STATE LAW DEVELOPMENTS

The Massachusetts Civil Rights Act: Recent Developments

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1I. Introduction

The Massachusetts Civil Rights Act ("MCRA"),[2] enacted in 1979 in response to increasing concern about racially motivated violence, [3] has been one of the most controversial features of the Massachusetts legal landscape in the last decade. The reason for that controversy can be seen in the broad language of the statute, which proscribes interference, or attempted interference, by "any person" with the "exercise or enjoyment of rights secured by the constitution and laws" of the United States or the Commonwealth, by means of threats, intimidation or coercion. The MCRA, which is the only state law of its kind in the United States, is broader than the federal Civil Rights Act of 1871, 42 U.S.C. § 1983, inasmuch as it (1) applies to private actors as well as state actors, and (2) proscribes interference not only with federally protected rights but also with rights secured under state laws, which may include the common law, as well as statutes and regulations.[4] The breadth of the statute is limited, however, by the "threats, intimidation or coercion" requirement.

The early cases applying the MCRA suggested that the law would be liberally construed, and would be applied in cases well beyond the scope of racial violence matters. [5] In one of those early cases, *Bell v. Mazza*, [6] the SJC held that the rights protected under the Act included those of two property owners who sought to build a tennis court on their land but who faced concerted opposition, including at one point a physical blockade, by their neighbors. In *Batchelder v. Allied Stores Corp.*, [7] the plaintiff successfully challenged the refusal of a shopping mall to permit him to collect signatures on a ballot access petition.[8] Recent cases, however, have sharply cut back the reach of the MCRA. As discussed more fully below, the SJC has interpreted the "threats, intimidation or coercion" requirement in an increasingly narrow manner, thus limiting the usefulness of the Act in a number of settings where it has formerly been thought to apply. In other cases, the Court has indicated a more restrictive approach to the scope of rights protected by the Act. This article also discusses recent developments concerning such other MCRA issues as the extent to which prohibited conduct must be "intentional," immunities for state actors, the so-called " *Redgrave* defense," the applicability of the MCRA to employment cases, the availability of injunctive relief, and the right to a jury trial.

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2. G.L.c. 12, §§11H, 11I.

3. *See* Sherman & Goldman, *The Development of the Massachusetts Civil Rights Act*, 29 Boston B.J.10 (Sept./Oct. 1985). The most immediate impetus for passage of the Act was the tragic sniper shooting of Darrell Williams, a black high school football player, during the half-time of a game at Charlestown High School in September 1979. Leibowitz, Sherman & McLindon, *The Project to Combat Racial Violence: A Six-year Retrospective*, 32 Boston B.J. 30 (May/June 1988).

4. One Superior Court judge has stated that "the broad remedial view [expressed in *Bell v. Mazza*] inclines one to believe that *every violation of 'law,' including the common law* of the Commonwealth is, *ipso facto*, a civil rights violation if accompanied by threats, intimidation or coercion." *Moran v. Angelo's Supermarkets, Inc.*, Civil No. 73697 (Suffolk Super. Ct. April 29, 1985) (Young, J.) (emphasis in original), 13 Mass. Lawyers Weekly 1133 (May 13, 195).

5. *See, e.g., Batchelder v. Allied Stores Corp.*, 393 Mass 819, 822 (1985) (" *Batchelder II*") ("The Massachusetts civil rights law, like other civil rights statutes, is remedial. As such, it is entitled to liberal construction of its terms.")

6. 394 Mass. 176 (1985).

7. 393 Mass. 819 (1985) ("*Batchelder II*").

8. The plaintiff sought relief under Article 9 of the Massachusetts Declaration of Rights and then used the MCRA in order to obtain attorneys fees.

The "Threats, Intimidation or Coercion" Requirement

A. "Direct" vs. "Indirect" Violations of the Act

In one of the more surprising developments under the MCRA, the SJC has recently held that governmental actors do not violate the Act when they deprive individuals of the rights "directly," because such direct violations do not constitute "threats, intimidation or coercion." In *Longval v. Commissioner of Correction*, 404 Mass. 325 (1989), an inmate was transferred against his will, from one prison to another, without a hearing and without the authorization of the Commissioner of Correction. The Court agreed that this apparent violation of the Department's regulations would fall within the scope of the MCRA *if* that violation was accompanied by threats, intimidation or coercion. But, the Court concluded:

> Shackling and handcuffing Longval and taking him to Concord was not by itself coercive under the Civil Rights Act, as Longval claims. *If the officials had some further purpose* in treating Longval as they did, threats, intimidation or coercion might be involved. Conduct, even lawful [sic] conduct, however, lacks these qualities when all it does is take someone's rights away directly.[9]

In drawing this distinction between "direct" and "indirect" violations of an individual's rights, the Court relied on its decision in *Pheasant Ridge Associates Limited Partnership v. Burlington*,[10] in which the SJC vacated an MCRA judgment against the town of Burlington and its selectmen. In *Pheasant Ridge*, the defendants had unlawfully sought to prevent the plaintiff developers from building low- and moderate-income housing in the town. Although the Court concluded that the town had exercised its power of eminent domain in bad faith, it held that the town's actions did not involve threats, intimidation or coercion:

> The taking was an attempted *direct, preemptive act* and did not seek to coerce any plaintiff to do or not to do anything. Legislation, *even unlawful legislation*, lacks any quality of coercion when that legislation seeks to eliminate the rights of a person and does not seek to force that person unwillingly to do or not to do something otherwise lawful.[11]

Both *Longval* and *Pheasant Ridge* take a disturbingly limited view of the "threats, intimdation and coercion" requirement of the MCRA. They demonstrate, at the very least, a lack of consistency in the application of the MCRA. This can be seen by comparing them to other cases involving apparently "direct" deprivations of rights—*e.g.*, MCRA cases involving racially motivated harassment or violence[12] or sexual harassment.[13] In such cases, the defendant's purpose in harassing or harming the plaintiff is not "to force that person unwillingly to do or not to do something otherwise lawful." Rather, it would appear that in such cases, the defendant's purpose has been simply to victimize the plaintiff—*i.e.*, deprive the plaintiff "directly" of his or her right not to be assaulted, discriminated against or harassed. The apparent inconsistency in these MCRA cases suggests that the "direct/indirect" distinction drawn by the Court in *Longval* and *Pheasant Ridge* does not completely explain the result in those cases.[14]

9. *Id.* at 333-34 (emphasis added) (citing *Pheasant Ridge Assocs. Ltd. Partnership v. Burlington*, 339 Mass. 771 (1987)). The above-quoted language is *dicta*, given the Court's holding, which merely vacated a summary judgment order and opened the way for a trial on, among other issues, whether Longval's rights were violated by means of threats, intimidation or coercion.

10. 399 Mass. 771 (1987).

11. *Id.* at 781 (emphasis added).

12. Although there are few reported MCRA decisions involving racially motivated violence (*e.g.*, *Commonwealth v. Guilfoyle*, 402 Mass. 130 (1988)), such cases are increasingly common at the Superior Court level. Since January 1987, the Attorney General has won injunctions in at least 43 MCRA cases, most of which involved racially motivated harassment or violence. (Telephone conversation with Stanley J. Eichner, Assistant Attorney General and acting chief of the Civil Rights Division, November 1, 1989.) *See also*, Sherman & Goldman, *The Development of the Massachusetts Civil Rights Act*, Boston B.J., Oct./Nov. 1985, at 10 (noting that, as of 1985, the Attorney General had won injunctions in at least nineteen cases involving minority victims who had been harassed or intimidated).

13. *See, e.g., O'Connell v. Chasdi*, 400 Mass. 686 (1987) (upholding MCRA claim involving sexual harassment).

14. The *O'Connell* Court noted that the defendant employer's unwanted sexual advances left the plaintiff feeling that "her job was in jeopardy" if she resisted. 400 Mass. at 688. Thus, one interpretation of the result in *O'Connell* is that the defendant's violation of Act was not "direct" but "indirect" because he used implicit and explicit threats that she would be fired if she did not submit to his advances.

One possible rationale which would harmonize these cases is the view that the MCRA is designed only to enforce such "core" civil rights as the rights of minorities and women, rather than such "peripheral" rights as those asserted in *Longval* and *Pheasant Ridge*. The SJC has recently indicated its sympathy with this approach by (a) de-emphasizing its "liberal construction" of the MCRA; (b) describing the Act as "intended to provide a remedy for victims of racial harassment"; and (c) defining its own "primary function" as "ascertain[ing] the 'intent of the Legislature'" when it adopted the MCRA.[15] It should be noted, however, that such limited approach was explicitly rejected by the court in its early MCRA decisions. Thus, the act cannot be cabined in that manner without seriously limiting, *inter alia*, *Bell* and *Batchelder II*.

Another possible rationale is that the plaintiffs in cases involving sexual harassment or racially motivated violence are "intimidated" by such actions, regardless whether they are forced "to do or not do anything." Under this theory, the cases involving such "direct" forms of intimidation can survive under a separate branch of the "threats, intimidation or coercion" requirement—*i.e.*, while direct deprivation of a person's rights may not qualify as "coercion" within the meaning of the Act, such deprivation might violate the Act's prohibition of "threats" and "intimidation." Yet such an approach ignores the obviously intimidating (and implicitly threatening) nature of the conduct at issue in *Longval*, where prison guards forcibly carried out the unlawful transfer of the plaintiff, and in *Pheasant Ridge*, where the defendants' purpose was to deter the plaintiff from building low-income housing in Burlington. Indeed, one might argue that state actors act "coercively" whenever they command action or inaction by an individual.[16]

B. Physical Force and Threats of Harm

Although the SJC has not categorically stated that physical force, or the threat of physical force, is a necessary component of "threats, intimidation or coercion," the Court's opinion in *Bally v. Northerastern University*,[17] suggests that either physical force or a specific threat of harm must be present. In *Bally*, a Northereastern student filed an action under the MCRA, challenging the university's requirement of drug testing for student athletes.[18] The SJC reversed the injunction issued below on the ground that the university's drug testing requirement did not constitute "threats, intimidation or coercion."[19] Reviewing previous MCRA decisions (specifically, *Batchelder II*, *Bell v. Mazza*, and *O'Connell*), the Court stated that "each involved a physical confrontation accompanied by a threat of harm."[20]

This emphasis on physical force is, of course, difficult to square with the full range of the Court's previous MCRA decisions. Perhaps the most noteworthy exception is *Redgrave v. Boston Symphony Orchestra*,[21] in which Vanessa Redgrave challenged the BSO's decision to cancel her performance because of threats directed to the BSO based on her political beliefs and activities. The *Bally* Court made an unconvincing effort to distinguish *Redgrave* by noting that "[a]lthough Redgrave did not involve physical confrontation, the Boston Symphony Orchestra's action involved the loss of a contract right."[22] Thus, the statement in *Bally* concerning "physical confrontation" as a necessary element of "threats, intimidation or coercion" is clearly overbroad and must include, at least, breach of contract as an additional type of conduct that meets the MCRA test.[23]

15. *Bally v. Northeastern University*, 403 Mass. 713, 718 (1989).

16. Coercion should likewise be found whenever the defendant conditions the enjoyment of some right or benefit on relinquishment of the plaintiff's rights (as in *Bally v. Northeastern University*, 403 Mass. 713 (1989)).

17. 403 Mass. 713 (1989).

18. The plaintiff also sought relief under the Massachusetts Privacy Act, G.L. 214, § 1B.

19. 403 Mass. 718-20. The Court also rejected Bally's Privacy Act claim. *Id.* at 720.

20. *Id.* at 719.

21. 399 Mass. 93 (1987). For a detailed discussion of the *Redgrave* litigation, *see* Heins, *Vanessa Redgrave v. Boston Symphony Orchestra*: Federalism, Forced Speech, and the Emergence of the *Redgrave* Defense, 30 B.C.L. Rev. (forthcoming 1989).

22. *Id.* at 720. In *Longval*, the Court reiterates this emphasis on physical confrontation, citing the same string of earlier cases, but this time mistakenly citing *Redgrave* as a case in which the defendant's conduct involved a "threat of disruptions, implicating physical safety and integrity of performance." 404 Mass. 333. In reality, it was third parties, not the defendant, BSO, who made those threats.

23. The *Longval* Court also noted that physical force, by itself, is not enough to prove a violation of the MCRA; "we see no coercion, within the meaning of the State Civil Rights Act, *simply from the use of force* of prison officials, authorized to use force, in order to compel a prisoner to do something he would not willingly do, even if it turns out that the official had no lawful right to compel the prisoner to take that action." *Id.* (emphasis added).

The court in *Bally* drew a second distinction between that case and those in which it had upheld MCRA claims. According to the Court, "[t]hose cases have all involved measures directed toward *a particular individual or class of persons.*"[24] Thus, the Court said, Bally's challenge to the university's drug testing program must fail because the program involved "indiscriminate" testing of all student athletes—*i.e.*, not a specifially focused "direct assault" on Mr. Bally.[25]

Of course, this distinction is also difficult to square with the facts in *Bally* and the Court's previous decisions. For example, the actions taken by the defendants in *Pheasant Ridge* were clearly aimed at a particular class (*i.e.*, real estate developers seeking to build low- and moderate-income housing in Burlington), as well as particular individuals. Likewise, the drug testing program at issue in *Bally* was aimed at a particular class—namely, the university's student athletes.

As the preceding discussion demonstrates, the SJC's efforts to define "threats, intimidation or coercion" more restrictively have left the body of law in disarray. These restrictions suggest that, in order to state a claim for relief under the MCRA, the plaintiff must show: (a) that the defendants' actions were aimed at a particular person or class; (b) that the defendants' actions are not "direct" deprivations of the plaintiff's rights; and (c) that the defendants actions involve either physical coercion or a specific threat or harm. Perhaps the only satisfying explanation of these developments is what many have perceived as the Court's "pulling back" from its earlier interpretations of the Act, as the Court has become more concerned that the MCRA, after *Bell* and *Batchelder*, might indeed become a "vast constitutional tort."

III. Other Recent Developments

A. The Meaning of "Intent"

In several of its recent MCRA decisions, the SJC has made it clear that a violation of the Act need not be "willful" in the sense that the defendant specifically intended to deprive the plaintiff of a right secured under the Act.[26] For example, in *Redgrave* the SJC held that a defendant's acquiescence to pressure from third parties could subject the defendant to MCRA liability, even though the defendant had no desire (*i.e.*, specific intent) to deprive the plaintiff of his or her rights.[27]

On the other hand, in *Deas v. Dempsey*, the Court held that the Act operates "almost entirely within the realm of intentional behavior," meaning that "the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it."[28] In *Deas*, the defendant was a Department of Public Welfare case worker who had failed to obtain an authorization for the plaintiff's participation in a "protective rent" program. As a result, the plaintiff was evicted from her apartment and temporarily separated from her children. The court held that the defendant's conduct amounted, at most, to negligence since she did not intend the consequences of her action (or inaction).

Thus, the Court has drawn a distinction between intentional conduct (including both specific intent and the more general intent that might give rise to tort liability), which is actionable and merely negligent conduct, which would seldom, if ever, give rise to MCRA liability.[29]

24. 403 Mass. at 718-19 (emphasis added).

25. *Id.* at 719.

26. *See Redgrave*, 399 Mass. at 99; *O'Connell*, 400 Mass. 694 (noting that the MCRA does not require a showing of "hostile intent" or "discriminatory animus"). *But see Longval*, 404 Mass. at 333 (indicating that intent to deprive the defendant of his rights would be relevant to question of MCRA liability: "If the officials had some further purpose in treating Longval as they did, threats, intimidation or coercion might be involved.").

27. 399 Mass. at 98-100.

28. 403 Mass. 468, 470-71 (1988) (citations omitted).

29. *See id.* at 471 ("Negligence is a concept distinct from intentional conduct...It would seem that the Legislature's use of such terms as "coercion," "threats" and "intimidation" expresses an intention to require intentional conduct."); *see also Breault v. Chairman of the Board of Commissioners of Springfield*, 401 Mass. 26, 36 n.12 (1987) leaving open the question of whether a negligent violation of an individual's civil rights could give rise to a valid claim under the MCRA).

B. Immunities for Governmental Defendants

Recent decisions by the SJC have confirmed that the qualified immunity available under § 1983 also applies to the MCRA. In *Duarte v. Healy*,[30] a case involving a newly implemented drug testing program for Cambridge firefighters, the Court held that, even though the MCRA "by its terms admits of no immunities," the legislature intended the immunity of public officials under the Act to be co-extensive with their immunity under § 1983. Since the Court concluded (a) that the defendants were exercising discretionary, rather than ministerial, functions when they implemented the program, and (b) that drug testing does not violate any "clearly established" right, it held that the defendants were immune from suit.[31]

The Court had laid the ground for this result in *Breault v. Chairman of the Board of Fire Commissioners of Springfield*,[32] a case involving "ministerial" duties. In *Breault*, the Court rejected the immunity claim of public officials who had denied the plaintiff's request for reinstatement in his job as a firefighter. Adopting the analysis of earlier Massachusetts common law cases involving immunity for governmental employees, the Court held that the officials were acting solely in a ministerial, rather than discretionary, capacity, and therefore were not immune from suit.

The net result, after *Duarte* and *Breault*, appears to be that the scope of governmental immunity under the MCRA will closely track the immunity available under § 1983.[33]

C. The "*Redgrave* Defense"

Although the *Redgrave* case reached the SJC on certified questions concerning the issues of intent and acquiescence to pressure from third parties,[34] the more controversial aspect of the *Redgrave* litigation arose from the First Circuit's *en banc* decision, which focused on the defendant BSO's rights of free expression.[35] The First Circuit rejected Redgrave's MCRA claim on the ground that the three opinions handed down by the SJC in response to the certified questions (*i.e.*, the plurality, concurring and dissenting opinions) indicated that the SJC would have found, *inter alia*, that BSO's "right not to speak" would provide BSO with an MCRA defense. In reaching this result, the Court relied on BSO's claim that threatened disruption by third parties would have substantially compromised the artistic integrity of the cancelled performances.

Although the First Circuit focused, as a matter of comity, on article 16 of the Massachusetts Declaration of Rights, the Court's opinion contains abundant *dicta* concerning the BSO's First Amendment right to make aesthetic choices about the works it performs and how it performs them. Indeed, the Court suggests that the First Amendment might provide an MCRA defense in cases involving other institutions, such as universities and newspapers.[36] Shortly after the First Circuit decision was released, the so-called "*Redgrave* defense" began to flourish in MCRA cases where the defendant has an arguable right to free expression.[37]

D. The Applicability of the MCRA in Employment Cases

During the decade in which the MCRA has been on the books, the courts have seen an enormous proliferation of wrongful termination cases. In many of these cases, plaintiffs have alleged violations of the MCRA, in addition to claims involving public policy, express and implied contracts, and the duty of good faith and fair dealing.[38] Although the SJC has not yet provided definitive guidance on the extent to which an MCRA action may lie for wrongful termination, a few guideposts have been erected.

30. 405 Mass. 43 (1989).

31. *Id.* at 48. *Compare Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

32. 401 Mass. 26 (1987).

33. *See also Chicopee Lions Club v. District Attorney for the Hampden District*, 396 Mass. 244, 251 (1985) (scope of prosecutorial immunity under MCRA "is at least as broad as under § 1983).

34. 399 Mass. at 100-01.

35. 855 F.2d 888 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 869. *See generally* Heins, *supra*.

36. 855 F.2d at 906 n.21.

37. *See, e.g., Korb v. Raytheon Corporation*, Middlesex Superior Ct., No. 87-7124, in which a Raytheon employee is challenging Pentagon spending practices. Raytheon has asserted that, under the First Circuit's decision in *Redgrave*, the company's own free expression right "not to speak" provides a complete defense.

38. The advisability of including an MCRA allegation in such actions is made clear by the Court's comment in *Flynn v. New England Telephone Co.*, 615 F. Supp. 1205, 1211 (D. Mass. 1985): "Various commentators have suggested that the elements of intimidation may be found in virtually every case of alleged wrongful [employment] termination." *But see Mouridan v. General Electric Company*,23 Mass. App. Ct. 538, 543 (1987).

For example, in *Hobson v. McLean Hospital Corp.*,[39] the SJC upheld the dismissal of an MCRA count in an otherwise legally sufficient complaint alleging breach of contract, violation of public policy, and interference with contractual relations. The Court held that the bare-bones allegations of the MCRA claim amounted to nothing more than a "summarization" of the Act and therefore failed to state a claim.[40] Interestingly, the Court found fault with the complaint's failure to indicate the particular right or rights that her former employer violated; the Court said nothing about whether her complaint sufficiently alleged the facts that would satisfy the "threats, intimidation or coercion" requirement of the Act.[41]

The Court's holding in *Redgrave* also confirms the view that the wrongful termination of a contract satisfies the "threats, intimidation and coercion" requirement.[42] To be sure, Redgrave was not an employee of BSO, but was instead working under a performance agreement. Nevertheless, it seems unlikely that the SJC would rely on that rather slim distinction to withhold relief under the MCRA to a wrongfully discharged employee. Moreover, in *O'Connell*, the Court's analysis of the plaintiff-employee's MCRA claim, which was based on sexual harassment, appears to rely on the finding below that the defendant's conduct, including his threats of job termination, involved "force, threats, and intimidation" within the meaning of the Act.[43]

The scope of rights secured by the MCRA in employment cases has been the focus of two recent Appeals Courts cases, which have held that the MCRA does not provide an additional remedy for acts proscribed by G.L. c. 151B.[44] Although one of those cases, *Mouradian v. General Electric Company* appears to question whether the MCRA provides a remedy for at-will employees,[45] the trial courts in Massachusetts appear to be going forward with such cases.[46]

E. The Availability of Injunctive Relief

Ordinarily, one of the requirements for obtaining injunctive relief is a demonstrated risk of irreparable harm if the injunction is not issued[47]—a requirement that might be difficult to satisfy in some cases involving racially motivated harassment or violence. In certain federal cases, such as *Lyons v. City of Los Angeles*,[48] courts have denied injunctive relief where the plaintiff could not show the requisite risk of future harm. Unlike those federal cases, however, Massachusetts decisions appear to recognize the unique nature of the harm which the MCRA was intended to prevent and, accordingly, have adopted a more flexible approach in the standards for awarding injunctive relief. In *Commonwealth v. Guilfoyle*,[49] the SJC articulated the rationale for such an approach, at least in MCRA cases brought by the Attorney General: "The injunction in this case is one that promotes the public interest and is not to be judged by the standards applicable to private litigation."[50] There would also appear to be support for a liberal approach to injunctive relief in the dozens of Superior Court cases, including a recent case brought by private parties,

39. 402 Mass. 413 (1988).

40. *Id.* at 417.

41. *Id.* at 417-18 ("The plaintiff does not identify, and we do not discern, what right guaranteed to her by Massachusetts law is concerned").

42. 399 Mass. at 98-100. This holding was reaffirmed in *Bally*, 403 Mass. at 720 (noting that "threats, intimidation or coercion" requirement was met in *Redgrave* by "the loss of a contract right").

43. 400 Mass. at 691. *But see Mouradian v. General Electric Company*, 23 Mass. App. Ct. 538, 543 n.5 (1987) (stating that "it is dubious whether [the plaintiff] has alleged the requisite 'threats, intimidation, or coercion'... Otherwise, on the facts pleaded, every routine reassignment or transfer in employment could be a violation of G.L. c. 12, §§11H and 11I.")

44. *Mouradian v. General Electric Coompany*, 23 Mass. App. Ct. 538, 543 (1987) (holding that the act does not "create an independent right to vindicate an alleged wrong which might have been the subject of investigation and possible vindication under G.L. c. 151B".); *Sereni v. Star Sportswear Manufacturing Corp.*, 24 Mass. App. Ct. 428, 431-32 (1987) (same; no independent cause of action under the MCRA even if the plaintiff has complied with the procedural requirements of c. 151B).

45. 23 Mass. App. Ct. at 543 n.5 ("There may be a case in which the termination of an at-will employee could give rise to a tenable complaint" under the MCRA, but "[t]his is not such a case...").

46. *See* Schilepsky & Ward, *The Massachusetts Civil Rights Act and Private Employment Litigation*, §III (paper presented at Third Annual New England Employee Relations Conference, May 25, 1988) (citing cases).

47. *Packaging Industries Group, Inc. v. Chaney*, 380 Mass. 609, 617 (1980).

48. 461 U.S. 95 (1983).

49. 402 Mass. 130 (1988) (holding that the MCRA applies to juveniles).

50. *Id.* at 135 (citations omitted).

granting such relief under the MCRA in situations involving not only racially motivated violence, but also violence and harassment based on religion, sexual preference, and national origin.[51]

F. The Right to a Jury Trial

While it is clear that there is no right to a jury trial under the MCRA for actions seeking only injunctive relief,[52] the SJC has not yet determined whether there is a right to a jury trial for MCRA claims involving compensatory, rather that equitable, relief.[53] One federal district court judge has described this question as "difficult and debatable."[54] A substantial argument in support of the right to a jury trial comes from the SJC's frequently cited statement that the MCRA is the state law equivalent of 42 U.S.C. § 1983,[55] under which the right to a jury trial is well established.[56] In any event, a number of courts have tried MCRA cases to jury, evidently concluding that, regardless whether there is a *right* to a jury trial, MCRA cases are at least *triable* to a jury.[57]

IV. Proposed Amendments to the MCRA

A bill currently pending in the legislature would remedy a number of the problems which have led to the courts' narrowing construction of the MCRA. (*See* Appendix A for the text of the proposed amendment.) The bill, proposed by the Civil Liberties Union of Massachusetts and filed by Senator Frederick E. Berry on November 1, 1989, would make the following changes.

First, the bill would eliminate the threats, intimidation or coercion requirement where the defendant is a governmental actor. The bill would also modify that requirement with respect to other defendants by making it clear that coercion does not necessarily mean physical force, but includes any statement or act that is "intended to or would have the reasonably likely effect of causing a person to forgo the exercise or enjoyment" of the rights protected by the Act.

Second, the bill would eliminate qualified immunity for governmental defendants.

Third, the bill would allow punitive damages, as well as attorney's fees and costs—a feature that it shares with the recently enacted Massachusetts Equal Rights Act, G.L. c.93 § 102.

Finally, in section 11I, which provides a cause of action for individuals (as opposed to section 11H, which provides a cause of action for the Attorney General), the bill specifies that the rights covered by the Act are "civil rights and civil liberties" secured by the constitution or laws of the United States and the Commonwealth.

Taken together, these proposed changes would solve a number of problems with the MCRA. Perhaps most importantly, the bill would resolve the anomalies that have arisen in connection with the "threats, intimidation or coercion" requirement, by (a) providing a cause of action for those who suffer "direct" deprivations of rights by governmental actors and (b) clarifying the definition of coercion as it pertains to private actors. The bill would also focus, in actions brought by private parties, on the civil rights/civil liberties issues that originally gave rise to the MCRA. Finally, the bill would increase the effectiveness of the Act by eliminating qualified immunity and allowing punitive damages where appropriate.

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51. Although both sections of the MCRA, §11I and § 11H, provide for injunctive relief, it appears that most of the cases in which injunctions have been sought under the Act have originated in the Attorney General's office. *See* Boyle, *Cases Spotlight Private Action*, 17 Mass. Lawyers Weekly 1, 31 (May 22, 1989) (describing *Daley v. Trembley*, Middlesex Super. Ct., No. 89-2838, as possibly the first private action under the MCRA in which an injunction has been granted and noting that Attorney General's Office had obtained 35 such injunctions since January 1987). *But see also Abromowitz v. Boston University*, Massachusetts Appeals Court, No. 86-0201-CV (May 9, 1986) (awarding preliminary injunction under MCRA in case involving free speech rights of students); *id.*, Suffolk Superior Court, *No. 82680 (Dec. 12, 1986) (awarding permanent injunction); Planned Parenthood League of Massachusetts, Inc., et al. v. Operation Rescue, et al.*, Massachusetts Supreme Judicial Court, No. 5212 (seeking, *inter alia*, injunction under MCRA barring interference with abortion rights).

52. *Commonwealth v. Guilfoyle*, 402 Mass. 130, 135-36 (1988).

53. *See O'Connell v. Chasdi*, 400 Mass. at 691 n.6.

54. *Redgrave v. BSO*, 602 F. Supp. 1189, 1192 (D. Mass. 1985). The difficulty surrounding this issue arises from the ambiguous language of § 11I of the MCRA, which permits an award of "injunctive and other appropriate *equitable* relief...including the award of compensatory money damages" (emphasis added). It is not clear from this language whether the legislation intended to include "compensatory money damages" as part of the "equitable relief" available under § 11I, or rather sought to provide legal and equitable claims under that section.

55. *See e.g.*, Batchelder II, 393 Mass. at 822-23 (MCRA provides a remedy "coextensive with 42 U.S.C. § 1983, except that the Federal statute requires state action whereas its State counterpart does not.").

56. *See* Sherman & Goldman, *supra*, at 13-14 & n.19.

57. *See* Shilepsky & Ward, *supra*, § IX (citing cases).

Appendix A

An Act Amending the Massachusetts Civil Rights Act

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1

Chapter 12 of the General Laws is hereby amended by striking the first sentence of Section 11H and substituting the following:

Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the Constitution or laws of the commonwealth, or whenever any person or persons, acting under color of law, directly or indirectly interfere, or attempt to interfere, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the Commonwealth, the attorney general may bring civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. For purposes of this statute, threats, intimidation, or coercion shall include but not be limited to statements or acts, whether or not accompanied by physical force or threat of force, that are intended to or would have the reasonably likely effect of causing a person to forgo the exercise or enjoyment of any right as described in this section, or to punish or retaliate against a person for having exercised any such right. Coercion shall include requirements imposed generally by employers, educational institutions or others in authority over individuals which condition employment or any other privilege or benefit on the relinquishment of such rights.

Chapter 12 of the General Laws is hereby further amended by striking section 11I and substituting the following:

(a) Any person whose exercise or enjoyment of civil rights or liberties secured by the constitution or laws of the United States or of civil rights or liberties secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief and/or the award of compensatory and punitive money damages.

(b) In any action brought pursuant to subsection (a), no defense of qualified immunity shall be available to any defendant.

(c) Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorney's fees in an amount to be fixed by the court.

Carifio v. Watertown: A Plaintiff's Presentment Case

There haven't been too many presentment cases under the Tort Claims Act coming down from the appellate courts lately, perhaps because word is getting around about the requirements of the statute and fewer defective presentments are being made. Or, perhaps it is because the 1988 amendment (St. 1988, c. 217), which allows presentment to be sent to a variety of municipal officials, has validated quite a few otherwise defective attempts. *See* 2 MA Gov. Liab. Rptr. 80 (1988). Recently, however, the Appeals Court shed a little more light on the presentment requirement in *Carifio v. Watertown*, 27 Mass. App. Ct. 571 (1989).

The Tort Claims Act requires the claimant to send the presentment to the "executive officer" of the defendant public employer. In the case of Watertown, the executive officer is the town manager. The plaintiff in *Carifio* sent it to the town clerk, with a copy to the town manager. The assistant town attorney wrote back (with a copy to the town manager) stating that the presentment was inadequate because it did not specify the date, location and manner of the accident, and, quizzically, requested the claimant to "submit the appropriate notice to the Town Clerk in accordance with G.L. Chapter 258, Section 4." 27 Mass. App. Ct.