rights Suit Targets Boston Police Tactics," *Boston Globe*, Oct. 1, 1990. According to the article, the Boston Police superintendent stated that his department "had no 'search-on-sight' policy, and the city's 2,000 officers were advised that such a policy is 'indefensible and unconstitutional.'"

[21]See also, Adrian Walker, "Roxbury College Conference Scores Police Policy on Searches," *Boston Globe*, Feb. 25, 1990.

[22]Last month, individual blacks and black organizations charged that a double standard was being employed by some police in Western Massachusetts. According to a recent media account, the Rev. Edward P. Harding, Jr. charged that the issue is "whether or not there was one standard for youngsters in Mason Square and another standard, for example, for youngsters at Springfield College." Susannah Pugh, Brad Smith, "Police Brutality Charged by Blacks," *Union-News* (Springfield), Jan. 11, 1991, p. 1 and p. 7.

become further divided as people of color are "relegated to second class and no citizenship."[23]

American Jewish Congress

Sheila R. Decter, the executive director of the American Jewish Congress (AJC), noted that the AJC was involved in the drafting of early antidiscrimination statutes in Massachusetts dealing with education, public accommodations, and fair employment, and, more recently, in helping to draft the CRA and advocate its passage. In the late 1970s, the attorney general of Massachusetts indicated that his office needed legislation for authority to enter cases where crimes such as assault, trespassing, and violence against property or persons prevented persons from enjoying their civil rights.[24]

According to Ms. Decter, the State attorney general said, too, that he needed additional authority for injunctions against individuals whose behavior showed a pattern of intimidation or coercion of other individuals or groups in the exercise of their civil rights.[25] Such injunctive relief could be used to control potentially dangerous situations before persons were physically harmed. Of particular concern at the time were youths intimidating racial minority group members who had moved into previously all-white or predominantly white neighborhoods. In some instances, the coercing parties were violating already existing laws. However, the penalties for breaking those laws were often too slight to deter perpetrators from repeating the crimes.

Ms. Decter pointed out that the civil remedies incorporated in the legislation interested AJC because they allowed the aggrieved party to sue for damages. The AJC was also interested in legislation that would provide minorities monetary relief by the time the case reached the court plus attorney's fees for those who often were without the resources to afford legal counsel. The rights to be protected by the legislation were described in broad terms since discrimination on the basis of race could manifest itself in many different ways and through many different kinds of intimidation or coercion.

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[23]On Dec. 18, 1990, the Massachusetts Department of the Attorney General concluded that "Boston police officers engaged in improper, and unconstitutional, conduct in the 1989-90 period with respect to stops and searches of minority individuals in the Roxbury, Dorchester, and Mattapan communities." James M. Shannon, Stephen A. Jonas, Marjorie Heins, Massachusetts Department of the Attorney General, *Report of the Attorney General's Civil Rights Division on Boston Police Department Practices*, Dec. 18, 1990, p. 60.

[24]See also Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, "Evolution of the Massachusetts Civil Rights Act," *Implementing the Massachusetts Civil Rights Act* (1983), pp. 11-12.

[25]According to the Massachusetts Department of the Attorney General, its "Civil Rights Division has obtained more than 20 preliminary injunctions under the MCRA in 1990, in addition to at least 12 final judgments. . . . Some of the cases are referred to us by police departments (most notably the Community Disorders Unit of the Boston Police Department) and district attorneys' offices. Others arise directly from citizen complaints or referrals from organizations such as the Lawyers' Committee. We also do investigate complaints of police misconduct, particularly if the allegations include racial harrassment." Heins Letter.

CRA Considered an Effective Tool

The AJC considers the CRA to have proven itself an effective tool for police enforcement and governmental protection of civil rights, said Ms. Decter. She added that the AJC has seen no evidence that public officials have used the CRA in such a way as to inadvertently deny someone his or her rights, or where the right itself was not clearly understood. However, she thought that "sometimes there is a timelag before police officials recognize the necessity to use this act and deal with this pattern of behavior in a given area." She added that one weakness in the CRA has to do with the question of private parties being able to obtain injunctive or equitable relief from other private parties. For this reason, she had asked an attorney, Thomas Sobol, to join her in AJC's presentation.

Mr. Sobol, of the law firm of Brown, Rudnick, Freed and Gesmer, said that much of the previous discussions had dealt with how public officials in law enforcement, the judiciary, or corrections deal with the CRA or may need to be educated to its proper uses. He then called attention to the area of private enforcement and the use of private resources in applying the CRA.

As background, he explained that in 1985, the Massachusetts Supreme Judicial Court held in *Bell* v. *Mazza*[26] that the rights covered by the CRA are broad, including "not only Constitutional rights [which] existed before enactment of this statute, but even rights that sort of look like they are a Constitutional right, but are not actually made unlawful." In *Bell* v. *Mazza*, the plaintiff stated that the plaintiff's constitutional right to build a tennis court had been infringed by neighbors who had engaged in threats, intimidation, and coercion in an effort to prevent the construction of the tennis court. After the decision was rendered supporting the plaintiff in this case, the court repeatedly construed broadly what conduct was unlawful. More recently, the court was faced with four cases which prompted it to try to ensure that the CRA is not so broadly applied as to become absurd, or to interpret threats, intimidation, and coercion "to mean physical force or potential physical threat of force."

Private Enforcement Through Use of CRA

Mr. Sobol offered this background and the possible backlash arising from the *Bell* v. *Mazza* case to suggest how the CRA can be improved for private enforcement in three ways. First, he stated that in some way—by winning the Wellesley case, creating legislation, or by other means—the CRA must not be interpreted solely to prohibit violent conduct or conduct that appears to be potentially violent. The reason is that such conduct has already been made unlawful, and "no lawyer is going to . . . take on a case where they are going to have to show actual violence, or potential violence, if that is not there [or] if the conduct has merely been threatening or intimidating."

Second, while the CRA provides attorney's fees, it does not make clear that people should be able to obtain private injunctive relief as easily as an attorney general can get injunctive relief. Upon going into court, the attorney

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[26]424 N.E. 2d 1111 (1985).

general only has to show a violation of the CRA and that it would be in the public interest to issue an injunction. However, a private party going into court has to show not only a violation of the CRA and that an injunction would be in the public interest, a private party has to evidence irreparable harm. Mr. Sobol questioned whether a private litigant should have to evidence such harm. One theory behind the CRA is that a private litigant can perform as a "private attorney general." Therefore, the CRA should be clear that such private attorneys general need only show that which the attorney general for the Commonwealth must show.

Third, Mr. Sobol indicated that there is a court-imposed limitation to the CRA that needs to be addressed. He noted other procedural statutes that exist to protect civil rights including statutes enforced by the Massachusetts Commission Against Discrimination (MCAD.) According to one Supreme Judicial Court decision, if a plaintiff could have gone to the MCAD or through any other procedural mechanism, the plaintiff is foreclosed from going forward under the CRA. Mr. Sobol argued that, before enactment of the CRA, many heinous violations of civil rights had been made unlawful, with procedural mechanisms created to deal with them. Speaking as an individual, Mr. Sobol urged that the CRA be allowed to serve as a duplicative remedy at least in the area of injunctive relief.

Incentive for Private Bar to Take Civil Rights Cases

Mr. Sobol stated that one ought to be permitted to go into court quickly and obtain an injunction quickly on the same basis as the attorney general. And, if the plaintiff obtains the injunction, then the plaintiff's attorney should be entitled to attorney's fees for that service and not have to wait for years for the ultimate resolution. Thus, if the CRA:

> were changed or interpreted in these ways, where it was made a very effective, equitable mechanism whereby private attorneys could represent somebody, go into court, get an injunction on the same terms as the attorney general, and their award of attorney's fees then and there, I think that you would . . . find . . . the private bar coming to the aid of civil rights.

At the same time, Mr. Sobol cautioned that, when private parties sue other private parties under the CRA, there is a clash of rights as, for example, when the Bells, who had a right to build a tennis court, sued their neighbors, the Mazzas, who had a right to contest its construction, or when Vanessa Redgrave, who had a right to speak her mind on issues, sued the Boston Symphony Orchestra, which had a right to put on artistic presentations as it wished. He emphasized that there is a need to balance such rights, and that there should not be a race to the courthouse to see which private litigant sues which other private litigant first, so that one can say that his or her rights have been violated before the rights of the other litigant.

La Oficina Hispana

Francisco Navarro, on the staff of La Oficina Hispana, said that he occasionally asks himself whether or not civil rights laws are for everyone or whether they are just for a few privileged persons, and that he sometimes has

thought that civil rights laws are not for minorities. At any rate, he observed that minority individuals are very discouraged about protecting themselves, and yet they face discrimination every day.

For example, in the schools, some principals ask students or their parents questions that should not be asked. At a school outside of Boston, a principal heard a parent's foreign accent and demanded to be shown a green card from the U.S. Immigration and Naturalization Service. Mr. Navarro said that he did not know whether the principal was ignorant of the law or whether he wanted to harass the parent out of the predominantly white neighborhood. Housing discrimination also happens daily, although landlords are subtle about refusing an applicant and merely quote a high rent or ask about an applicant's credit record, which many undocumented workers do not have, because they do not have social security numbers that are often needed to establish credit records.

Not Reporting Every Incident

Mr. Navarro further remarked that members of one minority group may discriminate against members of a different minority group. He agreed with Mr. Leong about the need for education, and he laid the blame for discrimination between minority groups on a lack of education; "we discriminate against each other because we do not know each other."

However, Mr. Navarro disagreed with those who suggested that every incident of bias ought to be reported. "Every time I get called 'Spic,'. . . I just don't pay attention. I think, really, racism is an illness, and I am not sick. They are sick. They have to look for a cure, not me."

He repeated that everyone should be sensitive to the differences among communities; when conflicts arise, it may not be that the members of one group are mistreating those of another group but that there are cultural differences and language differences. He suggested that a turning point will come when economic opportunities increase for the impoverished and when all people of each ethnic group are educated to the differences among them.

Neighborhood Justice Network

Marisa Jones, the executive director of the Neighborhood Justice Network, explained that the network is a nonprofit organization involved in crime prevention and court issues in Boston. It covers Dorchester, Jamaica Plain, Mattapan, and Roxbury, reaching out to over 2,000 households and working with over 300 crime watch groups.

She related an incident pointing to the need for more education for law enforcement authorities. It involved a woman of color residing with her three children in an apartment complex. A group of white males would voice racial slurs whenever she left or returned to her apartment. She then began calling 911, and the police responded with "sweeps," that is, by clearing the young men away from her building whenever she wished to leave or return.

Although practically living under siege, she was told by the police that they could do no more than carry out "sweeps." After a period of months, the young men began throwing rocks through her windows, a form of assault, said Ms. Walker. The police were then able to make an arrest after someone

witnessed a rock-throwing incident. The Neighborhood Justice Network accompanied the woman when she spoke to an assistant district attorney, and the network argued that after 3 or 4 months of such harassment, the woman had been victimized by having had her civil rights violated. The assistant district attorney, however, advised the woman not to make such a charge but to focus on the rock-throwing.

A second example involved a young boy who happened to be standing in a hallway waiting for a friend. Some police officers saw him and asked him what he was doing there and if he was in possession of any drugs or weapons. Not knowing his rights, the boy pulled down his pants so that the police could search him and verify that he had no drugs or weapons. Ms. Walker characterized this example as one demonstrating that youths must be educated about their civil rights and the CRA.

Student Alliance Against Racism

William Lee, a senior at North Quincy High School and a member of the Student Alliance Against Racism, an organization with chapters in 15 Norfolk County schools, supported what Mr. Leong had stated about immigrant families. When rocks were thrown and broke windows of his family's home just after the family had moved to Quincy, he asked his parents what could be done about it. They responded that "there was nothing we could do. This was something that we just had to endure if we wanted to live in a suburban neighborhood."

He also confirmed that students or youths decline to report civil rights infractions, partly attributing it to the fact that they are wary of adults. At the same time, he added that:

> youths live in their own world, and they have their own type of justice. If a boy beats me because I am Chinese, then I don't go to an authority. I might return the favor by getting a friend, and we'd beat him up.

He recounted an incident in which a group of white students beat up some Chinese students. The victims then called their friends from Chinatown and also were planning to take weapons. Fortunately the district attorney's office heard about the plan and were able to halt it.

Uncertain of Punishment, Unaware of What to Do

Another problem, said Mr. Lee, is that students are not convinced that any punishment will follow. He knew of a black student at a subway station who tried to flee from three white youths armed with a golf club. The black student even ran down the tracks, but a white youth hit him and shattered his elbow. The victim reported the incident to the police, but a year later, the white youths have continued to go unpunished, according to Mr. Lee.

Another friend suffered a broken jaw in an altercation but did not do anything about it because he was unaware of his rights under the CRA. This victim knew that what happened was wrong, but he had no knowledge of what to do. For such reasons, Mr. Lee agreed with the earlier panelists who called for more education. He also reported that the alliance was organized

by the office of the Norfolk County district attorney in the fall of 1989. Its main goal is to educate youths, even in the middle schools, about the issues being aired. An innovative idea suggested by the students themselves is for students to serve as a resource for victimized youths to turn to in reporting civil rights cases instead of their having to go to adults. The students would then decide whether the problem ought to be reported to the authorities or whether the students can serve as mediators for the disputants.

Dorchester Task Force

Faith Walker, the coordinator of the Dorchester Task Force, praised the CRA for its scope and potential, but said that it suffers from deficiencies, some of which lie in the bias of the investigating officer or in the limited knowledge of an officer not sensitive to CRA violations as a specially trained officer of the Boston Police Department's Community Disorder Unit (CDU) would be. In the case of an apparent vandalism or assault and battery, there may have been bias underlying the incident, but it would not necessarily be elicited by the investigating officer if that officer has not directed his or her line of questioning a certain way.

Second, there may be instances in which the officer is unwilling to acknowledge or report the CRA violation as such, due to his or her own personal bias. And there may also be instances where one officer is covering for another who has acted inappropriately in the line of duty. On the other side, there are situations in which the victim is unwilling to report a CRA violation committed against him or her because of cultural differences, undocumented status, fear, discouragement in the face of a predominantly white criminal justice system, and the like.

Moreover, it may prove difficult to identify the perpetrator of the crime who commonly is a stranger to the victim, or both the police officer and the victim may be unable to perceive in the incident the elements of a CRA violation, even if the elements had in fact been present. Ms. Walker then cited a study by a Northeastern University researcher who examined sample incidents handled by the Boston Police Department's CDU. The study indicated that, of over 450 cases, 40 went through the court system and, of those, only 6 "were actually given civil rights charges." Just 5 resulted in prison sentences. Acknowledging the paucity of prison sentences, she still voiced a belief that the incarceration of even one young perpetrator would have a deterrent effect on other youths "because they actually see that there is a law, and it is working, and there is going to be a consequence for the violation."

Panel II Discussion Period

During the discussion, Mr. Perlmutter remarked that some of what Mr. Elisa had said might be interpreted as making Mr. Elisa sound "more concerned with protecting the rights of some hoodlums, than of most of the rights of innocent blacks who are being victimized. . . ." Mr. Perlmutter stated that "I believe in education, but I believe more in enforcement of the laws because by the time you educate a bigot, you are not going to get anywhere . . . ."

A former police officer, Mr. Elisa responded that in the past "we all appreciated a policeman with a firm hand, who understood our community, who walked the beat . . . and knows the people in that community." On the other hand, about 5 years ago, the residents of Roxbury–Dorchester–Mattapan called for the police to come in and stop the proliferation of drugs, prostitution, and numbers betting. The community identified the trouble spots, but the police did nothing.

Advisory Committee vice chairperson Dorothy S. Jones commented that her nephew, an honor student and basketball player who is not a gang member, has been stopped three times in his own neighborhood. Although she was uncertain as to what the effects will be on her nephew, she said that such police conduct has turned other black youths against law enforcement. Committee member Arrington added that she and her husband live in a predominantly white neighborhood of South Hadley and that her husband, who works in the criminal justice system himself, has been stopped and then escorted home by suspicious police.

Supporting Policy of Stop–and–Search

Differing with Mr. Elisa, other panelists, and some Committee members, Ms. Marisa Jones pointed out that the Neighborhood Justice Network has supported the stop–and–search policy because the network is involved with many residents who feel under siege and believe that they have no other recourse. The network encouraged these residents to work closely with law enforcement officials and to share information with them about "negative activity" where they live. However, now that crime watch groups affiliated with the network have been identifying drug and crack houses and the police are not taking any action, the network is opposed to the stop– and–frisk policy.

Differing this time with Mr. Perlmutter, Ms. Jones repeated that education is key to the solution, for community residents have not been aware of the Massachusetts CRA. She added that a function of the network is to demystify the criminal justice system and the CRA so that youths as well as adult community residents are made aware of how the CRA is supposed to protect their civil rights.

Ms. Decter said that she had been to recent meetings where the CRA was discussed in terms of the stop–and–frisk policy and possible action against the police. AJC president David Cohen has stated that the policy had to be ended for it is clearly a violation of a person's civil rights. Ms. Decter added that, "If in fact no one has yet started a complaint action and a case here, . . . perhaps this is something we ought to take a look at together and file [a complaint]. And we would be happy to do that with you."

The City as Defendant

Turning to Mr. Elisa, Ms. Decter said that, when he was speaking earlier, she thought that he was going to suggest that there was a lack of sufficient police protection in his community because the problem was only in the black community. Ms. Decter had expected him to go on to say that civil rights violations affected whole areas of Boston where all people have become afraid

to walk or shop and, thus, she wondered if "maybe we have all been ignoring the possibility of [initiating a major case] under the Massachusetts Civil Rights Act, which may or may not win, but may in fact get a better response than we have seen so far."

Ms. Walker of the Dorchester Task Force observed a possible irony in that the CRA may apparently be utilized against gang member violence and was in fact invoked by a white person who sought to build a tennis court, but the CRA was not able to be marshalled in a situation in which a swastika was drawn, defacing a synagogue. Ms. Decter interrupted Ms. Walker to point out that:

> It wasn't the gangs that I saw as the defendant in the case; I saw the city. What I thought [Mr. Elisa] was doing when he started was suggesting that there was a condition and an atmosphere that had been allowed to develop. . . . It seemed to me that one could suggest that there is coercion here from the city, by failure to deal with these issues appropriately. . . . If you feel that the . . . police have been taking away civil rights, it seems to me that the [CRA] could be used there.

Suits Filed Against Boston Police Department

Ms. Leibowitz of the lawyers committee then noted that the Civil Liberties Union of Massachusetts, assisted by the firm of Burnham, Hines, and Dilday, filed a class action suit[27] alleging numerous causes of action including violations of the CRA. It would address whether there is a Boston Police Department policy or practice of carrying out "unlawful stops and searches or stops and frisks," and it was to be scheduled in the U.S. district court for May.

She added that other organizations and agencies have been taking complaints and that the offices of both the Massachusetts attorney general and the U.S. Attorney General have announced a willingness to take complaints. She believed that numerous complaints already were under investigation. Private organizations taking complaints and advising possible plaintiffs include the Massachusetts Black Lawyers Association and the lawyers committee, which has mobilized an ongoing complaint process.

Stop–and–Frisk v. Stop–and–Search v. Search–on–Sight

Having heard certain terms used interchangeably, Ms. Leibowitz also pointed out the distinctions among stop–and–frisk, stop–and–search, and search–on–sight. Stop–and–frisk is a lawful activity conducted by police during:

> a limited pat–down under the circumstances Mr. Elisa described. What is the allegation is that the stops are exceeding the scope of the frisk, that it is not just a frisk [but] an intrusive search including a strip search, and that

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[27] *Carr* v. *City of Boston*, No. 89-2995 (D. Mass. filed Dec. 22, 1989). According to Ms. Heins of the Civil Rights Division of the Massachusetts Department of the Attorney General, "This case was settled in October 1990 for $100,000 in damage but not injunctive relief." Enclosure sent with Heins Letter.

> the stops are being done improperly, not based on reasonable suspicion, but just on sight. Hence the term "search-on-sight."[28]

Mr. Elisa noted that, according to his understanding of the CRA, the Massachusetts attorney general is obligated to ensure that the constitutional rights of residents are protected.

> But the basic issue of people having the right of safe passage, feeling safe and secure in their own environment, being able to enjoy the benefits of their taxes, or being protected—those basic rights are being denied. I mean someone has to say from some level of government that the State has an obligation to do [its] job. . . . As relates to police doing their job . . . if they don't respect the basic rights of the people they are there to protect . . . unless they respect, and somehow we make them understand that, we are doomed to create a whole sector of society that has no respect for the right or the process of law.

He then suggested that everyone would share in the responsibility for the lawlessness in the communities. To stem such lawlessness, he expressed the hope that everyone would take "a strong . . . advocacy view to set up a RICO [Racketeer Influenced and Corrupt Organizations Act] statute in this State to train and educate the police about what their responsibility is to uphold the Constitution and civil rights of all citizens."

Ms. Decter observed that the RICO statute, originally intended to combat organized crime, has come to be used for other purposes, and thus, can possibly be misused. She had reservations about the RICO statute and cautioned that it is a challenge to make sure that all statutes are used for what they had been designed to do; otherwise, some may lose their effectiveness or hit the wrong target.

Advisory Committee member Reginald L. Johnson commented that there are many disabled people who have not availed themselves of the law against discrimination affecting them. He thought that, just as the disabled need assistance in using a law meant to protect them, so, too, do community residents need to be helped to avail themselves of the CRA. To begin with, some residents believe that pursuing a CRA case will go nowhere; others feel that reprisals will follow, if they lose a CRA suit. For such reasons, he urged that the organizations represented at the forum engage in education, as recommended earlier, and that class action suits be filed to reduce the vulnerability that individuals might feel, were they each to file separately.

SUMMARY

Ten panelists and others addressed the Advisory Committee and offered community perspectives on the Massachusetts Civil Rights Act. In general,

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[28]See also earlier discussion and footnotes on pp. 14-16 above.

they praised the goals and some of the successes which it has attained. Most pointed out, however, that much more public education must be mounted to apprise the population at large and youth, immigrants, and refugees in particular of the CRA's goals and uses. One speaker noted the unique vulnerability of undocumented workers who as refugees fled from countries supported or favored by the U.S. While two other speakers called for the creation of a statewide incident reporting system, there were questions about whether all bias-related incidents should be reported, what sanctions ought to be imposed on youthful offenders, and whether any such sanctions could be codified.

Some speakers noted the lack of knowledge about the CRA among law enforcement officials and the judiciary, and a few indicated that individuals involved in law enforcement or serving the judiciary may even discourage potential plaintiffs from availing themselves of the protection of the CRA. At the same time, it was learned that usage of the CRA has been expanded by, for example, those invoking the CRA in an artist's contractual dispute over a musical performance and in a homeowner's dispute with a neighbor over the construction of a tennis court.

Meanwhile, charges were made that a Boston Police Department area head has been remiss in allowing violations of the civil rights of some minority youths who are stopped and searched without reasonable suspicion and that some police are not pursuing leads provided by neighborhood residents on the location of drug and crack houses and other sites of illegal activities. In November and December 1990, such charges were commented upon by representatives of the Massachusetts Department of the Attorney General and the Boston Police Department who viewed the issue from different perspectives and offered supplementary information. In December 1990 the State Attorney General's office issued a report concluding that some Boston police had engaged in improper and unconstitutional conduct.

At any rate, the phenomena alleged in the charges made by some forum speakers may contribute to the state-of-siege outlook perceived by at least some residents of minority communities. Discussion during the forum also touched upon possibly using the CRA to counter police coercion in unwarranted stop–and–search incidents or bringing class action suits to halt such practices.

After reviewing a draft of the summary report of the forum, the Advisory Committee unanimously voted to submit it to the Commission.

APPENDIX

ACTS, 1979. - Chap. 801.

Chap. 801. AN ACT FOR THE PROTECTION OF THE CIVIL RIGHTS OF PERSONS IN THE COMMONWEALTH.

Be it enacted, etc., as follows:

SECTION 1. Chapter 12 of the General Laws is hereby amended by inserting after section 11G, inserted by section 51 of chapter 353A of the acts of 1977, the following two sections:

Section 11H. Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person or persons whose conduct complained or reside of have their principal place of business.

Section 11I. Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

SECTION 2. Chapter 265 of the General Laws is hereby amended by adding the following section:

Section 37. No person, whether or not acting under color of law, shall by force or thereat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the commonwealth or by the constitution or laws of the United States. Any person convicted of violating this provision shall be fined not more than one thousand dollars or imprisoned not more than one year or both; and if bodily injury results, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both.

Approved November 16, 1979.