



Civil Rights Law Section  
WASHINGTON STATE BAR ASSOCIATION

To: The President, President-elect, Immediate Past-President, and Board of Governors  
From: The Civil Rights Law Section, Chair Tracy S. Flood  
Date: September 14, 2010  
Re: Arizona SB 1070 Resolution

The Washington State Bar Association Civil Rights Law Section (CRLS) was tasked with reviewing the Resolution presented by the WSBA Board of Governors Diversity Committee with regard to Arizona SB 1070. The CRLS contacted the WSBA Section Chairs for comments. The Minority Bar Associations were also contacted for the July Board of Governors meeting and responses were received in the late materials. The following sections responded: the Litigation Section and Administrative Law Section, both took no position on the resolution. There was some concern that a resolution is not related to our educational mission and that we risk alienating members. Two individual chairs responded as members of the bar one in support of the Resolution and one in opposition. It was also clear that if there was any potential for proposed legislation in Washington State there would be strong positions of opposition from the section chairs.

The Civil Rights Law Section Executive Committee met and went over the Resolution and responses from the sections. In considering Arizona SB 1070, the climate of opposition and support that exists we look back 47 years to the Civil Rights movement. The CRLS presents the position below:

### **Historical**

On April 16, 1963, Martin Luther King, Jr. wrote a letter to the clergymen after he was jailed in the aftermath of the Birmingham confrontation with the authorities. The "Letter from the Birmingham Jail" in which Martin Luther King, Jr. wrote, "Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality tied in a single garment of destiny. Whatever affects one directly affect all indirectly. Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives inside the United States can never be considered an outsider anywhere in this country." He goes on to explain their strategy and addresses the issue of breaking laws. Martin Luther King Jr. states "The answer is found in the fact that there are two types of laws: There are just laws and there are unjust laws. I would be the first to advocate obeying just laws. One has not only a legal but moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with Saint Augustine that "An unjust law is no law at all."

### **Current Status**

Arizona SB 1070 was signed by Governor Jan Brewer in April. Since the controversial ant-illegal immigration law was signed significant changes have been made.

Governor Jan Brewer signed HB2162 which changes "lawful contact" to "lawful stop, detention or arrest." HB2162 removes the word "solely" from "may not solely consider race, color or national origin in implementing the requirements of this subsection." HB2162 also reduces some fines, etc.

In July, U. S. District Judge Susan Bolton issued a preliminary injunction. Judge Bolton suspended the law's requirement that police officers check a person's immigration status during traffic stops, detentions and arrests. A hold was put on the requirement that legal immigrants carry their citizenship papers at all times or face penalties and the provision for an undocumented immigrant to have a job.

It is estimated that twenty other states are considering enacting versions of the Arizona Law. Since Judge Bolton's ruling Ohio, Idaho, Minnesota and Texas have spoken out on the changes. Ohio and Idaho republican supporters have stated they will make some changes to their bill proposals while Texas Representative Debbie Riddle plans to continue to move forward with pushing for an Arizona -style law.

The U. S. Government has filed a complaint naming Sheriff Joe Arpaio, Maricopa County, and the Maricopa County Sheriff's office, with allegations of Title VI of the Civil Rights Act of 1964 violations.

It is also reported that the State of Arizona has received over \$1.6 million to help defend the new law.

### **Washington State Constitution**

Washington Constitutional protections are broader than the Federal Constitution Fourth amendment.

Article I section 7 of the Washington Constitution provides that "no person shall be disturbed in this private affairs, or his home invaded, without authority of law."

In 2004, in the case *State v. Rankin*, the Washington State Supreme Court held that the freedom from disturbance in "private affairs" afforded to passengers by article I section 7 of the Washington Constitution prohibits law enforcement officers from requesting identification from passengers for investigative purposes unless there is an independent reason that justifies the request. This is not to imply that officers may not engage passengers in conversation. They may do this. However, once the interaction develops into an investigation, it runs afoul of our state constitution unless there is justification for the intrusion into the passenger's private affairs. *Rankin*, 151 Wn.2d 689.

In 1998, in the case *State v. Young*, the Washington State Supreme Court held that there was no violation of Young's privacy in this case because, under the totality of these circumstances, the deputy's actions did not constitute such a show of authority that a reasonable person would not believe himself free to leave. The spotlight alone without additional indicia of authority, did not violate article I, section 7 since the spotlight did not illuminate anything Young sought to keep private. He was in the open on a public street. The spotlight did not reveal the contraband he had concealed on his person. *Young*, 123 Wn.2d 173.

The facts in Rankin involved a non criminal traffic offense with James Rankin as passenger and the deputy did not observe any criminal activity. The deputy had arrested Rankin about a month earlier for possession of stolen property and possession of a controlled substance.

The facts in Young involved the officer spotting Kevin Young standing on a corner talking to a young lady as he was driving by on patrol. The officer stopped his vehicle exited the car and talked with Young. He asked how he was doing, learned his name, returned to his vehicle and drove off. The officer did radio in Kevin Young's name because the area had a high incidence of drug activity. Kevin Young entered into the middle of street to see where the officer went. After seeing Young in his rearview mirror the officer turned his car around.

Both cases provided case law analysis utilizing cases in Washington and other states in connection with the overall question of the protections under Washington's constitution. Since Washington's constitutional protections are greater than those afforded in the Federal Constitution, and there are serious questions about the constitutionality of Arizona's SB 1070 under the Federal Constitution, it seems doubtful that a similar law in Washington would hold up under Washington's Constitution, particularly in light of the protections afforded in Article 1 Section 7. See, e.g., City of Seattle v. Mesiani, 110 Wash.2d 454, 456, 755 P.2d 775 (1988) ("Numerous cases from this court have indicated that article I, section 7 goes further than the Fourth Amendment in protecting 'against warrantless searches and seizures, with no express limitations' to this protection.") That court goes on to list some of the protections afforded Washingtonians that are not covered under the Federal constitution:

Young, 123 Wash.2d at 188, 867 P.2d 593 (prohibiting warrantless infrared surveillance of home);

Boland, 115 Wash.2d at 578, 800 P.2d 1112 (prohibiting warrantless search of curbside trash);

Gunwall, 106 Wash.2d at 63, 720 P.2d 808 (prohibiting the warrantless obtaining of phone records or installation of a pen register);

State v. Chrisman,

100 Wash.2d 814, 818, 676 P.2d 419 (1984) (finding article I, section 7 violation in warrantless intrusion into student's dormitory room).

### **Racial Discrimination**

The court in Farrakhan v. Gregoire (now on rehearing) found that racial discrimination exists in Washington State's criminal justice system. According to reports cited by the court, not only are there major discrepancies in incarceration rates based on race that cannot be explained by factors other than racial bias, there are also tremendous variations in the likelihood of a suspect being searched in the first place if he or she is not white:

The expert reports, which were not refuted by the State, provide compelling circumstantial evidence of discrimination in Washington's criminal justice system. Dr. Crutchfield's report states that criminal justice practices disproportionately affect minorities beyond what can be explained by non-racial means. For example, African Americans in Washington State were over nine times more likely to be in prison than Whites, even though the ratio of Black to White arrest for violent offenses

was only 3.72:1, suggesting that substantially more than one half of Washington State's racial disproportionality in its criminal justice system cannot be explained by higher levels of criminal involvement as measured by violent crime arrest statistics. A study of the Washington State Patrol shows that *Native Americans were more than twice as likely to be searched as Whites; African Americans were more than 70 percent more likely to be searched than Whites; and Latinos were more than 50 percent more likely to be searched.* A study of the Vancouver, Washington Police Department ("VPD") indicated that of those stopped for traffic violations by the VPD, *African Americans are nearly twice as likely to be searched as Whites, and Latino were three times more likely to be searched.* This, despite the fact that searches of Whites more frequently resulted in the seizure of contraband than searches of African Americans and Latinos. According to Dr. Crutchfield, these findings suggest that African Americans and Latinos are at greater risk for searches that could lead to felony charges, but because those searches are less fruitful than searches against Whites, it is likely that minorities are being placed at greater risk for no legitimate purpose.

*Farrakhan v. Gregoire*, 590 F.3d 989, 1009-10 (9th Cir. 2010) (emphasis added). If people of color in Washington are more likely to be searched by police and ultimately incarcerated because of their race, it seems incredibly unlikely that a law like Arizona's, which requires police to determine the immigration status of people they stop, detain or arrest and reasonably suspect are in the country illegally, would not be enforced in a discriminatory manner. This would be true even if the provision said on its face that race should not be taken into account because, as seen above, race is obviously taken into account in crimes not even associated with immigration.

#### **RECOMMENDATIONS FOR A RESOLUTION:**

**The Civil Rights Law Section recommends passing a resolution that reflects the WSBA Mission Statement, Guiding Principle, and Strategic Goals.**

It is vital that reform of immigration laws should not be thought of in terms of "border security" to be successful. Acknowledging the issues of drug trafficking, human trafficking and violence that have developed with travel across our borders we must not ignore the economic benefits that are a significant issue with the lack of immigration law enforcement because of the financial gains.

Immigration reform should not start with an assault on an individual's cultural or ethnic group and certainly not the core principles of individual's equality under the law and privacy rights, which are protected by the US Constitution and, even more rigorously protected, under the Washington's Constitution.