

ANTI-DEFAMATION LEAGUE

OF B'NAI B'RITH

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MEMORANDUM

To: National Legal Affairs Committee
From: Steven M. Freeman & Livia D. Thompson
Date: May 26, 1989
Subject: Miller v. Schaefer

We are pleased to share with you a copy of the amicus brief recently filed in Miller v. Schaefer, a case now pending before the Court of Special Appeals of Maryland. ADL argues that the trial court erred in denying the defendant's motions for a mistrial or, in the alternative, for a new trial because counsel for the plaintiff improperly introduced the issue of religion into the proceedings.

The defendant, a Jewish doctor, was charged with medical malpractice in a case involving a cataract operation. The case was tried before a jury in June 1988. During the examination of the defendant by plaintiff's counsel, he was asked about his religious instructors and synagogue attendance. The defense counsel objected to the questions and sought a mistrial on the grounds that plaintiff's counsel improperly introduced religion into the proceedings. The trial court denied the request.

The plaintiff's counsel then examined his own expert witness and asked whether it was standard for ophthalmologists to visit nursing homes for the elderly on "the Lord's day." The defense counsel objected to the reference to "Lord's day" and again sought a mistrial. The court denied the motion but warned the plaintiff's counsel that the cumulative effect of the references to religion may have an effect on the jury and that he was close to granting a mistrial.

The next day the plaintiff testified and plaintiff's counsel showed the jury the plaintiff's baptismal certificate as proof of age, even though the plaintiff's age was not an issue in the case. The defense counsel objected, arguing that it was improper for plaintiff's counsel to introduce a religious document into the proceedings when neither plaintiff's age nor her religion was at issue. The defense counsel's motion for a mistrial was denied.

At the conclusion of the testimony, the court instructed the jury that matters of race and religion should be excluded from its consideration. The jury awarded the plaintiff substantial compensatory and punitive damages. The defendant then brought this appeal to the Court of Special Appeals, asserting, among other claims, that plaintiff's counsel improper injection of the issue of religion into the proceedings had denied defendant a fair trial.

ADL's amicus brief argues that under the Federal Constitution and the Maryland Constitution all citizens are entitled to a fair trial as a basic requirement of due process. The courts must ensure that the impartial role of juries in our judicial system is not threatened by racial or religious prejudice. The brief argues that plaintiff's counsel's repeated improper references to religion denied the defendant his due process rights. The brief seeks a declaration by the court that whenever intentional and repeated references are made to religion, in a proceeding where religion is not an issue, prejudice will be presumed.

The brief argues that other courts have ordered new trials where appeals to religious prejudice prevent a fair trial. ADL acknowledges that the trial judge is entitled to exercise his discretion and there will be a reversal only in the exceptional case. However this case -- where there were repeated improper interjections of religion into the trial, despite the warnings by the court -- constitutes an exceptional case and reversal is warranted.

The brief next argues that references to racial and religious prejudices are so inflammatory that their harmfulness cannot be eliminated by retraction or instructions by the trial judge. Plaintiff's counsel introduced all three references to religion to highlight for the jury the different religions of the plaintiff and defendant. Other courts have granted mistrials in cases involving anti-Semitic remarks by individual members of the jury. ADL argues that the repeated references to religion could result in the jury deciding the issue on an incorrect basis and any instruction by the court to the jury to ignore references to racial and religious prejudice would be of little benefit.

Lastly, the brief argues that the integrity of the judicial system is at risk if a jury's verdict is based on racial and religious bias. Such a verdict can only undermine the public's confidence in the system and its guarantee of a fair and impartial trial.

The brief concludes that the Court of Special Appeals should reverse the judgment of the trial court and grant a new trial.

cc: Regional Directors

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM 1988

No. 1630

GERALD A. MILLER, M.D.,
Appellant

v.

AMELIA R. SCHAEFER,
Appellee

Appeal from the Circuit
Court for Baltimore,
Maryland
(Hon. Robert I. H. Hammerman, Judge)

Brief For Amicus Curiae
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Anti-Defamation League of B'nai B'rith

STATEMENT OF THE CASE

On March 1, 1989, this Court granted the motion of the Anti-Defamation League of B'nai B'rith ("ADL") for permission to file a brief as amicus curiae. The ADL will address the issue of whether the trial court erred in failing to grant defendant's (appellant's) motions for mistrial or a new trial, based on the improper injection of the issue of religion into the proceedings by counsel for the plaintiff (appellee). ADL as amicus curiae adopts the Statement of the Case contained in appellant's opening brief.

The ADL is a human relations agency founded in Chicago in 1913. Its purpose then and now is to stop the defamation of the Jewish people and to secure justice and fair treatment for all persons. The ADL is dedicated in its purpose and program to making this country's democratic ideals a way of life for all.

The ADL has 31 regional offices in the United States, as well as European offices in Paris and Rome, an Israel office in Jerusalem and affiliated offices in Latin America and Canada. The Civil Rights division of the ADL participates in efforts involving the legislative and judicial systems, including the filing of amicus briefs, to protect the rights of Jews and other minority groups. The ADL believes in this case that the conduct of counsel for the plaintiff had either the purpose of or the substantial potential of biasing the jury against the defendant (appellant) because he is a Jew, and therefore sought the permission of the court to address this important concern.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR A MISTRIAL AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, BASED ON THE IMPROPER INJECTION OF THE ISSUE OF RELIGION INTO THE PROCEEDINGS BY COUNSEL FOR THE PLAINTIFF.

STATEMENT OF FACTS

This medical malpractice case involving a cataract operation was tried to a jury from May 31 to June 16, 1988. On the third day of testimony, while defendant was testifying as an adverse witness in plaintiff's case, the following occurred during examination by plaintiff's counsel:

- Q. But you were taught to tell the truth as a child--
A. Right.
Q. -- by your parents and by your religious instructors?
MR. WEISS: Objection.
A. That's true.
THE COURT: Overruled.
Q. And it took you until --
THE COURT: I will sustain the objection as to religious instructors. There's no testimony about that.
Q. All right. Now, sir, did you have training in school with regard to telling the truth and in the synagogue?
MR. WEISS: Your Honor, I object. Can we approach the bench?
MR. O'DOHERTY: I'll withdraw the question then.

Q. Let me just say this to you. Are you aware this late in your life when you said not in protest now that the truth is the truth is the truth, are you aware of newspaper accounts every day that when people are sentenced to death row or severe punishment by our system that they come into court holding the bible and they all get religion when they want something else out of society?

MR. WEISS: I object, Your Honor.

THE COURT: Sustained. (E. 313-314)

Defense counsel moved for a mistrial, charging that these questions were asked "for the sole purpose of prejudicing the jury to communicate my client's religion to the jury, which has nothing to do with this case . . . and was done just for that purpose to bring religion to prey on the people in the jury who continue to hold to stereotypes with respect to Jews . . . who lie and Jews with large economic assets and I think these stereotypes are alive in this community" (E. 317).

The court denied the motion (E. 323-334), for two reasons. First, it "never struck" the court that this exchange was intended "to tap some latent prejudices" (E. 324), although the court conceded these prejudices "are very much alive" (E. 324); and that Mr. O'Doherty was "obviously trying to put the defendant before the jury in the most unfavorable context he possibly could" (E. 325). However, the court noted that it "was not happy with that question" [referring to the synagogue]; that one of the reasons it sustained the objection was that "I thought Mr. O'Doherty should have understood that

any reference to religion is one I wasn't going to allow" (E. 328); that "I can't deny" that "some members of the jury may have looked at it differently, that they might possibly have seen it on the type of negative light that Mr. Weiss [defense counsel] is suggesting" (E. 330-331); and that Mr. O'Doherty may very well have been deliberately and calculatedly asking questions he knew were improper (E. 333-334).

The second reason given for the court's denial of defendant's motion for a mistrial was the court's personal knowledge and estimate of Mr. O'Doherty, (E. 330-334); the court's observation that many of Mr. O'Doherty's friends and legal associates are Jewish (E. 332); and particularly the strong faith of the court, "perhaps in my own naivete . . . in the integrity of lawyers when they are speaking as officers of the court" (E. 333).

Mr. O'Doherty's next witness was his expert, Dr. Gleicher. Defendant had testified that he was a dedicated physician who sometimes, after working all week, made nursing home visits on Sunday (E. 697). The following occurred in Mr. O'Doherty's examination of his own expert:

Q. Okay, now is there a standard in the profession for ophthalmologists to visit

nursing homes on the Lord's day and tell all those old folks they got cataracts and if they are not treated, they will go blind?

MR. WEISS: Objection, Your Honor.

THE COURT: Sustained (E. 470-471).

Mr. Weiss thereupon approached the bench and again moved for a mistrial (E. 471-479), pointing out that "I don't think the Lord has anything to do with this. I don't think religion has anything to do with this and here he is, after we had a lengthy Motion for Mistrial regarding religion, here he is mentioning religion again, just to remind the jury, to re-emphasize the fact that he was doing this" (E. 471). The court "definitely" agreed with defense counsel that "you are introducing a religious suggestion here . . . a religious element that just does not belong in the case" (E. 473). The court further agreed "that you know full well as an experienced trial attorney that this was a very objectionable question, not a proper question," and stated:

What is of concern to me now is the cumulative impact that questions like this might have. . . . I can see an impact here on the jury with questions like this, ones that cannot be expunged by just words from you or words from me. We're getting close to the edge where there could very well be a mistrial. I'm giving you that caution now. So let that guide you. (E. 474-475).

The court also observed that Mr. O'Doherty "feels an attachment" to an older man who is a "former judicial figure, . . . [an] Orthodox Jew, who is very, very active in Jewish matters, who occupies a role in the Jewish community," to whom Mr. O'Doherty "feels perhaps closer . . . than he did his own father and looks upon him in that vein" (E. 479-480).

The next day, plaintiff herself testified. There was no dispute about her age. Nevertheless, at the very beginning of the direct examination of plaintiff, immediately after asking her birthdate, Mr. O'Doherty asked the plaintiff if she had brought her baptismal certificate at his request (E. 532-533). Mr. O'Doherty produced the certificate in front of the jury, presented it to the witness, and asked her to state the place where the certificate was issued, her date of birth, and her mother's name (E. 533). Although Mr. O'Doherty produced the certificate in front of the jury, he stated that he did not intend to introduce it into evidence (E. 533).

Defense counsel immediately once again moved for a mistrial (E. 534-535), objecting that the Hopkins record was not in evidence, that plaintiff's date of birth was never in issue, and that in any event it did not need to be proved by a "very pretty baptismal certificate . . . which shows some

Biblical figure in a portrait bearing what looks to me a staff in the shape of a cross" (E. 534), since plaintiff had a driver's license that stated her date of birth (E. 538). Mr. O'Doherty admitted both that the plaintiff did have a driver's license and that he knew that she had a driver's license (E. 538).

The court said "I do fault Mr. O'Doherty for what he's done in this connection" because (1) "there is no evidence here at all as to Mr. Weiss questioning the age of your client" (E. 539) and that if Mr. Weiss had been asked, "I'm sure he would have said he would stipulate to her age" (E. 539); (2) Mr. O'Doherty provided an opportunity for at least some of the jurors to see the baptismal certificate (E. 539); and (3) there was "absolutely no need to show her the baptismal certificate in the context of this case. Absolutely no need to show it" (E. 539). Nevertheless, the court denied a mistrial because the court did not believe that Mr. O'Doherty was "trying to inject religion into the case" (E. 539), but rather was attempting to "inject a favorable climate into the case for [his] client" by picturing her as "a saint among saints" (E. 539-540).

The court gave the jury the standard instruction at the very end of the case that all persons stand equal before the law and are entitled to the same treatment under the law; and that matters such as race, religion, political or social views, wealth or poverty "should be completely excluded from your consideration and I know they will be" (E. 874).

The jury awarded plaintiff \$350,000 compensatory damages, and \$750,000 punitive damages (E. 26). Plaintiff filed a consent to a remittitur of compensatory damages from \$350,000 to \$50,000 (E. 30). The court refused to disturb the award of punitive damages (E. 980-985), and judgment was entered against defendant for \$50,000 compensatory damages and \$750,000 punitive damages (E. 5).

ARGUMENT

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR A MISTRIAL AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, BASED ON THE IMPROPER INJECTION OF THE ISSUE OF RELIGION INTO THE PROCEEDINGS BY COUNSEL FOR THE PLAINTIFF.

The most fundamental principle of our jurisprudence is that every citizen, regardless of race or religion, is entitled to due process and equal justice under the law. A "fair trial in a fair tribunal" is a basic requirement of due process guaranteed by the Fourteenth Amendment to the Federal Constitution.^{1/} Crawford v. State, 285 Md. 431, 451-52 (1979), quoting, In re Murchison, 349 U.S. 133, 136 (1955). The Maryland Constitution Declaration of Rights also provides that no one may be deprived of "life, liberty, or property, but by the judgment of his peers, or by the Law of the land."^{2/}

^{1/} "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, §1.

^{2/} Md. Const. Declaration of Rights, art. 24. The Maryland Court of Appeals has equated the phrases "law of the land" and "due process of law." Horace Mann League of the United States v. Board of Public Works, 242 Md. 645, appeal dismissed, 385 U.S. 97 (1966).

The judiciary has a constitutional mandate to ensure equality and fairness in the judicial process, and must remain vigilant in its responsibility. United States v. Heller, 785 F.2d 1524, 1527 (11th Cir. 1986). Racial or religious prejudice in the judicial context prevents the impartial decisionmaking based solely on the facts and law that our jury system requires. Id. In the present case, plaintiff's counsel's repeated improper references to religion denied defendant his due process right under state and federal constitutional law to a fair and impartial trial.

A. ANTI-SEMITISM IN AMERICA

Despite longstanding and continual efforts, both by legislative enactments and by judicial decisions, to purge our society of racial and religious prejudice, both racism and anti-Semitism remain "ugly malignancies sapping the strength of our body politic." Heller, at 1527. Of particular concern in recent years has been the resurgence and proliferation of "hate groups," including neo-Nazi Skinheads, White Aryan Resistance, and the Ku Klux Klan. The 1988 ADL Audit of Anti-Semitic Incidents showed the highest number of such incidents reported in more than five years: 823 episodes of vandalism and desecration, and 458 acts of harassment, threats and assaults

against Jewish individuals, their property, and institutions.^{3/} The 1988 incidents represent a 26% increase over 1987. Incidents were reported in 40 states, and the District of Columbia and Puerto Rico. Maryland had the fifth largest number of anti-Semitic vandalism incidents in the nation (36).^{4/}

Such "hate crimes" are, of course, extreme manifestations of prejudice, but Jews and other minorities are often the victims of more subtle practices, such as negative stereotyping. After Hour Welding v. Laneil Management, 324 N.W.2d 686, 690 (Wis. 1982). Anti-Semitic stereotypes and prejudices cause people to assume that all Jews possess certain undesirable characteristics, and influence their behavior toward Jews.

The frequency and pervasiveness of anti-Semitic behavior in 1988 is a dramatic example of just how deeply imbedded are the roots of anti-Semitism in the United States. The ADL, of course, has no way of reading the minds of the jury in this

^{3/} 1988 Audit of Anti-Semitic Incidents, Anti-Defamation League of B'nai B'rith (1989).

^{4/} Id. Pages 3 through 19 of the 1988 Audit, as well as Appendices C and E, are included as an Appendix to this Brief.

case. Nevertheless, a five year study conducted for the ADL by the University of California Research Center demonstrates that anti-Semitic attitudes and beliefs are still strongly held by members of the general public. ^{5/} Given these facts about anti-Semitism in the United States and in Maryland, this Court should declare that whenever counsel for a party deliberately injects the Jewishness of another party into a civil trial, he does so at his peril. This Court should adopt a rule which recognizes that whenever intentional and repeated references are made to religion in circumstances such as this case, where religion was not an issue and the Christianity of the plaintiff was played off against the Jewishness of the defendant, prejudice will be presumed. The introduction of a religious issue into a civil trial where it has no relevance to any legitimate issue in the case is clearly the type of improper conduct which prevents a fair trial.

B. THE COURTS HAVE ORDERED NEW TRIALS WHERE APPEALS TO RELIGIOUS PREJUDICE PREVENT A FAIR TRIAL

The persistence of prejudice in our society emphasizes the need for courts to ensure that verdicts have not been compromised by jurors who harbor prejudice toward any

^{5/} The study was published in eight volumes. The conclusions of the total study are contained in Anti-Semitism In America, H. Quinley and C. Glock (Free Press, 1979).

minority. After Hour Welding, at 690. The choice of methods to protect the fair and unprejudiced workings of judicial proceedings customarily is left to the discretion of the trial judge, and will be reversed only in the exceptional case. DeMay v. Carper, 247 Md. 535, 540 (1967). Courts will interfere, however, where the irregularity appears to be such as to prevent a fair trial. Wernsing v. General Motors Corp., 298 Md. 406 (1984); see also Crawford, at 451 ("But even though a trial judge 'runs the court,' the right . . . to a fair trial, although not a perfect trial, is paramount") and Ferry v. Cicero, 12 Md. App. 502, 509 (1971) ("Had a motion for mistrial been made and denied, we would have reversed for an abuse of discretion" where counsel referred to inadmissible evidence and made other improper remarks to the jury.) The repeated improper interjections of religion into the trial at issue, despite objections from counsel and several warnings by the court, constitute an "exceptional" case in which the lower court's refusal to grant the requested relief denied the defendant a fair trial.

In Texas Employers' Insurance Association v. Jones, 361 S.W. 2d 725, 726 (Tex. Ct. Civ. App. 1962), the judgment of the trial court was reversed based on several improper remarks, including plaintiff's counsel's reference to defendant's expert

as "that Jew," and an implication that the expert would give false testimony for money. These remarks were deemed an "appeal to racial and religious prejudice in language clear and strong." Id. at 727. The court found the nature of this argument "so inflammatory and prejudicial that its harmfulness could not have been eliminated by retraction or instruction, or both; and that same was reasonably calculated to and probably did result in an improper verdict and judgment, and requires a reversal." Id.

In the case before this Court, plaintiff's counsel's repeated references to religion clearly constituted an appeal to potential prejudices and biases on the part of the jurors. Although the religious backgrounds of the participants in the trial had absolutely no relevance to any legitimate, substantive issue in the case, plaintiff's counsel made certain that the jury was aware that defendant was Jewish and plaintiff was Christian.^{6/}

First, Mr. O'Doherty asked about the defendant's training in the "synagogue." This was clearly an improper question, as the court had just sustained an objection to a reference to

^{6/} It does not appear that there were any Jews on the jury. Plaintiff's counsel struck from the venire a Jewish sabbath observer who had to leave on Fridays before 4:30 p.m. (E. 56) and whose mother was a nurse at Sinai Hospital (E. 58-59).

"religious instructors" on the grounds that it assumed facts not in evidence (E. 327-328). Nevertheless, the question effectively communicated to the jury the fact that Dr. Miller is Jewish. The court itself observed that the purpose of the question was "to put the defendant before the jury in the most unfavorable context" (E. 325).

Second, Mr. O'Doherty's reference to the defendant visiting nursing homes on the "Lord's Day" (E. 470) appealed to anti-Semitic stereotypes of Jews as being money-hungry and engaging in "sharp" practices. Dr. Miller was portrayed as "hustling business" even on the (Christian) holy day of rest and worship, thus demonstrating a vulgar contempt for Christian religious traditions. The question also subtly reinforced to the jury that Mr. O'Doherty acknowledged Sunday as the "Lord's Day", but that Dr. Miller did not.

Finally, Mr. O'Doherty produced in front of the jury an ornate Baptismal certificate belonging to the plaintiff, although plaintiff's date of birth was not at issue (E. 532-534). The court agreed with defense counsel that there was "absolutely no need" to show the witness her baptismal certificate (E. 539). The production of the baptismal certificate placed before the jury the extraneous fact that the plaintiff was a Christian, for no other purpose than to highlight for the jury that this case pitted an elderly Christian woman against a Jewish doctor.

Courts are sensitive to the cumulative effect of improper remarks which, "one by one, locate a feeling in the minds of the jury [that is] impossible to eradicate." Schotis v. North Coast Stevedoring Company, 1 P.2d 221, 227 (1931); see also Jones, supra. In Schotis, counsel made repeated and persistent appeals to racial and religious prejudice against Japanese. The court cited its own remarks in an earlier case:

However intelligent, impartial, and honest jurors may be they, of course, find it difficult to decide correctly and fairly the complicated questions of facts submitted to them in a lawsuit, without their being influenced and disturbed by what naturally appeals to passion and prejudice. . . . It is the cumulative effect of improprieties that is involved. They were grave departures from the rule of a fair and impartial trial that could be attempted to be overcome only by the sometimes dangerous expedient or method of constant objections by counsel in the presence of the jury, and admonitions by the court.

1 P.2d at 226, quoting McSweyn v. Everett, 239 U.S. 205, 206 (1925).

Maryland's highest court has held that where counsel made repeated references to the defendant's prior arrest after such evidence had been excluded by the trial court, the defendant "was in effect denied the protection of rulings of the court [because] evidence not to be considered in the decision of the issue being tried was persistently given to the jury by counsel

and its damaging tendency enlarged upon . . . " Nelson v. Seiler, 154 Md. 63, 72-73 (1972). This conduct by counsel was held to be prejudicial to the defendant "in such a degree that it vitiated the trial beyond cure by cautionary instruction," so that the trial court's refusal to grant a continuance was held reversible error. Id.

The cumulative effect of the deliberate and repeated references to religion in the present case resulted in a jury verdict which could have been based in part on extraneous, irrelevant, and inflammatory "facts" not in evidence. Plaintiff's counsel persisted in injecting the issue of religion into the trial even after being admonished by the court several times and advised that he was "close to the edge" of a mistrial. The outrageous unfairness of such tactics was noted in all of the cases discussed above, and was particularly well stated by the Schotis court:

[I]f the first departure of counsel may have been rendered harmless, the second outbreak could not have been inadvertent, but was without any excuse, and can only be regarded as a purposed violation of the admonition of the court and an attempt to gain an advantage in a court of justice by a known wrong.

1 P.2d at 227.

Such appeals to prejudices and widely-held negative stereotypes about Jews as occurred in this case are, by their very nature, difficult or impossible to "cure" with an instruction or other intervention by the court. See Jones and Schotis, supra. Any attempt to dismiss the improper remarks from the minds of the jurors only would have focused greater attention on the remarks and reinforced the fact that defendant is part of an often-maligned minority group. Defendant was effectively denied the protection of the court's rulings on defense counsel's objections, and the court's admonishments to plaintiff's counsel on the issue of religion, because the court's warnings were largely ignored by Mr. O'Doherty. The only measure of protection available to defendant was a mistrial; therefore, the trial court's refusal to grant a mistrial constitutes reversible error. See Nelson v. Seiler, supra.

The potential for a jury's decision to be influenced by racial and religious prejudice so fundamentally impairs the right to a fair trial that a new trial must be ordered if there is any possible effect on the jury's deliberations or verdict. See Heller, supra, at 1527 (mistrial was warranted where anti-Semitic "joking" by jurors was "potentially so damaging to public confidence in the equity of our system of justice, that [courts] must act decisively to correct any possible harmful

effects"); After Hour Welding, supra, at 692 (judgment reversed where one juror's reference to an officer of a defendant corporation as a "cheap Jew" might have affected a hypothetical average juror). In the present case, Judge Hammerman acknowledged that it is "possible" that some members of the jury may have seen Mr. O'Doherty's religious references in the "negative light" that defense counsel suggested (E. 33). Since such remarks may have affected the jury, justice requires that a new trial should have been ordered.

The trial court's consideration of what it believed to be Mr. O'Doherty's personal attitudes toward Jews constitutes a basic flaw in the court's analysis of defendant's motions for a mistrial. As the court noted initially but later seemed to disregard (E. 321-334), Mr. O'Doherty's beliefs and attitudes about Jews are not at issue in this case. His tactic of repeatedly introducing religion into the trial played on negative stereotypes and prejudices that jurors could have toward Jews, regardless of whether Mr. O'Doherty himself might share such views.^{6/} Accordingly, by focusing on its own

^{6/} The ADL does not know Mr. O'Doherty's views. However, his response to the motion of the ADL to file an amicus brief in this case demonstrates, at a minimum, total insensitivity on his part to the issue of religious prejudice and stereotyping. Mr. O'Doherty referred to the interest of the ADL in filing an amicus brief as a defamatory "tarbrush tactic" based on "rabble rousing charges," comparable to the Ayatollah's death sentence on the author of the Satanic Verses.

assessment of Mr. O'Doherty's character and reputation as a trial lawyer (E. 330-334) and its observation that Mr. O'Doherty has friends and colleagues who are Jewish (E. 332), the court failed to properly evaluate the effects of Mr. O'Doherty's remarks on the jury and, consequently, on the defendant's due process right to a fair trial. The issue before the trial court was not Mr. O'Doherty's friends, but his tactics.

Religious prejudices can be overt, as in the case of the "hate crimes" reported by the Anti-Defamation League. Such prejudices can also be hidden, deeply felt but unacknowledged. In light of the persistent and perhaps escalating level of prejudice and bigotry in our society, courts cannot assume that jurors will be able to completely "turn off" their sensibilities and be immune to trial tactics which improperly appeal to widely-held prejudices against particular groups. Furthermore, given the complicated nature of religious prejudices, it is virtually impossible to gauge the effect of an appeal to these prejudices.

Litigants in Maryland courts should not have to run the risk of the existence of religious prejudices and biases on the part of jurors when an appeal to such prejudices is deliberately and repeatedly injected into a trial by extraneous references to the religion of the parties, as it was in this case. Appeals to

religious prejudices and negative stereotypes have no legitimate place in a court of law; counsel should never be permitted to gain an advantage for a client at the expense of his opponent's right to a fair and impartial trial. The only way to ensure that a jury's verdict has not been affected by counsel's improper remarks in cases such as this one is to order a new trial whenever such objectionable tactics have been employed. In our system of justice, it is far better to place a greater burden on the resources of the courts by granting a new trial than to allow even one litigant to receive a verdict which is tainted by religious prejudice.

In holding that the systematic exclusion of women from a jury panel constituted reversible error, even without a showing of prejudice in an individual case, the Supreme Court stated that:

[t]he injury is not limited to the defendant -- there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

Ballard v. United States, 329 U.S. 187, 195, (1946). The Supreme Court has reached exactly the same conclusion with respect to the systematic exclusion of Blacks from a petit jury. Batson v. Kentucky, 476 U.S. 79 (1986). In Batson, the Supreme Court specifically recognized that a prosecutor in a

particular case violates the Constitutional rights of a black criminal defendant when he uses peremptory challenges to strike black jurors solely on the assumption that black jurors as a group will be unable to consider impartially the State's case. No burden of showing prejudice is placed on the defendant in this circumstance. While these jury selection cases are not directly on point, they are important because they establish that the right to a fair trial, not tainted by discrimination or prejudice or reliance on prejudicial stereotyping, is of paramount importance in our judicial system.

In the case at bar, plaintiff's counsel's attempts to influence the jury against the defendant by appealing to widely-held anti-Semitic prejudices caused injury far beyond the denial of this defendant's right to a fair trial. The possibility of a verdict based, even in part, on racial and religious bias is utterly offensive to the judicial process and severely undermines public confidence in the courts. A new trial is required in this case in order to assure due process under the law for this defendant, and to guard against the subtle undermining of the right of all persons to a fair and impartial trial.

CONCLUSION

Based on the foregoing reasons, the Anti-Dafamation League of B'nai B'rith requests that this Court reverse the judgment of the court below and grant a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of March, 1989, a copy of the foregoing Brief of Amicus Curiae was hand delivered to (1) Melvin J. Sykes, Esquire, 310 Maryland Bar Center, 520 West Lafayette Street, Baltimore, Maryland 21201, attorney for Gerald A. Miller; and (2) Patrick A. O'Doherty, Esquire, O'Doherty, Nead & Hoffmann, Suite 800, Ten East Baltimore Street, Baltimore, Maryland 21202, attorney for Ameilia R. Schaefer.

Kathryn Kelley Hoskins

the precondition of arbitration in the Health Care Malpractice Claims Act. *Attorney Gen. v. Johnson*, 282 Md. 274, 385 A.2d 57, appeal dismissed, 439 U.S. 805, 99 S. Ct. 60, 58 L. Ed. 2d 97 (1978).

Article 24. Due process.

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land. (1977, ch. 681, ratified Nov. 7, 1978.)

- I. General Consideration.
- II. Police Power.
- III. Taxation.
- IV. Illustrative Cases.

Cross References.

See articles 5, 19 and 21 of the Declaration of Rights and article III, §§ 29 and 40, of the Constitution.

I. GENERAL CONSIDERATION.

Maryland Law Review. — For note discussing the degree of nondisclosed evidence sufficiently exculpatory to constitute a denial of due process, see 26 Md. L. Rev. 62 (1966).

For article, "Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland," see 35 Md. L. Rev. 414 (1976).

For survey of Court of Appeals decisions on search and seizure law for the year 1974-1975, see 36 Md. L. Rev. 429 (1976).

For article discussing mechanics' liens in Maryland, see 36 Md. L. Rev. 733 (1977).

For comment, "Gasoline Marketing Practices and 'Meeting Competition' Under the Robinson-Patman Act: Maryland's Response to Direct Retail Marketing by Oil Companies," see 37 Md. L. Rev. 323 (1977).

For article, "Douglas v. Seacoast Products, Inc.: The Legal and Economic Consequences for the Maryland Oyster," see 38 Md. L. Rev. 1 (1978).

University of Baltimore Law Review. — For note discussing Maryland's Anti-Residential Picketing Statute, see 7 U. Balt. L. Rev. 107 (1977).

For note, "Rape and Other Sexual Offense Law Reform in Maryland, 1976-1977," see 7 U. Balt. L. Rev. 151 (1977).

For article, "State Constitutional Law for Maryland Lawyers: Individual Civil Rights," see 7 U. Balt. L. Rev. 299 (1978).

For article, "The Maryland Rules — A Time for Overhaul," see 9 U. Balt. L. Rev. 1 (1979).

For comment discussing the constitutionality of medical malpractice mediation panels, see 9 U. Balt. L. Rev. 75 (1979).

Purpose of article. — The object of article 21 and this article of the Declaration of Rights

was to declare and secure the preexisting rights of the people as those rights had been established by usage and the settled course of law. *Lanasa v. State*, 109 Md. 602, 71 A. 1058 (1909).

"The law of the land". — The words "by the law of the land" (copied from Magna Charta) mean due process of law according to the course and process of the common law. *Wright v. Wright's Lessee*, 2 Md. 429 (1852).

The phrase "law of the land" is equivalent to the words "due process of law" as used in the United States Constitution. *Baltimore Belt R.R. v. Baltzell*, 75 Md. 94, 23 A. 74 (1891); *Solvuca v. Ryan & Reilly Co.*, 131 Md. 265, 101 A. 710 (1917); *In re Easton*, 214 Md. 176, 133 A.2d 441 (1957).

By "the law of the land" is meant, by the due course and process of the law — the general law, prescribed and existing as a rule of civil conduct, relating to the community in general, judicially to be administered by courts of justice. *Regents of Univ. of Md. v. Williams*, 9 Gill & J. 365 (1838).

The Maryland Court of Appeals has construed "law of the land," as those words appear in this article, to be synonymous with "due process of law," as that phrase is used in the Fourteenth Amendment. *McIver v. Russell*, 264 F. Supp. 22 (D. Md. 1967).

The Court of Appeals has equated the phrases "law of the land" and "due process of law." *Horace Mann League of the United States of America, Inc. v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51, cert. denied, 385 U.S. 97, 87 S. Ct. 317, 17 L. Ed. 2d 195 (1966).

The words and content of this article are derived from the Magna Charta and are equivalent to "due process" as that term is used in the Fourteenth Amendment. *Sanner v. Trustees of Sheppard & Enoch Pratt Hosp.*, 278

Amend. XIII, § 1 ANNOTATED CODE OF MARYLAND

[AMENDMENT XIII]

Section 1.

[Abolition of Slavery]

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

[Power to Enforce This Article]

Congress shall have power to enforce this article by appropriate legislation.¹²

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

[Apportionment of Representatives in Congress]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

12. Proposed by Congress on January 31, 1865, and declared ratified on December 18, 1865.



**1988 ADL Audit of
Anti-Semitic
Incidents**

**Including
*A Decade's
Perspective:*
1979-1989**

Anti-Defamation League of B'nai B'rith

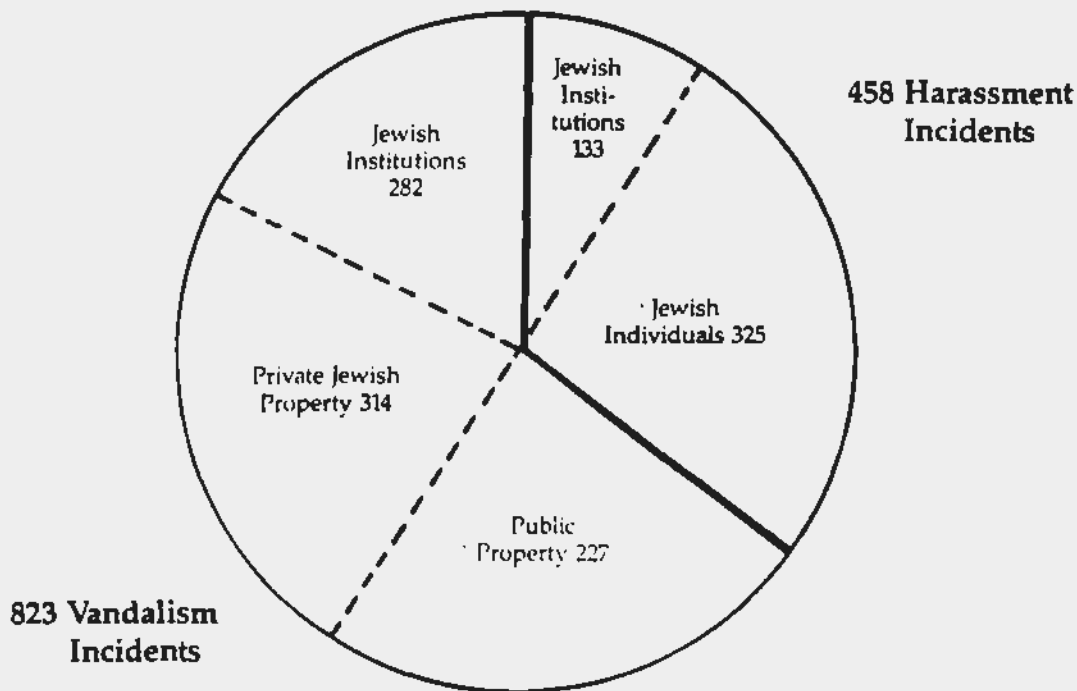
1988 ADL Audit of Anti-Semitic Incidents

Introduction

During 1988, 823 episodes of vandalism and desecration, and 458 acts of harassment, threat and assault against Jewish individuals, their property and their institutions resulted in the highest number of anti-Semitic incidents reported in more than five years. Incidents included in this Audit were reported to the Anti-Defamation League between December, 1987, and December, 1988, from 40 states, plus the District of Columbia and Puerto Rico.

The 1988 vandalism figure represents an 18.5% increase over the 694 of 1987; the 1988 harassment figure—the second highest in any ADL survey—reflects a 41% increase over 1987, when there were 324 such acts reported.

This is the second straight year of substantial increase in anti-Semitic vandalism after a general four-year downward trend (1983-86). Prior to that time, 1981 with 974 such acts and 1982 with 829 were and continue to be the years of highest vandalism activity noted in the ADL surveys. (See graph, Appendix C.)



1988 Anti-Semitic Incidents

Significant Increase—Five Important Factors

Five notable factors apparently played an important role in the 1988 increase in anti-Semitic incidents:

- (1) neo-Nazi Skinhead gangs proliferated around the country and were involved in numerous attacks on Jewish targets;
- (2) the widely publicized observance of the 50th anniversary of *Kristallnacht*, Nov. 9—10, (when anti-Semitic mobs destroyed synagogues and Jewish property throughout Germany and Austria) was associated with dozens of incidents;
- (3) a large number of episodes were linked to the "uprising" by Palestinians in the West Bank and Gaza;
- (4) a significant increase in campus anti-Semitic incidents was recorded, including serious acts of vandalism as well as individual and group harassment of Jewish students;
- (5) an unusually large number of incidents occurred in the South, including states having very small Jewish populations.

On a more positive note, 5 more states passed laws dealing with hate crimes. A total of 43 states now have such laws in some form. (See p. 29, "Hate Crimes and the Law.")

Skinheads

An especially troubling factor this year was the continuing spread of neo-Nazi "Skinhead" activity around the country. Responsibility for 41 anti-Semitic incidents in at least 15 states was either claimed by or attributed to Skinhead elements. The year before, 12 incidents in six states fell into that category. ADL has been actively monitoring this violent movement. (See below.)

—from "Young and Violent: The Growing Menace of America's Neo-Nazi Skinheads,"
ADL *Special Report*, October 1988:

The ranks of the Skinheads have continued to grow over the past several months. The last tally undertaken by the Anti-Defamation League in February, 1988 indicated that some 1,000 to 1,500 Skinheads were active at that time in twelve states. A recently completed survey, conducted through the League's thirty-one regional offices, shows a rise in the number of racist Skinheads to about 2,000, located in twenty-one states. A number of new gangs have cropped up in this short period of time. Skinheads may now be found in virtually all sections of the United States, but the area of greatest concentration is California. Other regions where gangs are active are the Pacific Northwest, the Southwest, the Midwest and the Southeast.

The rise in the number of Skinheads has been paralleled by an increase in the amount of violent crime they have committed, including two homicides and numerous shootings, beatings and stabbings, mostly directed against members of minority groups. Skinheads

have also been responsible for a significant number of vandalisms of synagogues and other Jewish institutions.

The Skinheads of special concern here are those shaven-headed youths who sport Nazi insignia and preach violence against Blacks, Hispanics, Jews, Asians and homosexuals. They range in age from about 13 to 25, with males outnumbering females.

(We stress once again, as we have in our previous reports, the important distinction between racist and non-racist Skinheads. Not all youths with shaved heads or closely cropped hair are neo-Nazis. Indeed, there are young people who call themselves "Skinheads" who are anti-racist, some of whom have actually been targeted for violence by neo-Nazi Skinheads.)

The chief problem presented to communities by the presence of Skinhead gangs is that of lawless behavior, and the appropriate response to all such criminal conduct is firm law enforcement. Where culprits are too young to be tried and penalized as adults, they must be dealt with by the criminal justice system as juveniles. But strict law enforcement is the most effective means available for dealing with Skinhead violence. Not only does it tend to discourage future criminal acts, but experience has shown that some Skinhead gangs have become inactive when confronted with no-nonsense law enforcement.

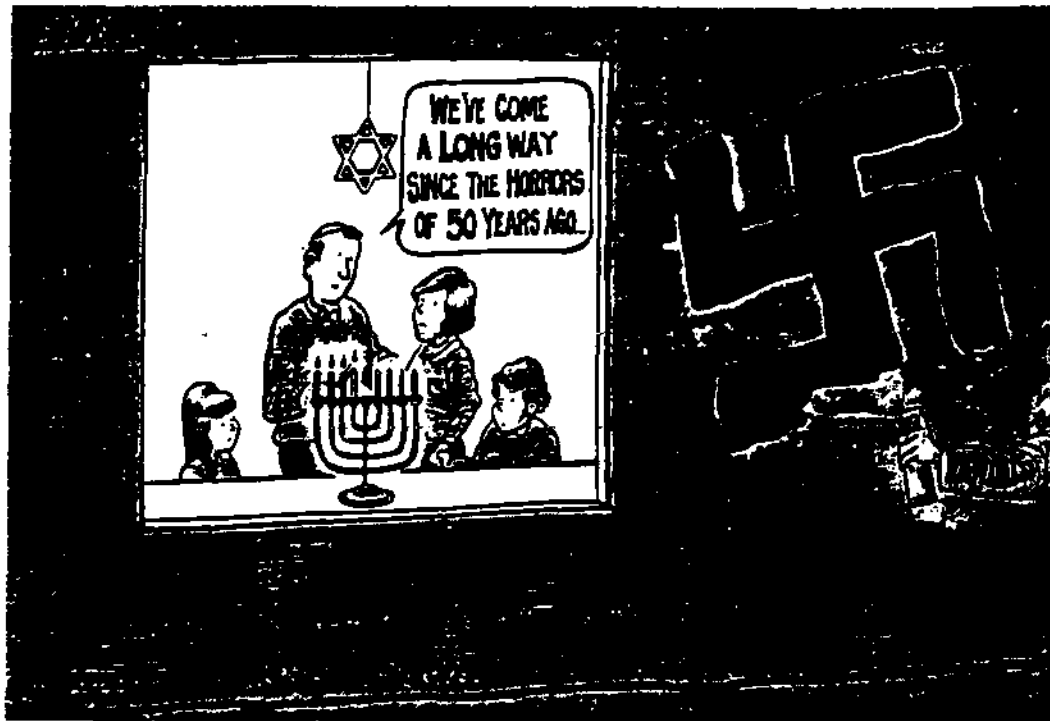
At the same time, judicial authorities ought not view Skinheads who come before them, especially the younger ones, as beyond redemption. Sentences handed down by the courts should include, in addition to appropriate punishment, measures designed to rehabilitate.

A second problem posed by the Skinheads is the potential influence of their propaganda on young people. The Constitution, of course, protects the right to express racist and anti-Semitic views, detestable as they are. By the same token, the opponents of bigotry have the right and a moral responsibility to do what they can to neutralize the impact of such propaganda.

"Kristallnacht"

November 9—10, 1988 marked the 50th anniversary of the infamous "Night of Broken Glass," when Nazi-inspired mobs in Germany and Austria burned synagogues, smashed Jewish shop windows and killed or injured many Jews. Some observers have described this pogrom as the beginning of the Holocaust.

Numerous press articles, TV reports and community memorial services focused intense public attention on this commemoration. Some individuals inclined toward anti-Semitic behavior apparently found the *Kristallnacht* theme appropriate for expressing their hate. During the week of November 6—13, over 60 incidents involving anti-Semitic graffiti and verbal or written threats were reported from all parts of the country. Since ADL has found that the average weekly total of reported anti-Semitic incidents is about 15 (except for such "high-profile" periods as the Jewish High Holidays and Halloween), it is reasonable to conclude that the intense public focus on *Kristallnacht* had the paradoxical side effect of providing a stimulus to those perpetrating anti-Semitic acts during this week.



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The Anti-Israel Factor

This year, for the first time, an external political event—namely, the West Bank/Gaza Palestinian “uprising”—was clearly related to a high number of anti-Semitic incidents in the U.S. Prior to 1988, world and national events related to Jewish concerns had generated a negligible number of anti-Semitic attacks in this country.

Yet in 1988, a total of 117 reported incidents (including bomb threats, vandalism, and phone or mail threats) targeting American Jews, their institutions and their property were linked by the perpetrators to the Israeli/Palestinian unrest—9% of the year’s total. These incidents occurred in all sections of the U.S.; they were reported in 20 states,¹ Washington, D.C., and Puerto Rico. By way of comparison, during *all* of 1987 there were only 3 anti-Semitic incidents recorded by ADL of a politically related anti-Israel nature, out of the total of 1,018 anti-Semitic episodes of all types recorded in that year—obviously an infinitesimal percentage. In 1986, the comparative figure showed eight such politically oriented episodes out of that *entire year’s* total of 906, (594 vandalisms, 312 harassments) again a tiny percentage (less than 1%).

As another interesting point of comparison, a scant few anti-Semitic incidents were recorded in connection with other recent foreign and domestic controversies of special concern to Jews in the U.S. For example, Israel’s 1982 incursion into Lebanon was linked

¹These states, listed in order of frequency of such incidents reported, were California (28), Florida (12), Minnesota (11), Illinois (10), Massachusetts (6), Pennsylvania (6), Oregon (5), Georgia, Maryland and Washington (4 each); Arizona, Kansas and Tennessee (2 each); and Alabama, Colorado, Nebraska, Ohio, Rhode Island and Texas (1 each) [Two such incidents were reported in Puerto Rico, one in D.C.]

to four anti-Semitic episodes in the United States. The 1984 Jackson/Farrakhan controversy, President Reagan's 1985 visit to the Bitburg cemetery in West Germany, and the 1986 revelations concerning Austrian President Kurt Waldheim—all of which generated significant media coverage and public debate—were reflected in ADL's annual audit by six or less anti-Jewish incidents in each case.

A June, 1988 ADL *Special Report* entitled "Audit of Anti-Semitic Incidents: The Anti-Israel Component" provided the following illustrations of such acts:

There were four synagogues vandalized in the Palm Beach County, Florida area. The graffiti included "Victory Uprising" and "Abu Jihad." Arson at a Fullerton, California synagogue was followed by the taunting phone threats of a Palestinian sympathizer who claimed responsibility for the fires. In Springfield, Illinois two synagogues were among a half dozen targets throughout the city over a five-day period. In San Juan, Puerto Rico, two synagogues were defaced with anti-Israel graffiti. In addition to these episodes, phone threats and harassments were reported in Minneapolis, San Francisco, Seattle, Philadelphia, and Atlanta, while bomb threats were received by synagogues in Fullerton and La Jolla, California, Skokie and Springfield, Illinois, and Mercer, Washington.

(In issuing the June report ADL emphasized that it was not condemning mere expressions of political criticism. Rather, the violence and the anti-Semitic bigotry of the incidents cited placed them beyond the bounds of legitimate debate.)

Campus Incidents

Reports of anti-Semitic incidents of all kinds (i.e., vandalism, threats, harassment and assault) on American college campuses during 1988 have more than doubled since ADL's 1987 survey, which cited episodes at 14 campuses.

In 1988 reports from 38 campuses revealed a total of 54 incidents, (3% of all incidents nationwide) including several anti-Jewish vandalism episodes related to the 50th anniversary remembrance of Kristallnacht, and to the year-long Palestinian uprising or *intifada* in the West Bank and Gaza.

For example, on November 10, 1988, spray-painted swastikas and anti-Semitic slogans such as "Kill the Kikes" and "Zionazi racists" were found on the wall of the Jewish Student Center at SUNY Binghamton.

Another serious act of campus anti-Semitic vandalism took place on October 21 at the Jewish Student Union on the Memphis State University campus. Swastikas and the words "Hitler is God" were spray-painted on a sign advertising an exhibit of Jewish antiquities and on the JSU building.

An example of the Mideast-related campus vandalism occurred at the University of Minnesota's Minneapolis campus, where vandals spray-painted "PLO" on the front of the B'nai B'rith Hillel Building.

Another disturbing campus phenomenon that has been monitored by ADL over the past several years, and that continued during 1988, is the use of abusive remarks and "humor" known as "J.A.P. jokes" and "J.A.P.-baiting" (for Jewish American Princess). These vulgar slurs, combining anti-Semitism and sexism, have proliferated on numerous

campuses, manifested in graffiti, public harassment of Jewish female students—particularly at school sports events—printed materials and even T-shirts. Incidents along these lines have been reported at such universities as: American, Boston, Cornell, Hartford, Maryland and Syracuse.

ADL has encouraged vigorous investigation and forthright repudiation by campus officials of such incidents. Using its informational resources and the expertise of its Campus Affairs Department, ADL will continue to work with college administrators, with Jewish and other concerned students, as well as with campus organizations (including Hillel and the American Zionist Youth Foundation) to counter such disturbing developments.

Racist and anti-Semitic attacks take on a uniquely troubling character when they occur in a university environment dedicated to civilized dialogue and the pursuit of knowledge. ² (See p. 14 for a listing of campus incidents.)

Most Serious Crimes

As noted, 823 of the 1988 incidents were acts of vandalism. Of those, 282 or 34% were reported against Jewish institutions (as opposed to attacks on *personal* or *public* property). In previous Audits, institutional vandalism made up about 25% of the vandalism total. Thus, the hostility of anti-Semitic vandals was focused intensely on synagogues and Jewish centers—the most basic and obvious symbols of Jewish community life.

This year saw a rise in the most serious violent crimes as well. In all, there were 28 such incidents, the highest total in the last five years for this category—including 7 cases of arson, 7 of attempted arson, one bombing and 13 cemetery desecrations. During the comparable period in 1987 there were 12 such serious crimes: 5 arsons, 3 attempts, 2 bombings and only 2 cemetery desecrations. In 1988, a pipe bomb exploded on the grounds of a Florida synagogue. Arson and attempted arson were reported in New York, California, Florida, Illinois, Texas, Pennsylvania, Connecticut and Ohio. Desecrations of Jewish cemeteries—a particularly cruel and painful form of vandalism—were reported in Louisiana (4), New York (2), Ohio (2), Massachusetts, Connecticut, Rhode Island, Oregon, and Mississippi, one each.

Most "Active" States

The states reporting the highest totals of anti-Semitic vandalism in 1988 were as follows: (See Appendixes A and B for complete state-by-state breakdowns.)

The greatest activity, as in past years, was reported in New York with 208, up one from 1987. (New York City figures, however, totalled 103, an increase over 1987 by 13%.) California is next with 121, down 16 from that state's total of 137 in 1987. Next is Florida

²See also "J.A.P. Baiting: When Sexism and Anti-Semitism Meet," ADL Special Edition, October 1988.

with 89, up 25, the most ever reported in an ADL Audit for that state. New Jersey, with 67, is up 24 from last year.

Maryland, with 36, is up 13. Massachusetts, with 35, is up 8; Pennsylvania, with 33, is up 11; and Illinois, with 29, is down 7.

At the next level, both Texas and Georgia report higher-than-previously recorded yearly totals of 23 and 22 incidents respectively. Next is Connecticut with 19, Michigan and Ohio with 16 each and Minnesota with 11. Alabama and Tennessee each report 8, followed by Colorado, Nebraska, Oregon, Virginia and Arizona each with 7. There were fewer than five incidents in each of the remaining states reporting in 1988.

Arrests

Law enforcement action against perpetrators of anti-Semitic acts is becoming increasingly effective. This year, police departments in 19 states reported 124 arrests in connection with 57 of the incidents. Of those arrested, 111—approximately 90%—were under 21 years of age. In 1987, 58 incidents in 15 states had resulted in the arrest of 78 individuals, nearly 22% of whom were 21 or older—the highest percentage of arrests in that age group noted in any ADL audit.

The fact that 1988 saw many more arrests than 1987, in connection with a comparable number of incidents, may indicate that many acts of anti-Semitic vandalism are being perpetrated by groups or gangs of youths, rather than by individual miscreants.

Among those arrested for vandalizing Jewish institutions in 1988 were a number of teenage members of local "Skinhead" groups. They were arrested in Mobile, Alabama; Dallas, Texas; Oklahoma City, Oklahoma; and in Ventura, and San Diego, California.

A malicious harassment trial—the first one of its kind to prosecute someone under the state of Washington's seven-year-old law—recently brought a twenty-four-year-old neo-Nazi skinhead into court to be tried for his alleged racial attack on a black truck driver. On December 14, 1988 the defendant, Bill Wayne Worl, was convicted of attempted murder and malicious harassment in the vicious knife attack which took place July 30, 1988. (Worl, originally from Oklahoma, said he was attracted to the Northwest by the Idaho-based Aryan Nations, a stridently anti-Semitic, white supremacist paramilitary group.—See also ADL's publication *Hate Groups in America*, © 1988.)

The 1981 Washington law is similar to ADL model legislation. It states that it is a felony to cause physical injury with the intention of harassing or intimidating someone because of his or her race, color or ancestry.

ADL's Seattle regional director indicated that he hoped the case would raise awareness among public and law enforcement agencies that such laws can and should be used for combating bias crimes.

Geographic Breakdown

Regionally, the **South**, with 12 states reporting 172 vandalism incidents, was the most notable geographic area for increases. Up nearly 50% over last year's total of 115, the South reported several state totals of record proportions: Florida—89 incidents; Texas—23; Georgia—22, and Alabama and Tennessee with 8 each. In Virginia there were 7; North Carolina, 4; Louisiana, 4; and 4 in Mississippi. Arkansas, South Carolina and Kentucky each reported one incident in 1988.

Law enforcement officials in the South have had considerable success in bringing perpetrators of anti-Semitic vandalism to justice. The key factor in this success has been a reward fund. In most cases it is posted by the ADL regional office; occasionally it is supplemented by the institution defaced. Our lay leaders have pledged their resources to ADL for this purpose. It does not require a large commitment from any one individual.

Since most of the vandals have turned out to be teenagers, it is of critical importance that the reward be announced in public schools located in the neighborhood of the crime. Information should be turned in to the police department investigating the crime. While some calls will be made by students bearing a grudge against others, decisive leads have been obtained from students who have heard the culprits brag about their exploits.

The normal procedures and penalties of the courts have been supplemented in Dade County, Florida by explicit authorization of school principals to recommend expulsion from schools of those guilty of hate crimes. In this way, the vandals are separated from their peers, minimizing the spread of the virus of bigotry.

—Charles F. Wittenstein, ADL Southern States Civil Rights Area Director.

The **Northeast**, where the greatest number of incidents occur annually, was up 22% with 411 incidents reported in 11 states and the District of Columbia. As noted, New York with 208 incidents was followed by New Jersey, 67; Maryland, 36; Massachusetts, 35; Pennsylvania, 33; Connecticut, 19; Rhode Island, 4; New Hampshire, 2; Maine, West Virginia and Delaware, each with one; and three in the District of Columbia.

The ADL Audit of Anti-Semitic incidents has been an important tool in measuring the problems presented by anti-Semitic bias crimes. I frequently discuss the Audit as an introduction to seminars on police training, emphasizing that the Audit provides us with much useful information to help us target areas with which we have had such difficulties.

We know from the Audit, for example, if incidents in our area have recurred, whether the response of police was effective and if arrests were made. Also, many victims know that we keep track of these incidents and are therefore far more inclined to call us. This means that we are frequently being contacted even before the police; this in turn underscores the importance of open lines of communication between law enforcement and the ADL.

—Sally Greenberg, ADL Eastern States Civil Rights Area Director.

The **Midwest**, with 92 incidents in 1988, was slightly higher than in 1987, when there were 85—an 8% increase. Nine states in the region reported vandalism incidents. Illinois had 29; Michigan, 16; Ohio, 16; Minnesota, 11; Nebraska, 7; Indiana, 4; Oklahoma, Kansas and Missouri, 3 each.

There is a growing awareness that government and law enforcement officials can do more to directly address the far-reaching implications of crimes prompted by prejudice. The severe penalties levied against the individuals responsible for the Howard Beach [NY] incident in December of 1986 and the indictment of a neo-Nazi leader in Chicago for acts of vandalism directed against Jewish community institutions on the 49th anniversary of Kristallnacht in 1987 are examples of effective response to hate crimes.

The Anti-Defamation League has played an important leadership role in crafting strategies to confront hate crimes. The data we collect enables us to make important comparisons, chart trends, draw conclusions, and tailor our response.

In the last year, the League has produced two useful publications on this important subject. The first, "Hate Crimes Statutes: A Response to Anti-Semitism, Vandalism and Violent Bigotry," contains our model legislative initiatives and a survey of state hate crime statutes around the country. The most recent publication, "Hate Crimes: Policies and Procedures for Law Enforcement Agencies," provides a number of examples of specifically-focused programs, procedures, and practices employed by law enforcement agencies around the country to confront hate crimes. We believe that these initiatives can greatly enhance the success of efforts to reduce the number of bias-related incidents of violence and harassment nationwide.

We recognize that prejudice, hatred, and bigotry cannot be legislated, regulated, or prosecuted out of existence. Even the stiffest criminal penalties, the most thoughtful law enforcement agency guidelines, and the best trained officers and prosecutors will not eliminate criminal activity motivated by prejudice. But we can make treatment of these crimes a priority. We can send an unmistakable message that these crimes are not pranks and that they will be treated seriously.

—Michael Lieberman, ADL Midwestern States Civil Rights Area Director.

The **West** was the only region to report a decrease. In 1988, six states reported 146 incidents compared to 157 reported in 1987—a 7% decrease. California had 121 incidents—down 16 from the disturbing 137 of last year; Arizona, Colorado and Oregon, 7 each; Washington, 4; and New Mexico, 1.

It has been gratifying to hear ADL mentioned so often as the one community organization which has long had a system for reporting incidents of hate. Representatives of various other ethnic and racial communities typically complain that the members of their respective communities do not know whom to call when they become the victims of a hate crime. Precisely because the ADL has established an effective system for reporting, and encouraging the reporting, of hate crimes and has successfully obtained a certain degree of visibility

through the annual publication of an Audit of Anti-Semitic Incidents, the League can serve as a model for the multitude of organizations which represent minority interests.

As one example, ADL reporting forms and samples of past ADL Audits have been provided to the members of a Hate Violence Reduction Committee of the Los Angeles City Human Relations Commission.

ADL can further improve its own data collection capabilities through cooperative efforts with other agencies which are the recipients of similar data. In Los Angeles, for instance, the Anti-Defamation League regularly trades statistics on incidents of anti-Semitic vandalism with the Los Angeles County Human Relations Commission and the Los Angeles Police Department.

As a way to increase understanding among line officers in the police department about hate crimes, and the impact they have on their victims, specific training should be introduced for police officers. They must learn how to recognize a hate crime and how to respond to the needs of the victims.

Also, in terms of police training, it is essential for new police cadets to undergo an extensive session on human relations. Minority-community leaders should be encouraged to observe one or more of these sessions and to provide input about the way their respective communities are portrayed during the classroom training.

—Betsy Rosenthal, ADL Western States Civil Rights Area Director.

Harassment, Threats and Assault

In a second general category of incidents, there were 458 acts of anti-Semitic harassment, threats and assault committed against Jewish individuals and institutions during 1988. This year's total is 41% greater than the 1987 total of 324.

It is the second highest total of such incidents ever recorded in ADL's annual surveys. (See Appendix C.) The highest yearly total was in 1982 when 593 were reported; the average yearly figure has been 340. Of the incidents noted in 1988, 60 were characterized by references to the Israeli/Palestinian situation discussed earlier in this report.

This year, more harassment and threats were directed against Jewish *institutions* (as opposed to *individuals*) than ever before—133 incidents, or nearly 30%. Generally, institutions are targeted in about 20% of the total number of harassment incidents.

Of the 325 incidents reported against Jewish individuals, 21 were physical assaults. This total is about the yearly average with few having resulted in serious bodily injury. One incident in New York in November was brutal however, as a Yeshiva University student was set upon by a gang of teenaged thugs. The attackers yelled anti-Semitic epithets as they beat and then stabbed the 19-year-old student. He was also robbed of \$20 and his jacket in the attack. The victim survived the assault and two days later his five attackers were arrested. One, a thirteen-year-old, has already been convicted. The other four, aged 14-16, await trial.

A Decline in Civility?

[Why have complaints of personal harassment, assault, and the casting of slurs apparently been rising? A recent *New York Times* article suggests some possible answers:]

This may well be remembered as the year when nastiness came into its own and became a commodity.

Morton Downey Jr. sneered at guests on his talk show and drew three million viewers a night. Geraldo Rivera's nose was broken, along with rating records, in a brawl on his own talk show when it presented a segment called "Teen Hatemongers." The harsh, scatological humor of performers like Eddie Murphy spawned a new phrase: attack comedy. And the Presidential campaign was fueled by extraordinarily negative advertising and more than a few nasty one-liners.

'We Hate Most Everybody'

Now, just in time for the holidays, anyone can partake of confrontational entertainment, or "confrontainment" as it is being called

Novelty stores in Washington are selling a Monopoly-like board game called Home Roulette, a parody of the District that slurs blacks, homosexuals, the homeless and women. Its instruction manual says, "Yes, we hate most everybody. . . ."

"Nastiness seemed to reach an all-time low this year," said Todd Gitlin, a professor of sociology at the University of California who is the author of numerous books on the impact of television

Professor Gitlin argues that television functions as a "funhouse mirror" of the culture, exaggerating still further what is already extreme

By no means is the outbreak confined to television, or to a number of publications that have adopted the gossipy and particularly irreverent style of the British press. "The deterioration of politeness and public manners is at a sufficiently rapid stage to be measurable within any one individual's experience," said Dr. Willard Gaylin, a psychoanalyst who is president of the Hastings Institute of Society, Ethics and the Life Sciences, in Hastings-on-Hudson, N.Y.

The therapeutic venting of one's emotions emerged as a fad in the late 1960's, amid sweeping social changes that also undermined conventional civility. Traditional values and authority came under attack

Other factors include what Dr. Gaylin calls "the coarsening and corrupting influence of modern urban life"; the Federal Communications Commission's deregulation of commercial radio in 1981, which fostered "shock radio;" and the bruising battle for television ratings

Undeniably, the "confrontainment" strikes many Americans as entertaining. A school of crude and hostile comedy has gained an enthusiastic audience

Where does it end? "We are testing the limits," said Dr. [Chaytor] Mason, who is an associate professor at the University of Southern California. "We're waiting until there is a complete breakdown. Like Geraldo's broken nose."

[C]ivility should not be underestimated, said the Rev. Robert Paul Mohan, a professor of philosophy, ethics and theology at Catholic University in Washington.

"I define civility as the outer ramparts of morality," he said. "I think civility has been replaced with the ethic of self-interest, accompanied with an inadvertent assumption that principles don't mean much. That has made us a rather rude, insensitive people."

—Excerpted from "It Was a Year When Civility Really Took It on the Chin" by Lena Williams, *The New York Times*, Sunday, Dec. 18, 1988. © 1988 by The New York Times Company. Reprinted by permission.

Listing of Campuses Reporting Anti-Semitic Incidents

The most serious campus incidents were anti-Semitic vandalisms targeting Hillel buildings, other on-campus centers of Jewish student activity and Jewish religious displays or monuments. Fourteen campuses across the country reported those types of incidents in the period covered by the 1988 Audit. They are:

December 1987—The University of Southern California;

January 1988—University of Miami, Ohio;

January—Rutgers University;

April—University of Kansas;

April—University of Alabama;

April—University of Arizona;

May—University of Minnesota;

May—University of Maryland;

July—University of California, Berkeley;

October—Yale University;

October—Memphis State University (TN);

October—University of Texas, Austin;

November—Drexel University (PA);

November—State University of New York, Binghamton.

The vandalism incidents at the Kansas, Minnesota and Arizona campuses were included in ADL's special report in June, 1988 which addressed anti-Semitic attacks apparently motivated by Palestinian unrest. The Rutgers, Alabama and Yale campus incidents included graffiti that suggested that the desecrations were perpetrated by "Skinheads."

Additionally, anti-Semitic vandalism to dormitory rooms, private offices and other personal property were reported at the following campuses: January—University of Southern California; February—State University of New York, Plattsburg; April—University of Kansas, April—Northern Illinois University; May—Rutgers University (NJ); May—Michigan State University; May—University of Pennsylvania; October—Southwest Missouri State; November—University of Pennsylvania.

Moreover, anti-Semitic graffiti on college public property was also reported at the following campuses: February, University of Connecticut, Law School; February, University of Miami (FL); February, San Francisco State University; April, Harvard (MA); April, California State, Long Beach; July, University of Minnesota; October, Memphis State (TN); October, Duke University (NC); November, University of Pennsylvania, November, University of Minnesota; December, Rutgers University (NJ); December, Michigan State University.

At some of the locations listed above, phoned threats and harassment were recorded in connection with vandalism incidents. In addition, other harassment incidents, in the form of verbal abuse, threats and the distribution of anti-Semitic hate-literature, were reported at these campuses: University of New Mexico; East Tennessee State; State University of New York, Cortland; Wayne State (NJ); Stanford (CA); University of California, Davis.

A Look at Some Major Incidents

Many anti-Semitic vandalism incidents generated considerable news coverage and community response—including ADL counteraction—during 1988. The following are several illustrative examples.

—Brooklyn, NY

Just after midnight, on September 17, the Sabbath between Rosh Hashanah and Yom Kippur, the Congregation Rabbinical Institute Sharai Torah in Midwood, Brooklyn was viciously desecrated. Two boys, ages 12 and 15, spray-painted 15 swastikas on the walls, ripped up and burned six Torah scrolls and set fires around the building, which was heavily damaged by the blaze.

The incident drew immediate response from the Jewish community, and numerous law-enforcement and political officials. Nearly 10,000 Jews held a "funeral" in the streets of Brooklyn for the six Torah scrolls.



Photo Credit: S. A. Schwartz, B'nai B'rith Star

Police Commissioner Benjamin Ward said the young vandals acted out of hatred. "It was exactly like a lynching," he was quoted as saying.

Announcing the indictment of the 2 boys, Brooklyn District Attorney Elizabeth Holtzman said, "Crimes of hatred or bigotry of any kind must be prosecuted to the fullest extreme of the law."

ADL's National Director, Abraham H. Foxman, later escorted sixth and tenth graders to the site, where he talked with the students about the destructiveness of bigotry.

"Some good will be derived from this evil," he said, "if each of you becomes a messenger. . .transmitting to all those you know how terrible this desecration is and helping them to understand where hatred can lead."

"If you hear someone calling other people derogatory names simply because they may be of a different religion or race," Mr. Foxman went on, "have the courage to speak up, to say that bigotry, hatred and prejudice are wrong."

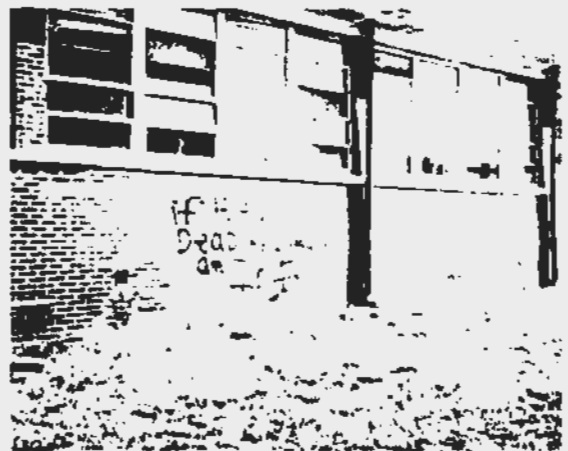
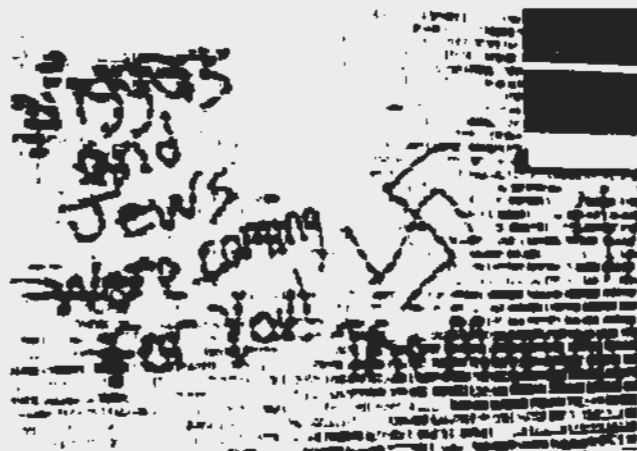
—Doraville, GA

ADL played a major role in the resolution of a disturbing incident in Doraville, GA. Last March, the community's Yeshiva High School was vandalized and spray-painted with anti-Semitic and anti-Black slogans.

ADL's Southeast regional office in Atlanta offered a \$1,000 reward for information about the perpetrators. As a result, police received a tip that brought about the arrest of two youths, ages 17 and 15. Both pleaded guilty and the younger one was sentenced in a closed Family Court session.

The older youth was tried and sentenced to a five-year term including time at a "shock treatment" facility which offers strict discipline similar to Marine Corps boot training. In addition, he will be subject to intensive probation and receive mandatory psychological counseling.

ADL photographs taken at the scene were introduced into evidence at the trial. (see below) At the pre-sentencing hearing—in an unprecedented move—the judge invited Charles F. Wittenstein, the League's Southern area Civil Rights director, to address the court. Mr. Wittenstein said the vandalism was not "merely a childish prank but a serious act of violence that severely affected the entire community."



—Denver, CO

In Denver, on November 9, the 50th anniversary of *Kristallnacht*, a synagogue and a Jewish-owned store were both spray-painted with swastikas and anti-Semitic graffiti.

The defacement of the Hebrew Educational Alliance and Steinberg's Kosher Grocery "brought an outpouring of letters, flowers, phone calls, money and offers of help from people of varied religious beliefs," according to the November 18 *Denver Post*.

Because it coincided with *Kristallnacht*, the incident generated considerable local newspaper and television publicity.

In 1987, the ADL Mountain States office (Denver) was instrumental in convincing the Colorado Legislature to pass the Ethnic Harassment and Intimidation bill, which would make such a crime a Class I misdemeanor. In a prepared statement ADL said "should the offenders in this case be identified, ADL would encourage examination of the appropriateness of prosecution under this new statute."

—San Diego, CA

At two A.M. on Sunday, November 13, the Tifereth Israel Synagogue in San Diego was extensively spraypainted with virulently anti-Semitic graffiti. Emblems and slogans of anti-Semitism, including swastikas, were painted on the synagogue's stained glass windows, exterior walls, signs and landscaping. The damage was noticed around 8:30 A.M. by the janitorial staff. The Anti-Defamation League's regional director, Morris Casuto, was contacted at 8:45 A.M. and after viewing the extent and nature of the obscenities, considered it "the worst vandalism of a Jewish institution in the history of San Diego." Two nearby homes of synagogue members were also marked with four-letter words and hate symbols.

The incident followed on the heels of the commemoration of *Kristallnacht*. The hate messages include "Adolph Lives," "America Befor [sic] Israel," and "Love Skinheads." The incident, however offensive, became a model situation in terms of community and media involvement. ADL coordinated the public response, including the offering of a reward for the apprehension and conviction of the vandals. A press conference was attended by all three local TV stations, two major San Diego newspapers, the Associated Press and three radio news stations. The 5 P.M. and 11 P.M. television news shows all carried lengthy stories about the incident and community leaders were on the air condemning the crime.

On Monday, September 14, five 16-year-olds (three girls and two boys) were arrested. An official of the San Diego Police Department said, "We had a tremendous outpouring of community support and information." He said three of the youths refer to themselves as Skinheads, but none of them appeared to appreciate the seriousness of the crime until expressions of shock and outrage became clear via the news coverage.

ADL's Morris Casuto criticized longtime California hate-monger Tom Metzger, the head of a white supremacist group called White Aryan Resistance, based in nearby Fallbrook. Casuto noted that Metzger "serves as the catalyst" for Skinhead activities.³

³See also "Young and Violent: Skinheads Target America's Youth, ADL *Special Report*, October 1988.

—Oakland, NJ

On November 17, Temple Emanuel in Oakland, New Jersey was painted with anti-Semitic slogans including, "Die Kikes," "Adolph Lives" and "Kill Jews." The Oakland police, who discovered the vandalism during a routine patrol, notified not only the Temple's rabbi, but also the principal of nearby Indian Hills High School. That day and the next, groups of students, faculty members, the school principal and the police sergeant worked with scrub brushes, paint removers, hoses and a sand-blaster to remove the slurs.

(See p. 44 for "Recommendations for Community Action," a set of guidelines for coping with hate-motivated vandalism, distributed statewide to community leaders by ADL's New Jersey regional office.)

Conclusion

The findings in ADL's 1988 Audit reflecting a significant rise in anti-Jewish incidents are deeply disturbing—all the more so because they follow upon the earlier notable increase reported in the 1987 Audit. Regarding only acts of anti-Semitic vandalism, the last two years have seen a jump of 38% over 1986 figures.

Several of the factors noted earlier in this report as having contributed to the increase may have been unique to 1988:

—The 50th anniversary of *Kristallnacht* was the focus of intense national publicity, evidently prompting some violence-prone anti-Semitic individuals to commit imitative acts of destruction.

—More than 100 anti-Semitic acts of vandalism were linked by their perpetrators to the Palestinian "uprising" in the West Bank and Gaza. Most of these incidents, however, occurred during the first half of 1988; if this limited downward trend continues, it may portend a decline in this particular type of incident during the coming year.

—The unusually high degree of anti-Semitic activity reported in the South has been met, in large measure, with condemnation and repudiation by the general community and by a strong law enforcement response. It remains to be seen whether this increased level of bias crime continues next year.

Two other major factors, however, showed continued signs of increase for the second straight year—(1) the spreading menace of violent young neo-Nazi Skinhead gangs responsible for many acts of anti-Semitic vandalism, among other violent crimes against racial and ethnic minorities; and (2) the dismaying rise of anti-Jewish incidents reported on college campuses. In addition, a higher percentage than ever before of both vandalism and threats were directed against Jewish institutions, and the most serious types of violent vandalism more than doubled as compared to the previous year.

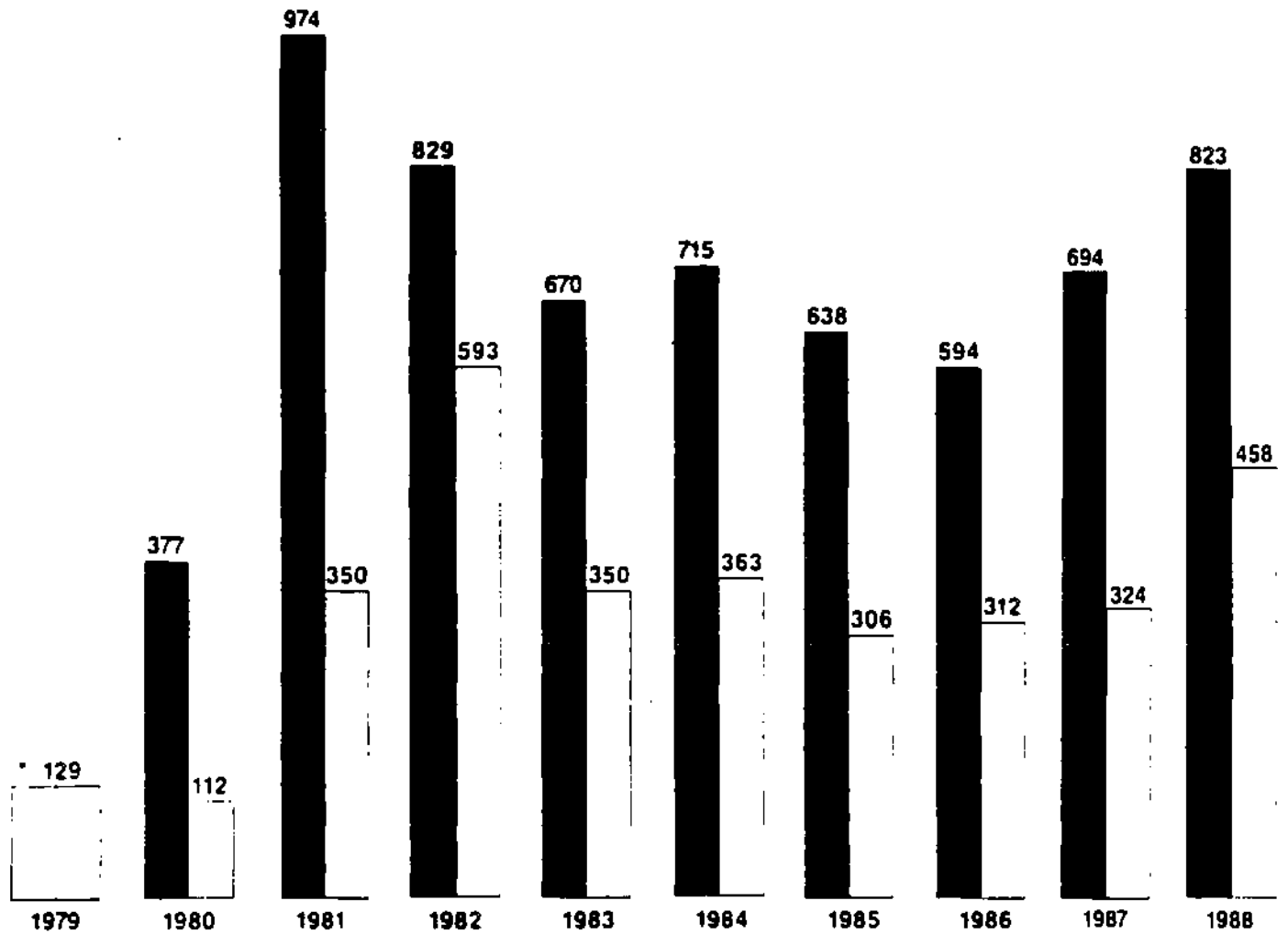
These problems, like the rest of the general nationwide increase in anti-Semitic acts, must be countered ever more forcefully through those means available to official



authorities and community leaders in a democratic society: firm enforcement of appropriate laws, regular and creative educational programming against prejudice, and enhanced public awareness of the nature and dimension of the hate crime phenomenon. ADL's active monitoring efforts, its widely hailed "A World of Difference" project (see p. 27), and its counteraction program (described in "A Decade's Perspective," p. 26), including the publication of this 10th Annual Audit report, are geared toward those goals.

Despite the year's troubling statistics, there remain as well some grounds for cautious optimism. Forty-three states now have some form of statute dealing with hate crimes (see p. 29, "Hate Crimes and the Law"), many patterned after ADL model legislation. Numerous states and localities are working to improve communication between community groups and law enforcement authorities, and the latter, increasingly sensitized, are developing better reporting and investigative procedures on bias crimes. Public officials, educational administrators and community leaders frequently respond to hate-motivated incidents with sympathy and solidarity toward victims and a determination to reject and overcome the affront to decency and the threat to pluralism posed by prejudice.

With the passing of 1988, its 75th anniversary year, ADL rededicates itself to broadening those advances.

**ADL AUDIT OF ANTI-SEMITIC EPISODES
VANDALISM
HARASSMENTS, THREATS AND ASSAULTS
YEAR-BY-YEAR
NATIONAL TOTALS**



KEY:  VANDALISMS
 HARASSMENTS, THREATS AND ASSAULTS

* 1979 report recorded only "Anti-Semitic Incidents," without separate category of threats, harassment, etc.

State-by-State Composite, 1979-1988

STATE	VANDALISM		
	ALL ANTI-SEMITIC INCIDENTS TOTAL	VANDALISM TOTAL	ASSAULTS, THREATS and HARASSMENT TOTAL
1. NY	<u>2,951</u>	<u>1,996</u>	<u>955</u>
2. CA	<u>1,223</u>	<u>941</u>	<u>282</u>
3. NJ	<u>807</u>	<u>615</u>	<u>192</u>
4. FL	<u>611</u>	<u>443</u>	<u>168</u>
5. MA	<u>526</u>	<u>333</u>	<u>193</u>
6. MD	<u>431</u>	<u>327</u>	<u>104</u>
7. PA	<u>401</u>	<u>247</u>	<u>154</u>
8. MN	<u>328</u>	<u>139</u>	<u>189</u>
9. IL	<u>321</u>	<u>198</u>	<u>123</u>
10. MI	<u>237</u>	<u>155</u>	<u>82</u>
11. GA	<u>177</u>	<u>86</u>	<u>91</u>
12. OH	<u>171</u>	<u>76</u>	<u>95</u>
13. VA	<u>168</u>	<u>113</u>	<u>55</u>
14. CT	<u>139</u>	<u>97</u>	<u>42</u>
15. RI	<u>114</u>	<u>65</u>	<u>49</u>
16. AZ	<u>110</u>	<u>54</u>	<u>56</u>
17. MO	<u>102</u>	<u>49</u>	<u>53</u>
18. TX	<u>86</u>	<u>68</u>	<u>18</u>
19. WA	<u>84</u>	<u>36</u>	<u>48</u>
20. LA	<u>59</u>	<u>43</u>	<u>16</u>
21. CO	<u>55</u>	<u>45</u>	<u>10</u>
22. NC	<u>55</u>	<u>28</u>	<u>27</u>
23. NE	<u>54</u>	<u>31</u>	<u>23</u>
24. OR	<u>54</u>	<u>25</u>	<u>29</u>
25. IN	<u>50</u>	<u>36</u>	<u>14</u>
26. DC	<u>48</u>	<u>36</u>	<u>12</u>
27. TN	<u>40</u>	<u>20</u>	<u>20</u>
28. WI	<u>37</u>	<u>21</u>	<u>16</u>
29. MS	<u>27</u>	<u>25</u>	<u>2</u>
30. AR	<u>23</u>	<u>20</u>	<u>3</u>
31. AL	<u>17</u>	<u>12</u>	<u>5</u>
32. KY	<u>15</u>	<u>7</u>	<u>8</u>
33. NM	<u>14</u>	<u>10</u>	<u>4</u>
34. IA	<u>13</u>	<u>4</u>	<u>9</u>
35. SC	<u>11</u>	<u>4</u>	<u>7</u>
36. KA	<u>9</u>	<u>7</u>	<u>2</u>
37. NH	<u>9</u>	<u>5</u>	<u>4</u>
38. DE	<u>8</u>	<u>2</u>	<u>6</u>
39. OK	<u>7</u>	<u>7</u>	<u>0</u>
40. ID	<u>6</u>	<u>4</u>	<u>2</u>
41. NV	<u>6</u>	<u>5</u>	<u>1</u>
42. WV	<u>5</u>	<u>3</u>	<u>2</u>
43. ME	<u>3</u>	<u>2</u>	<u>1</u>
44. PR	<u>2</u>	<u>2</u>	<u>0</u>
45. MT	<u>1</u>	<u>1</u>	<u>0</u>
46. ND	<u>1</u>	<u>0</u>	<u>1</u>
47. VT	<u>1</u>	<u>0</u>	<u>1</u>
10 YEAR TOTALS:	<u>9,617</u>	<u>6,443</u>	<u>3,174</u>