The Maine Civil Rights Act: History, Enforcement, Application, and Analysis

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THE MAINE CIVIL RIGHTS ACT: HISTORY, ENFORCEMENT, APPLICATION, AND ANALYSIS

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THE MAINE CIVIL RIGHTS ACT: HISTORY, ENFORCEMENT, APPLICATION, AND ANALYSIS*

"Under our Constitution men are punished for what they do or fail to do and not for what they think and believe."

—United States Supreme Court Justice Hugo Black

I. INTRODUCTION

Since the passage of the "Maine Civil Rights Act" (MCRA, Act) in 1989, the Maine Department of the Attorney General has made enforcement of that civil

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* This Comment is dedicated to the late Professor David D. Gregory, who encouraged the Author to examine the topic and enforcement of the Maine Civil Rights Act, and who mentored the Author throughout the research and writing process.


§ 4681. Violations of constitutional rights; civil action by Attorney General

Whenever any person, whether or not acting under color of law, intentionally interferes or attempts to intentionally interfere by physical force or violence against a person, damage or destruction of property or trespass on property or by the threat of physical force or violence against a person, damage or destruction of property or trespass on property with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State or violates section 4684-B, the Attorney General may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the rights secured. Each violation of this section is a civil violation for which a civil penalty of not more than $5,000 for each defendant may be adjudged. These penalties must be applied by the Attorney General in carrying out this chapter. The civil action must be brought in the name of the State and instituted in the Superior Court for the county where the alleged violator resides or has a principal place of business or where the alleged violation occurred. A person who knowingly violates a temporary restraining order or preliminary or permanent injunction issued under this section commits a Class D crime. Each temporary restraining order or preliminary or permanent injunction issued under this section must include a statement describing the penalties provided in this section for a knowing violation of the order or injunction. The clerk of the Superior Court shall transmit one certified copy of each order or injunction issued under this section to the appropriate law enforcement agency having jurisdiction over locations where the defendant is alleged to have committed the act giving rise to the action, and service of the order or injunction must be accomplished pursuant to the Maine Rules of Civil Procedure. Unless otherwise ordered by the court, service must be made by the delivery of a copy in hand to the defendant.

§ 4682. Violations of constitutional rights; civil actions by aggrieved persons

Whenever any person, whether or not acting under color of law, intentionally interferes or attempts to intentionally interfere by physical force or violence against a person, damage or destruction of property or trespass on property or by the threat of physical force or violence against a person, damage or destruction of property or trespass on property with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State or violates section 4684-B, the person whose exercise or enjoyment of these rights has been interfered with, or attempted to be interfered with, may institute and prosecute in that person's own name
and on that person's own behalf a civil action for legal or equitable relief. A person who knowingly violates a temporary restraining order or preliminary or permanent injunction issued under this section commits a Class D crime. Each temporary restraining order or preliminary or permanent injunction issued under this section must include a statement describing the penalties provided in this section for a knowing violation of the order or injunction. The clerk of the Superior Court shall transmit one certified copy of each order or injunction issued under this section to the appropriate law enforcement agency having jurisdiction over locations where the defendant is alleged to have committed the act giving rise to the action, and service of the order or injunction must be accomplished pursuant to the Maine Rules of Civil Procedure. Unless otherwise ordered by the court, service must be made by the delivery of a copy in hand to the defendant.

§ 4683. Attorney's fees and costs

In any civil action under this chapter, the court, in its discretion, may allow the prevailing party, other than the State, reasonable attorney's fees and costs, and the State shall be liable for attorney's fees and costs in the same manner as a private person.

§ 4684. Application includes interference by private parties

For the purposes of this chapter and Title 17, section 2931, rights secured by the Constitution of the United States and the laws of the United States and by the Constitution of Maine and the laws of the State include rights that would be protected from interference by governmental actors regardless of whether the specific interference complained of is performed or attempted by private parties.

§ 4684-A. Civil rights

For purposes of this chapter and Title 17, section 2931, a person has the right to engage in lawful activities without being subject to physical force or violence, damage or destruction of property, trespass on property or the threat of physical force or violence, damage or destruction of property or trespass on property motivated by reason of race, color, religion, sex, ancestry, national origin, physical or mental disability or sexual orientation.

§ 4684-B. Additional protections

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

   A. "Building" means any structure having a roof or partial roof supported by columns or walls that is used or intended to be used for shelter or enclosure of persons or objects regardless of the materials of which it is constructed.

   B. "Health service" means any medical, surgical, laboratory, testing or counseling service relating to the human body.

   C. "Physical obstruction" means rendering impassable ingress or egress from a building or rendering passage to or from a building unreasonably difficult or hazardous.

2. Violation. It is a violation of this section for any person, whether or not acting under color of law, to intentionally interfere or attempt to intentionally interfere with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State by any of the following conduct:

   A. Engaging in the physical obstruction of a building;

   B. Making or causing repeated telephone calls to a person or a building, whether or not conversation ensues, with the intent to impede access to a person's or building's telephone lines or otherwise disrupt a person's or building's activities;

   C. Activating a device or exposing a substance that releases noxious fumes and offensive odors within a building; or

   D. After having been ordered by a law enforcement officer to cease such noise, intentionally making noise that can be heard within a building and with the further intent either:
“hate crime” law one of its highest priorities. According to one statistic, “more than 125 people have been prosecuted in Maine’s civil courts on hate crime charges since 1994,” and only two of those actions have been lost by the State. The Attorney General at the time of this writing, Andrew Ketterer, has stated that he takes the perpetration of hate crimes seriously, and that it has been important to him “that the message gets out that Maine will not tolerate the abuse of its minority citizens.”

The breadth of the term “Maine Civil Rights Act” is a bit misleading because although the Act protects civil rights, it does so only in narrow circumstances. Unlike the broader Maine Human Rights Act, the Maine Civil Rights Act is intended to apply only to situations in which there is violence or threats of violence or damage to property or threats of damage to property that are motivated by bias against categories identified by the legislature.

This Comment will explore the Maine Civil Rights Act in detail. The primary purpose of this writing is to provide practitioners of law in Maine with information about the Act. To that end, Part II conveys general background information about the statute, including its legislative history and related Maine case law, as well as an explanation of the manner in which the Department of the Attorney General enforces the Act.

§ 4685. Short title
This chapter may be known and cited as the “Maine Civil Rights Act.”

Id.

3. The phrase “hate crime” is a relatively new one in social parlance. According to one source, “[t]he term ‘hate crime’ first appeared in a popular magazine in the October 9, 1989 issue of U.S. News and World Report, in an article entitled “The Politics of Hate,”’ authored by John Leo. JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 4 (1998) [hereinafter JACOBS/POTTER TREATISE]. A “hate crime” (or often alternatively termed, “bias-motivated crime”) is generally considered to be an unlawful act that is accompanied, or found to be motivated, by prejudice against, e.g., the race, gender, sexual orientation, national origin, mental or physical disability, or religion of the victim. See id. at 3.


5. Id. at A7.

6. Id.


Indeed, the “Policy” section of the Maine Human Rights Act indicates its broad provisions:

To protect the public health, safety and welfare, it is declared to be the policy of this State to keep continually in review all practices infringing on the basic human right to a life with dignity, and the causes of these practices, so that corrective measures may, where possible, be promptly recommended and implemented, and to prevent discrimination in employment, housing or access to public accommodations on account of race, color, sex, physical or mental disability, religion, ancestry or national origin; and in employment, discrimination on account of age or because of the previous assertion of a claim or right under former Title 39 or Title 39-A and in housing because of familial status; and to prevent discrimination in the extension of credit on account of age, race, color, sex, marital status, religion, ancestry or national origin; and to prevent discrimination in education on account of sex or physical or mental disability.

Id. § 4552.

The discussion in Part III is meant not only to describe but also to illustrate the manner in which the Maine Civil Rights Act is enforced by the Attorney General. To do so, this Comment reconstructs three injunctive actions brought by the State under the Act.

Next, an analysis is presented that consists of three subparts. In the first subpart, the analysis will focus on the consent decrees and permanent injunctions used by the State in its enforcement of the Act. In the next subpart of the analysis, the constitutionality of the Maine Civil Rights Act will be discussed in relation to the United States Supreme Court’s holdings in three First Amendment cases: Chaplinsky v. New Hampshire,9 Near v. Minnesota,10 and R.A.V. v. City of St. Paul.11 The final subpart of the analysis will focus on a significant public policy consideration that is worth thinking about: the manner in which the Act is enforced by the State against children.

II. HISTORY & ENFORCEMENT

A. History

The Maine Civil Rights Act became effective on September 30, 1989.12 Modeled in part after the Massachusetts Civil Rights Act,13 the Maine Act is nearly identical to that law in its intent to protect rights secured by the federal and state constitutions.14 A summary of the Act posted on the Maine Department of the Attorney General’s Internet site explains that the Act prohibits anyone from “[i]ntentionally interfering with another person’s right to engage in lawful activities...[t]hrough the use of violence, threat of violence or property damage...[w]hen the conduct is motivated by bias toward the victim because he or she is a minority.”15 The Internet site goes on to state the following:

The statute specifically applies to bias based on race, color, religion, ancestry, sex, national origin, sexual orientation and physical or mental disability. The statute authorizes the Attorney General to file suit in Superior Court seeking an injunction ordering that conduct to stop. Additionally, the Attorney General is authorized to recover from the defendant the costs of the State’s attorneys and a civil penalty of up to $5,000. A defendant who knowingly violates a civil rights injunction can be charged with a class D crime punishable by up to 1 year in jail.16

The Attorney General’s authority to enforce the Act will be explored in greater detail in Part III. However, to truly understand and appreciate the statute in its entirety, a brief account of its legislative history is first in order. Following that will be a discussion of case law that has involved the Maine Civil Rights Act.

10. 283 U.S. 697 (1931).
12. See P.L. 1988, c. 582.
16. Id.
1. A Brief History of the Maine Civil Rights Act


The Maine Civil Rights Act was first introduced into Maine law as H.P. 896—L.D. 1253, “An Act to Prevent, Punish and Remedy Violations of Constitutional Rights.” The legislation arose at a time when there was a “rising movement of hatred directed at selected groups.”17 National and state headlines reflected the growth of “hate groups” including the Ku Klux Klan, the American Nazi Party, Posse Comitatus, the Aryan Nations, and the Skinheads.18 One such article quoted a Lewiston, Maine resident’s words at a national rally of one of the above groups, which showed that Maine was not insulated from the rise of hateful sentiments.19 The purpose of the new Act was to address and remedy this trend.

The bill declared that it would be a violation of law “[w]henever any person...interferes by threat, intimidation or coercion or attempts to interfere by threat, intimidation or coercion, with the exercise or enjoyment by any other person of rights secured by” the United States and Maine constitutions.20 The “Statement of Fact” in the Legislative Document, however, was drawn more narrowly to say that the intent of the bill was to “provide public and private remedies for private property damage arising from the exercise of constitutional rights.”21 Those remedies were to be equitable in nature and could be sought in civil actions by the Attorney General or by aggrieved parties.22 The legislation also allowed private parties, but not the State,23 to recover reasonable attorney's fees, and imposed the correlative responsibility on the State to reimburse such fees for any prevailing defendant.24

Testimony to the Judiciary Committee regarding the bill included a statement by Donald F. Fontaine of the National Lawyers Guild, who said that the growth of hate crimes was far from being a “strictly ... big city phenomenon on the West Coast.”25 He urged the committee to consider that the hate group phenomenon would become more evident locally as national trends came “up the turnpike to southern Maine” from Boston—a city which itself was “plagued [with] thousands of racial incidents per year involving the deprivation of civil rights.”26

Fontaine further testified that the bill “does not prohibit anything that is not

19. See 1989 MCRA Hearing, supra note 17 (statement of Donald Fontaine).
21. Id. at Statement of Fact.
22. See id. § 4682(1).
25. 1989 MCRA Hearing, supra note 17, at 1 (statement of Donald Fontaine).
26. Id. at 2.
already prohibited by law," pointing out that there already existed in Maine a criminal statute prohibiting interference with civil rights.27 Fontaine stated, however, that existing statutory protections were not adequate:

It is no answer to a person who has been frightened away from going to a Jewish temple by a Swastika having been painted there to say that the crime of defacing a building was committed. The far more serious crime of attempting to interfere with a person's right to worship needs to be deterred and punished when it occurs.28

Fontaine concluded that what justified the proposed legislation was that it was necessary "to protect people's civil rights from being taken away through threats."29 Diane Elze of the Maine Lesbian/Gay Political Alliance offered further testimony. Elze testified that the increase of hate crimes in Maine and across the nation warranted legislation particularly aimed at addressing the "insidious" nature of such crimes.30 Hate crimes, said Elze, were "meant to intimidate entire groups of people based on a particular characteristic."31 She concluded by encouraging the Judiciary Committee to follow other states by providing a civil action in law to "promote peace and harmony in Maine."32

Following the testimony, the Judiciary Committee voted 13-0 that L.D. 1253 "ought to pass as amended."33 The bill was passed into law not long after, making sections 4681, 4682, and 4683 of the Act effective.34

b. 1992: "An Act to Amend the Maine Civil Rights Law Regarding Violations of Constitutional Rights"


The first purpose of the legislation was to address "a potential problem [with the Act] resulting from the Law Court's decision in Phelps v. President and Trustees of Colby College,"35 one of the first cases involving the Act to reach the highest court in Maine. The testimony of one person before the Judiciary Committee succinctly explained the facts and issues of the Phelps case:

27. Id.
Fontaine refers to Me. REV. STAT. ANN. tit. 17 § 2931 (Supp. 1999), which falls under Chapter 93C of the Maine Criminal Code: Harassment Based on Characteristics. Section 2931 reads:
A person may not, by force or threat of force, intentionally injure, intimidate or interfere with, or intentionally attempt to injure, intimidate or interfere with or intentionally oppress or threaten any other person in the free exercise or enjoyment of any right or privilege, secured to that person by the Constitution of Maine or laws of the State or by the United States Constitution or laws of the United States.

28. 1989 MCRA Hearings, supra note 17, at 6 (statement of Donald Fontaine).
29. Id. at 5.
30. 1989 MCRA Hearings, supra note 17, at 1 (statement of Diane Elze).
31. Id.
32. Id. at 2.
33. See 1989 MCRA Hearings, supra note 17 (Voting Tally Sheet of the Joint Standing Committee on Judiciary).
34. See P.L. 1989, ch. 582.
35. 595 A.2d 43 (Me. 1991).
[Phelps] involved a rule against fraternities and sororities which Colby College
instituted in 1984. The plaintiffs in the case were Colby College students who
had been disciplined by Colby College for engaging in underground fraternity
activities in violation of the college rule. They sued under the Maine Civil Rights
Act, alleging that they had a constitutional right of freedom of association to
engage in fraternity activities and that Colby's disciplinary action constituted a
form of coercion that interfered with the exercise of their constitutional rights.

The Law Court rejected the students' claim. It did so, however, by interpret-
ing the statutory language to mean that the statute did not provide protection
against the actions of a non-governmental party such as Colby College unless the
specific rights in question were rights that are protected not just against govern-
ment action but also against private action. In other words, because the consti-
tutional freedom of association is a right which is secured against interference by
the government, the students did not have a right to complain about a private
college's rules against fraternity activity.36

According to the bill, the problem with the Act,37 as interpreted by the Law Court,
was that it required state action, i.e., its application was limited only to situations
involving the government. The new legislation therefore was designed to clarify
"that the protections against interference with civil rights apply to actions by pri-
vate parties as well as governmental actors" by eliminating the state action re-
quirement.38 Section 4684 of the Act achieved this result.39 Section 4684's es-
sential aim was to make it unlawful for private citizens to infringe on the lawful
rights of other private citizens in the same way that the state may not infringe on
such rights.40

The adoption of section 4684 was significant, particularly for reasons identi-
fied by one person who testified before the Judiciary Committee about L.D. 2318's
waiver of the state action requirement:

[T]here are problems in imposing constitutional requirements upon private par-
ties. For one thing, private institutions and private citizens themselves have con-
stitutional rights, and it is ordinarily not the role of the State to referee disputes
between private parties in the area of First Amendment rights. In addition, whole-
sale imposition of constitutional requirements upon private parties and private
relationships would create new rights fundamentally altering the relationships of
private parties and would have a number of unintended consequences.41

Here, the notion is raised for perhaps the first time in the record that imposing civil
rights penalties on private actors created a risk that the free speech rights of those

36. An Act to Amend the Maine Civil Rights Law Regarding Violations of Constitutional
Rights: Hearing on L.D. 2318 Before the Joint Standing Comm. on the Judiciary, 115th Legis.,
person) (on file with the Maine State Law Library).
39. See id. § 4684.
40. See id.
41. 1992 MCRA Hearings, supra note 36 (statement of unidentified person).
actors would be abridged—an issue that will be explored later in Part III of this Comment. Suffice it to say, however, that in addressing that risk, the testimony of the unidentified person went on to point out that constitutional implications of section 4684 would be limited because of the narrow tailoring of the Act to instances involving violence or the threat of violence.\textsuperscript{42}

Sally Sutton, Executive Director of the Maine Civil Liberties Union, also testified regarding the section 4684 provision of L.D. 2318. In advocating for that provision, Sutton stated that “[a]lthough [the Act] did not create any new substantive rights, [it] creates a new and important cause of action.”\textsuperscript{43} Sutton then criticized the Law Court’s decision in \textit{Phelps}, explaining to the Judiciary Committee that the court’s decision “essentially gutted the legislation” by holding that “the MCRA, by its plain language, does not permit action against private parties who interfere with others’ exercise or enjoyment of constitutionally protected rights.”\textsuperscript{44}

Section 4684, therefore, seems to have been viewed by the MCLU as necessary to correct this problem.\textsuperscript{45}

In addition to the imposition of the state action requirement on private parties, the other purpose of L.D. 2318 was to limit the Maine Act’s application to conduct involving “force or violence or the threat of force or violence,” deleting from the original language of sections 4681 and 4682 provisions allowing civil actions based on “intimidation” and “coercion.”\textsuperscript{46} That change was meant to narrow “the type of situation in which the Attorney General may bring a civil action for relief.”\textsuperscript{47}

Despite the MCLU’s support for the addition of section 4684 to the Act, the aim of L.D. 2318, to eliminate the “intimidation” and “coercion” language from the Act, drew fire from that organization. In her testimony before the Judiciary Committee, Executive Director Sutton explained that the MCLU’s support of L.D. 2318 was “tempered” because eliminating the “intimidation/coercion” language “would offer the citizens of Maine little more than an alternative way to plead an assault and battery charge.”\textsuperscript{48} Such a limitation of the scope of the Act to situations only involving force or violence, or threat of force or violence, Sutton continued, “does not go far enough in protecting basic liberties.”\textsuperscript{49} Sutton concluded by asserting that the MCRA “must not exempt from liability those who possess the power to interfere with civil rights without having to raise their fists in anger,” i.e., through intimidating or coercive conduct.\textsuperscript{50} She expressed the MCLU’s belief that only the amendment to the Act clarifying who may bring actions should be passed, and the “intimidation/coercion” language should remain.\textsuperscript{51}

Ultimately, the deletions of the “intimidation” and “coercion” wording did occur. Section 4684, however, was preserved, as was a provision in L.D. 2318 that “formally supplied the title of ‘Maine Civil Rights Act’ to the law,” reflected in section 4685 of the Act.\textsuperscript{52}

\textsuperscript{42} See id.
\textsuperscript{43} See id. (statement of Sally Sutton).
\textsuperscript{44} Id.
\textsuperscript{45} See id.
\textsuperscript{47} See id. at Statement of Fact.
\textsuperscript{48} 1992 MCRA \textit{Hearings}, supra note 36 (statement of Sally Sutton).
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} See id.
\textsuperscript{52} See L.D. 2318 (115th Legis. 1992).
Following further testimony, L.D. 2318 was given an “ought to pass as amended” recommendation by the Judiciary Committee, 11-0-1 (with one member absent).53 The full legislature later passed the amendment into law.54


The Maine Civil Rights Act was amended again in 1993 by S.P. 355—L.D. 1069, “An Act to Amend the Maine Civil Rights Law Regarding Violations of Constitutional Rights.” The purpose of this amendment was threefold. According to the “Statement of Fact” contained in the legislative document, the bill [made] 3 changes to the civil rights laws. First, the bill provide[d] that intentional interference with secured rights through damage or destruction to, tampering with or trespassing on property violates the law. Second, the bill provide[d] for civil penalties for violations of the Maine Revised Statutes, Title 5, section 4681. Third, the bill provide[d] that a violation of an order or injunction issued under the law constitutes a crime.55

Testifying before the Judiciary Committee in support of L.D. 1069, MCLU Executive Director Sally Sutton characterized the legislation as “an attempt to broaden the protections provided by the Maine Civil Rights Act.”56 Of particular significance, Sutton noted, was that the legislation “strengthen[ed] the enforcement measures available under the Maine Civil Rights Act to include civil penalties and, where there have been violations of injunctive orders issued under the Act, criminal sanctions.”57 As with her testimony regarding the 1992 amendment to the Act, however, Sutton criticized L.D. 1069 as not going far enough to protect Maine’s citizens fully: “Still omitted from protection … are cases where the interference is not carried out through means of force … but rather through economic, psychological, or other ‘non-physical’ means.”58 Because of this, Sutton asked the legislature to amend the Act to restore its original “intimidation” and “coercion” wording.59 She asserted that that change would protect the basic rights of Maine citizens against “interference … that is equal in scope to the protections they already enjoy with respect to those who seek to interfere with their contract rights.”60 Despite the MCLU’s appeal, however, the “intimidation” and “coercion” language ultimately remained omitted.

Laurent F. Gilbert, Sr., Chief of Police of the Lewiston Police Department, also testified in support of L.D. 1069.61 Gilbert explained that with the passage of

53. See 1992 MCRA Hearings, supra note 36 (Voting Tally Sheet of the Joint Standing Committee on Judiciary).
57. Id.
58. Id.
59. See id.
60. Id. at 3.
61. See id. (statement of Laurent F. Gilbert, Sr.).
the federal “Hate Crimes Statistics Act of 1990,” police departments throughout Maine had appointed a civil rights officer to handle hate crimes complaints in cooperation with the Maine Department of the Attorney General Civil Rights Unit. Gilbert testified that the establishment of “Hate/Bias Crimes Task Forces” in both the Portland and Lewiston Police Departments created an important link “between the departments and various minority communities who are often victimized by criminals.” He added that although the MCRA had been a “tremendous asset” in dealing with civil rights violations, it was in need of the improvements “identified by the Attorney General.” Gilbert concluded by praising the injunctive mechanism of the new legislation and by urging the committee to unanimously recommend an “ought to pass” report.

With the exception of one absent representative, the Judiciary Committee did just that, by a vote of 12-0. The legislation was approved thereafter, effectuating sections 4681 and 4682, which were broadened sufficiently to include the additional provisions of the legislation.

**d. 1993: “An Act to Amend the Maine Civil Rights Act Regarding Violations of Constitutional Rights”**

The first lively debate in the history of the Maine Civil Rights Act concerned the intent of L.D. 1334, “An Act to Amend the Maine Civil Rights Act Regarding Violations of Constitutional Rights,” to specify categories of citizens to whom the statute would apply.

The “Statement of Fact” for the new legislation states that the “bill establishes a right of a person to be free of violence or property damage motivated by bias for purposes of the Maine Civil Rights Act and the Maine Revised Statutes, Title 17, section 2931.” The text of the bill specifically guaranteed the right to be free from violence or property damage “motivated by reason of race, color, religion, sex, ancestry, national origin or sexual orientation.” An amendment to the L.D. inserted “physical or mental disability” into that list.

The bill received broad support in the form of testimony to the Judiciary Committee. Cecelia E. Levine of the Jewish Federation—Community Council of Southern Maine encouraged the Judiciary Committee to pass the amendment so as to prevent “other minorities [from] suffer[ing] … acts of discrimination because of the bias of hate-filled individuals.”

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63. See 1993 MCRA Hearings, supra note 56 (statement of Laurent F. Gilbert).
64. Id.
65. Id.
66. See id.
67. See 1993 MCRA Hearings, supra note 56 (Voting Tally Sheet of the Joint Standing Committee on Judiciary).
69. See id. §§ 1-2.
72. Id. § 4684-A.
Sr., testified again, by letter, stating that the amendment “will give law enforcement officers and prosecutors the tools necessary to protect the rights of all citizens [they] collectively serve.” Gilbert further declared that “[c]rimes cannot be tolerated and especially in a free society those motivated by hate and bias must never be tolerated if we are to truly claim to be a free country.”

The Maine Department of the Attorney General also offered testimony in support of L.D. 1334. Stephen L. Wessler, then-Deputy Attorney General and Chief of the Civil Rights Unit, stated that the bill, which was drafted by the Department of the Attorney General, would fill a “hole” in the Maine Civil Rights Act that had been detected by the Civil Rights Unit while enforcing the Act. Wessler explained that the Act requires a showing of an interference with a right protected by the constitutions or laws of Maine or the United States. Such a showing, Wessler said, could easily be made when a “victim has been denied access to housing or public accommodation as a result of racial, ethnic, or religious discrimination as protected by the Maine Human Rights Act or the federal civil rights laws.”

Wessler stated, however, that a showing of interference was difficult, if not impossible, when violence was not motivated by bias against a class unprotected by those laws, for example, gays and lesbians. L.D. 1334, said Wessler, would make “clear that, for purposes of Maine’s Hate Crimes statutes, a person has a right to engage in daily living activities without being subject to attack based upon the victim’s minority status...whether they be black, Native American, Jewish, Asian, Hispanic or gay and lesbian.”

Following all the testimony, the Judiciary Committee recommended an “ought to pass as amended” report by a vote of 12-0-1; yet when the bill reached the full House the written record shows the opposition to the Civil Rights Act. In a June 3, 1993, speech to the House, Representative Marshall of Elliot moved “that L.D. 1334 and all of its accompanying papers be indefinitely postponed.” After asserting that the bill “was very cleverly packaged ... in order to make anyone opposed [to its passage] look like a gay basher or homophobic,” Marshall stated that he was “not in favor of inflicting violence on anyone.” He contended, however, that he did not “think it is necessary to specify any one category of people when it comes to crimes of violence toward persons or property.” Marshall conceded that despite the Constitution’s broad protections, classes of citizens have been singled out for protection because they are (1) “readily discernible,” (2) “educationally or economically handicapped,” and (3) “politically handicapped.”

75. Id. (statement of Laurent F. Gilbert, Sr.).  
76. Id.  
77. Wessler is currently the Director of the “Center for the Study and Prevention of Hate Violence” at the University of Southern Maine.  
78. 1993 MCRA Hearings (L.D. 1334), supra note 74 (statement of Stephen L. Wessler).  
79. See id.  
80. Id.  
81. See id.  
82. Id.  
83. See 1993 MCRA Hearings (L.D. 1334), supra note 74 (Voting Tally Sheet of the Joint Standing Committee on Judiciary).  
85. Id.  
86. Id.  
87. Id.
Representative Marshall posited that the "group pushing this bill"—presumably meaning gays and lesbians—met none of the three criteria. 88

Representative Cote of Auburn, following Marshall, proceeded to read into the record an "eloquent" statement by Jasper S. Wyman, then-Executive Director of the Christian Civic League of Maine, who had testified before the Judiciary Committee in support of L.D. 1334. 89 Cote noted that Wyman had praised the legislation as having the "eloquent testimony to the high purpose for which all law must aspire" and then Cote encouraged the House to vote against Marshall's motion to postpone, 90 which the House did by a vote of 35-104-12. 91 L.D. 1334 was then "passed to be enacted" and sent to the Senate. 92

In the Senate, Senator Hanley characterized L.D. 1334 as a superfluous bill, arguing that the criminal code and the constitution already provided the protections that the bill was designed to afford. 93 Hanley pointed out that the Attorney General had yet to test whether the already existing legislation was defective in the way Wessler had described in his testimony before the Judiciary Committee. 94

Senator Lawrence of York, a sponsor of L.D. 1334, followed Hanley. Lawrence said L.D. 1334 simply gave the Attorney General the ability to pursue a civil injunction and remedies in situations involving violence toward others, in addition to the criminal protections already offered by the law. 95 "It is a very simple Bill, ... a very good Bill," concluded Lawrence, who then called for a vote. 96

Following some additional comments by Hanley during the roll call reemphasizing his opposition, the Senate voted 25-7-3 to pass the bill and present it to the governor for signing into law. 97 This change ultimately was reflected in section 4684-A of the statute. 98

The addition of section 4684-A to the law dramatically transformed the character of the Maine Civil Rights Act. The new section expanded the Act from its original design as a statute analogous in purpose to the federal civil rights acts, to a law intended to address crimes motivated by bias against the categories identified in section 4684-A.

In short, the law by its new language became typical of what is commonly thought of as a "hate crime" statute.

e. 1995: "An Act to Amend the Maine Civil Rights Act to Provide Greater Protection to Reproductive Facilities"

The Maine Civil Rights Act was amended in 1995 by H.P. 866—L.D. 1216, "An Act to Amend the Maine Civil Rights Act to Provide Greater Protections to Reproductive Facilities." 99 According to the "Statement of Fact," the purpose of

88. Id.
89. Id. (statement of Rep. Cote).
90. Id.
92. See id.
94. See id.
96. Id.
97. See id. at 1039 (Roll Call).
the measure was to add to the protections already contained in the Maine Civil Rights Act for persons seeking services from reproductive health facilities and for persons providing services at those facilities. Specifically, the bill prohibits persons from physically obstructing ingress to or egress from a reproductive health facility; making repeated telephone calls to a facility; setting off a device releasing noxious odors; and intentionally making noise that jeopardizes the health of persons receiving reproductive health services. The current provisions of the Maine Revised Statutes, Title 5, sections 4681 and 4682, prohibit the use of violence, threat of violence, property damage and trespass with the intent of interfering with the provision or receipt of constitutionally secured reproductive health services.100

A number of parties testified before the Judiciary Committee in favor of this legislation. Dr. Lani Graham, Director of the Bureau of Health, said that the bill would add important protections to the law for persons seeking services at reproductive facilities.101 Kathryn Vezina, Director of Internal Affairs and Legal Counsel for the Family Planning Association of Maine, urged the committee to "recognize the legitimate fear of providers and recipients of reproductive health services and ... act to increase the legal protections and reduce the potential for violence" at clinics, by recommending passage of the legislation.102 Dr. Greg Luck warned of the potential for women to avoid obtaining safe and legal medical abortions, and rather to seek abortions in "back alleys" for fear of encountering violence at clinics and doctors' offices.103 The ACLU and the Maine Life Coalition also voiced support for the bill. The former declared that L.D. 1216 did not in any way "run afoul of the free speech provisions of the Maine and United States Constitutions,"104 while the latter voiced its support believing "in good faith that the legislation [would] be used appropriately."105

Stephen L. Wessler of the Department of the Attorney General also testified in support of the amended version of L.D. 1216, a bill drafted and submitted by that Department.106 Making reference to the "unthinkable violence" of the Oklahoma City bombing of that same year, Wessler explained that the bill before the committee provided the Attorney General "with the legal authority to obtain restraining orders to prohibit illegal and dangerous conduct ... [by] prohibiting persons from intentionally interfering with another person's exercise of a constitutionally or statutorily secured right, including the right to obtain abortions" through the conduct specified in the legislation.107 "Our ultimate goal in seeking this authority," concluded Wessler, "is to provide the [Attorney General] with the tools to stop and restrain illegal conduct before that conduct escalates to the level of tragic violence."108

100. Id. at Statement of Fact.
102. Id. (statement of Kathryn Vezina).
103. Id. (statement of Gregory C. Luck, M.D.).
104. Id. (statement of Sally Sutton).
105. Id. (statement of Margaret Yates).
106. See id. (statement of Stephen L. Wessler).
107. Id.
108. Id.
The Judiciary Committee voted that L.D. 1216 “ought to pass as amended” by a 13-0-0 count.109 On reaching the House, however, yet another debate erupted in the history of the Act. The exchange concerned some legislators’ beliefs that the amendment was not only redundant in view of rights already secured by the federal and state constitutions, but that it also was unreasonably narrow in scope.110

In statements to the House, Representative Waterhouse of Bridgton expressed concern that the bill’s focus on protecting abortion facilities was a limited one, and that the protections the amendment sought to impose “should be comprehensive and for everyone.”111 Waterhouse offered an amendment to the bill that would have made its language more comprehensive, in part to avoid what he perceived as an equal protection problem because of its limited protection of only abortion facilities.112

Representative Lumbra of Bangor argued for Waterhouse’s amendment, as well as for the legislation as a whole.113 Lumbra agreed with Waterhouse’s view, arguing that other buildings—such as churches—deserved the same protections against disturbance by noise and protests as clinics and that the legislation ought to have been broadened to include such places.114

Representative Ott of York responded to Waterhouse’s criticism, arguing that L.D. 1216 was narrowly tailored to address demonstrations at abortion clinics to prevent violent confrontations and tragedies at those facilities.115 Ott also made a constitutional point by questioning whether Waterhouse’s amendment to the L.D. would cause it to violate the First Amendment’s guarantee of free speech and assembly.116

Ott’s comments were followed by those of Representative Hartnett of Freeport, who said that while he was for the legislation as a whole, he was against Waterhouse’s amendment.117 Hartnett emphasized that the problem the legislation sought to address was specific to the emotional issue of abortion.118 Despite initial reservations about L.D. 1216 for constitutional reasons, Hartnett changed his mind after a confrontation with a member of the House, who apparently disagreed with his views on abortion.119 That confrontation, Hartnett said, made him realize “what we are dealing with here”: legislation aimed at curtailing potentially violent confrontations that occur at abortion clinics.120

Following further remarks, the full House defeated Waterhouse’s amendment to L.D. 1216 by a 28-114-0-9 vote.121 The legislation then was passed and sent to the Senate, and became law shortly thereafter.122 These changes were effectuated in section 4684-B of the Act.123

109. See id. (Voting Tally Sheet of the Joint Standing Comm.).
112. See id.
113. See id. at 1234 (statement of Rep. Lumbra).
114. See id.
115. See id. at 1233 (statement of Rep. Ott).
116. See id.
117. See id. at 1234 (statement of Rep. Hartnett).
118. See id.
119. See id.
120. Id.
121. See id. at 1235 (Roll Call No. 218).
122. See id.
f. 1999: "An Act to Provide the Right to a Jury Trial in Civil Actions for Violations of Constitutional Rights"

The Maine Civil Rights Act was recently revisited in 1999 in the form of H.P. 273—L.D. 381, "An Act to Provide the Right to a Jury Trial in Civil Actions for Violations of Constitutional Rights."124 The bill sought to amend section 4681's provisions authorizing injunctive actions by the Attorney General by adding language providing that "[i]t is a right to a trial by jury in any action brought under this section."125 The bill also aimed to add language to section 4682 to the effect that an "action must be instituted in the Superior Court for the county where the alleged violator resides or has his principal place of business or where the alleged violation occurred."126 Further, the legislation added wording to section 4682 providing that "[i]t is a right to trial by jury in any action brought under this section."127 As a general matter, the bill provided in its summary that the legislation was meant to afford "the right to a trial by jury in civil actions for violations of constitutional rights under the Maine Civil Rights Act."128

The new language and provisions to allow for a trial by jury in civil actions, however, never came to fruition. By a vote of 9-3, the Judiciary Committee reported an "Ought Not to Pass" recommendation.129 L.D. 381 ultimately perished, and with it died the chance that determinations of whether bias motivated the conduct sought to be enjoined by the Attorney General could be made by a jury's evaluation.130

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125. Id. § 1.
126. Id. § 2.
127. Id.
128. Id. at Summary.
130. The issue of whether or not jury trials should be allowed in cases involving formal actions brought by the State under the Act may need to be revisited in light of the recent Supreme Court ruling in Apprendi v. New Jersey, 530 U.S. ___ , 147 L.Ed.2d 435, 120 S. Ct. 2348 (2000). In Apprendi, the defendant fired several shots into the home of a black family and made a (later-retracted) statement that he did not want the family in the neighborhood because of their race. See id. at 442. The defendant pleaded guilty to the act, which carried a prison term of 5 to 10 years. See id. at 442-43. The State, however, sought an enhanced penalty under a New Jersey "hate crime" statute allowing for enhancements of punishments "if the trial judge found that Apprendi committed the crime because of racial bias." See id. After a post-plea hearing, the trial court found by the preponderance of the evidence that the shooting was racially motivated and imposed a 12-year sentence. See id. at 443. The appeals court affirmed, despite Apprendi's contention that the Due Process Clause requires that a bias finding be proved to a jury beyond a reasonable doubt. See id. On review, the Supreme Court reversed, holding that any fact that increases the penalty for a crime beyond the statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. See id. at 455.

The Apprendi case is distinguishable on its facts because it involved a sentencing enhancement statute and not an action brought under a civil statute like the MCRA. What such statutes share, however, is that they require a determination of whether bias motivated an alleged unlawful act. In view of this, the Supreme Court's ruling in Apprendi that bias motivation is a question of fact for the jury—and not one of law for a judge—would be relevant in determining whether bias motivated a person to act unlawfully in a civil matter. Apprendi suggests that bias determinations should not be left in the hands of the court but rather in the hands of a defendant's peers.
2. Maine Case Law Involving the Maine Civil Rights Act

Few reported Maine cases have ruled on the validity of claims under the Maine Civil Rights Act besides the Phelps case discussed above. 131 In Bagley v. Raymond School Department, 132 the Law Court held that the Act was inapplicable to a claim against a state agency because the plaintiff had not alleged "use or threat of 'physical force or violence' in an effort to interfere with the exercise of a constitutional right." 133 The Law Court also applied that standard to a claim by a state employee against his agency in Andrews v. Department of Environmental Protection, 134 holding that, because the plaintiff had not alleged interference with his free speech rights by violence or threats of violence, he had no cause of action. 135

In Janess v. Nickerson, 136 the Law Court held that the plaintiff's claim against police officers and the State for an alleged unconstitutional search was untenable. 137 The court held that the State could not be sued "because the Legislature did not express an intent to include the State within the definition of 'person' under the [Act]," 138 and that the action could not be maintained against the law officers because they enjoyed the same qualified immunity under the Act as in federal cases involving 42 U.S.C. § 1983. 139

The first—and the one as of this writing, only—Law Court decision involving State enforcement of the Act under section 4681 was State v. DeCoster. 140 In that case, the Law Court held that the defendant had violated his farm workers' civil rights by denying them the right to receive visitors at their on-work-site mobile home park. 141 The defendant had posted a sign barring admission 142 to the site of the workers' homes, and his supervisors followed visitors at a dangerous proximity, blocked one visitor's exit, and told one visitor, "[I]f you come back ... we will take

131. See supra note 35 and accompanying text.
132. 1999 ME 60, 728 A.2d 127. In Bagley, the Law Court affirmed a lower court's ruling holding that, on principles of state-church separation, it was constitutional for the Town of Raymond to deny state voucher/tuition fees to parents wanting to send their son to a private Catholic high school. See id. ¶ 72, 728 A.2d at 149.
133. Id. ¶ 10 n.5, 728 A.2d at 131 n.5.
134. 1998 ME 198, 716 A.2d 212. In Andrews, the Plaintiff brought an action against the Maine Department of Environmental Protection, alleging, inter alia, that they had violated his right to free speech by "pursuing a course of adverse employment actions against him in retaliation for a letter he wrote to the Maine Times." Id. ¶ 2, 716 A.2d at 214.
135. See id. ¶ 23, 716 A.2d at 220. Yet, in a dissent, Justice Dana wrote that he was "not convinced that the Maine Civil Rights Act necessarily precludes a private cause of action for a constitutional violation in the absence of physical force or violence, damage or destruction of property, trespass on property, or threats thereof." Id. ¶ 24, 716 A.2d at 221 (Dana, J., dissenting).
136. 637 A.2d 1152 (Me. 1994).
137. See id. at 1158-59.
138. Id. at 1158.
139. See id. at 1159.
140. 653 A.2d 891 (Me. 1995).
141. See id. at 893.
142. The sign at issue read:
NO ADMITTANCE
AUTHORIZED EMPLOYEES
ONLY
OTHERS REPORT TO OFFICE
A.J. DECOSTER CO.
Id.
the superior court found that the supervisors’ actions met the section 4681 requirement of interference with rights “[by the threat of] physical force or violence against a person.” In affirming the superior court injunction, the Law Court rejected the defendant’s argument that an injunction ordering the removal of the sign was overly broad.

B. Enforcement of the Maine Civil Rights Act by the Maine Department of the Attorney General

Having examined the history of the Maine Civil Rights Act, the discussion now will focus on the enforcement powers of the State to bring civil actions under section 4681 of the Act against individuals who allegedly have violated the statute.

The Department of the Attorney General vigorously enforces the Maine Civil Rights Act under the authority conferred upon it by section 4681 of the statute. The mode of enforcement is a two-tiered system that includes an educational component and a law enforcement component. Both tiers deserve examination, after which there will be a brief discussion about the consent decrees often entered into by defendants to forgo the need for a formal trial.

I. Enforcement of the Maine Civil Rights Act Through Education

The Department of the Attorney General established a “Civil Rights Team

143. Id.
144. Id. at 895.
145. See id.
146. That section reads as follows:
§ 4681. Violations of constitutional rights; civil action by Attorney General
   Whenever any person, whether or not acting under color of law, intentionally interferes or attempts to intentionally interfere by physical force or violence against a person, damage or destruction of property or trespass on property or by the threat of physical force or violence against a person, damage or destruction of property or trespass on property with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State or violates section 4684-B, the Attorney General may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the rights secured. Each violation of this section is a civil violation for which a civil penalty of not more than $5,000 for each defendant may be adjudged. These penalties must be applied by the Attorney General in carrying out this chapter. The civil action must be brought in the name of the State and instituted in the Superior Court for the county where the alleged violator resides or has a principal place of business or where the alleged violation occurred. A person who knowingly violates a temporary restraining order or preliminary or permanent injunction issued under this section commits a Class D crime. Each temporary restraining order or preliminary or permanent injunction issued under this section must include a statement describing the penalties provided in this section for a knowing violation of the order or injunction. The clerk of the Superior Court shall transmit one certified copy of each order or injunction issued under this section to the appropriate law enforcement agency having jurisdiction over locations where the defendant is alleged to have committed the act giving rise to the action, and service of the order or injunction must be accomplished pursuant to the Maine Rules of Civil Procedure. Unless otherwise ordered by the court, service must be made by the delivery of a copy in hand to the defendant.

Project" with 18 high schools and middle schools in the fall of 1996. According to the Attorney General’s Web site, the Civil Rights Team Project was created "to address the problems of bias and prejudice in [Maine’s] schools." An increasing number of schools participate in the Project, with 58 participating in 1997 and expanding to 100 schools by the fall of 1998. The Attorney General’s Web site explains the creation of the project:

The genesis of the Project lies in the enforcement efforts undertaken by the Department of the Attorney General under the Maine Civil Rights Act. The Maine Civil Rights Act is a civil statute that empowers the Attorney General to bring an enforcement action in court to obtain a restraining order against any person who commits an act of violence, threat of violence or property damage motivated by bias or prejudice. Increasingly the defendants in our civil rights cases are teenagers who commit hate crimes against other teenagers.

According to the site, teenagers have been involved in half of the cases initiated by the Department of the Attorney General. Those cases typically have "two common denominators": first, the "alleged violence was preceded by months, and sometimes years, by [a] lower level harassment generally beginning with racial, ethnic, sexual, religious and homophobic slurs"; and, second, "school administrators were not aware of the earlier harassment because the minority victims did not pass the information on to the appropriate school personnel." As a result,

[the Civil Rights Team Project attempts to create a structure whereby the culture of intolerance and potential for violence which exists within too many of our schools can be changed and, equally importantly, to create a mechanism through which targeted students (or the friends of targeted students) can alert someone of harassment before it escalates to the level of serious violence. The "Civil Rights Teams" in each school consist of "Community Advisors," who are provided by the Attorney General and assigned to work with various schools' Civil Rights Teams throughout the state, one or two faculty advisors, and three students per grade. Those Teams attend two full day training programs, conducted by the Department of the Attorney General, where they learn a number of different techniques to bring back to their schools to raise awareness of bias and prejudice. In addition, the Attorney General "conducts an in-service training for faculty and administrators at each of the participating schools."
The Civil Rights Teams at each school also are given the opportunity to attend a "Civil Rights Team Project Statewide Spring Conference" each year. 158

The Civil Rights Team Project is intended to "create mechanisms by which students can provide information about harassment directly to Team members." 159 The Teams, however, are not themselves responsible for enforcement of the MCRA. 160 "Rather, when the Teams learn of harassment their responsibility is to pass the information on to the appropriate school or law enforcement authorities." 161

Thus, the Attorney General views the Civil Rights Teams as serving an educational mission, and that the Teams are not meant to initiate civil actions under the Act. 162 The Department's Web site, however, specifically contemplates using the Teams as a medium for reporting incidents of bias-motivated harassment, which implies that the Teams can serve as a first step in legal action brought under section 4681. 163

2. Enforcement of the Maine Civil Rights Act Through State Policing

The Maine Department of the Attorney General's police enforcement system that is in place to bring civil actions under the Maine Civil Rights Act "has two critical components":

First, because the Department has no attorney positions budgeted for civil rights enforcement, the Department utilizes Assistant Attorneys General from throughout the Department who volunteer to handle civil rights cases. Second, the Department trains and certifies Designated Civil Rights Officers in police departments throughout the State. 164

Police departments in the State that work with the Attorney General include those municipalities and university campuses that have "Designated Civil Rights Officers." 165 Those officers are selected and trained to evaluate incidents potentially motivated by bias or prejudice against the specified categories listed in section 4684-A. 166 The Attorney General also conducts civil rights training for entire law

158. See id. According to the Attorney General's Web site, each school, by participating in the Project, "commits to ... (1) [p]rovid[ing] time and space for the Team to meet no less than once every other week ... (2) [p]rovid[ing] Faculty Advisors for the Teams ... (3) [s]chedule[ing] a date for in-service training for the entire faculty... and (4) [t]ransport[ing] students to a fall and spring conference." Id.
The Department of the Attorney General, for its part, commits to (1) [t]rain[ing] all 100 Teams in the fall and provid[ing] a Civil Rights Team Project Statewide Spring Conference ... (2) [p]rovid[ing] in-service training for the faculty of each participating school ... [and] (3) [p]rovid[ing] support to Teams through: (a) Community Advisors, (b) On-going support from Debora Ferreira and Debi Gray, (c) [a] Resource Library, (d) [an] Internet Home Page [and] (e) [a] Newsletter.

Id.
159. Id.
160. See id.
161. Id.
162. See Harnett Interview, supra note 154.
163. See C.R. Team Page, supra note 147.
165. See id.
166. See id.
enforcement departments, as well as the Maine State Police Academy.

Most case referrals originate from law enforcement agencies, probably because the Designated Civil Rights Officers are trained to track every incident involving possible bias or prejudice that comes through their respective law enforcement departments. Incidents involving violence or threats of violence that police suspect are motivated by bias against a specified category (as enumerated in section 4684-A) are then "flagged" and forwarded to the Attorney General's Office, which investigates any incident that involves elements of the unlawful conduct described by the MCRA. In its investigation, the Department of the Attorney General will talk to everyone involved in an incident (the alleged victim of the crime, any witnesses, and the potential defendant), as well as examine police statements in order to "try to get the whole picture" and determine whether an alleged crime was motivated by bias.

If the Department decides to proceed with a civil action because, in its determination, there was unlawful conduct that was bias-motivated, then the State will file for a preliminary injunction (or if the circumstances are more exigent, a temporary restraining order) with the superior court in the jurisdiction in which an alleged hate crime occurred. Once a temporary restraining order or preliminary injunction is obtained, the State then will ask the court to issue a permanent order enjoining the defendant from violating the Act in the future. Generally speaking, the injunctions not only bar the defendant from violating the rights of a specific victim, but also bar the defendant from violating the rights of any person on account of the characteristics protected under the Act.

The two-tier system of enforcement through both the schools and the police departments seems to have been effective. Between October 1992 and September 1998, 1,164 complaints of civil rights violations and bias-motivated incidents were reported to the Department of the Attorney General. Those complaints alleged 365 incidents against gay/lesbian victims; 440 against black victims; 167 against Jewish victims; forty-seven against Asian victims; twenty-seven against Native American victims; forty-five against Hispanic victims; eighteen against physically or mentally disabled victims; twenty-six against religious organizations.

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167. See id.
168. See Harnett Interview, supra note 154.
169. See id.
170. See id.
171. Id.
172. See id.
173. See id.
174. See id.
175. See Department of the Attorney General (Maine), Civil Rights Statistics (Sept. 14, 1998) (on file with Author). According to the chart, "civil rights violations" include actions addressed by the MCRA, i.e., "violence, threat of violence, property damage or trespass motivated by bias." Id.
176. "Bias incidents" include acts of bias or prejudice not accompanied by violence, threat of violence, property damage or trespass." Id.
(e.g., churches or temples)\textsuperscript{178}; thirty-eight against white victims; and ninety-one against persons falling into the “miscellaneous” categories protected under the Act.\textsuperscript{179}

3. Consent Decrees

Often the Department of the Attorney General does not have to litigate under the Maine Civil Rights Act because defendants enter into consent decrees. Consent decrees function similarly to permanent injunctions issued by a court and are essentially contractual agreements between defendants and the State saying they will not violate the terms of the decree.

The use of consent decrees has become an integral part of the enforcement of the Act by the Department of the Attorney General. According to data supplied by the Department, 135 defendants entered into decrees during the period of August 28, 1992 through October 21, 1999.\textsuperscript{180} These decrees resulted from eighty-six formal actions brought by the Department of the Attorney General for alleged bias-motivated incidents.\textsuperscript{181} Of these actions, twenty-nine involved bias against gay/lesbian citizens; twenty-six involved bias against black citizens; six involved bias against Jewish citizens; seven involved bias against persons seeking to exercise reproductive rights; five involved bias against Asian citizens; three involved bias against Native American citizens; two involved bias based on gender; two involved bias against Hispanic citizens; one involved bias against a person with a mental disability; one involved bias against a religion; one involved bias against a white citizen; and three involved bias against multi-ethnic citizens.\textsuperscript{182} During the same period, eight permanent injunctions were issued; three default judgments were granted; two consent decrees were violated; and one decision/order was issued.\textsuperscript{183} Five cases from the period were dismissed, while thirteen cases are pending as of this writing.\textsuperscript{184}

\textsuperscript{178} \textit{See}, e.g., \textit{Attorney General Files Civil Rights Case in Auburn} (Press Release), May 24, 2000. In that press release, the Attorney General announced that a MCRA enforcement action was being initiated against a Livermore, Maine, man “for threatening a teenage boy because of his Christian religion.” The release explains that the defendant, who was a co-worker of the teenager, “claimed to be a witch and said that he had evil powers and could read minds.” \textit{Id.} The defendant also allegedly told the teenage victim, “I hate Christians” and that Christians “should all be burned at the stake like witches”—speech which was apparently enough for the Attorney General to seek a permanent court order “prohibiting [the defendant] from committing any further threats or acts of violence against the victim and others.” \textit{Id.} The Attorney General stated, “It is unfortunate that there are those in our community who would make threats of violence because of a person’s religion. This office is committed to protecting the rights of all people in Maine to be free from violence and threats.” \textit{Id.}

\textsuperscript{179} \textit{See} Wendall, \textit{supra} note 177, at A1.

\textsuperscript{180} \textit{See} Department of the Attorney General, Formal MCRA Actions Aug. 1992-Oct. 1999 at Table of Contents (copy on file with Author).

\textsuperscript{181} \textit{See id.}

\textsuperscript{182} \textit{See id.}

\textsuperscript{183} \textit{See id.}

\textsuperscript{184} \textit{See id.}
The consent decrees often contain "boiler plate" language, some of which is worth highlighting. First, consent decrees frequently enjoin not only the defendant from any of the actions described in the decree, but the defendant’s "agents, servants, employees, attorneys, and upon those persons in active concert participation with [defendant]." The decrees often bar defendant’s future bias-moti-


Smith’s decree is detailed in part below:

Plaintiff, State of Maine, having filed its Complaint on January 29, 1999, reflects allegations of civil rights violations; and Plaintiff and Defendant having consented to the entry of this Consent Decree without trial or adjudication of any issue of fact or law herein, and without this Decree constituting any admission by Defendant with respect to such issues, it is hereby ORDERED and DECREED as follows:

I. JURISDICTION

This Court has jurisdiction over Plaintiff and Defendant Walter Smith and the subject matter of this action. The Complaint states a claim for relief under 5 M.R.S.A. § 4681.

II. INJUNCTION

1. Defendant Walter Smith[,] his agents, servants, employees, attorneys or anyone acting under his control, or any person in active concert or participation with him, is permanently enjoined pursuant to 5 M.R.S.A. § 4681 from:

   a. making lewd or sexually threatening gestures or statements to any woman either from or in a vehicle, or in any public place including, but not limited to, streets, roads, and parking lots.

   b. assaulting, using physical force or violence, threatening to use physical force or violence, intimidating, coercing or harassing, or attempting to assault, use physical force or violence, threaten to use physical force or violence, intimidate, coerce or harass [victims’ names omitted] motivated by bias based upon race, color, religion, ancestry, national origin, physical or mental disability, gender or sexual orientation;

   c. assaulting, using physical force or violence, threatening to use physical force or violence, or attempting to use physical force or violence upon any person motivated by bias based on race, color, religion, ancestry, national origin, physical or mental disability, gender or sexual orientation;

   d. causing or attempting to cause damage to or trespass upon the property of [victims’ names omitted] or any other person motivated by bias based upon race, color, religion, ancestry, national origin, physical or mental disability, gender or sexual orientation;

   e. assaulting, using physical force or violence, threatening to use physical force or violence, intimidating, coercing or harassing, or attempting to assault, threaten, intimidate, coerce or harass any person or causing or attempting to cause damage to or trespass upon the property of any person because he did or might complain of or testify about acts alleged in this Complaint or act prohibited by Maine or Federal law, or did or might cooperate in any investigation concerning such acts;

   f. speaking to, telephoning, writing or … otherwise communicating with [victims’ names omitted] except through attorney in order to prepare for
vated conduct not only against a specific victim, but also against all persons included in the categories specified in the Act. For example, a defendant who has victimized a person because of bias against a particular race often is enjoined from violating the Act not only against that specific victim and any other person of the same race, but also against any other person on account of race and any other person on account of any other characteristic specified in section 4684-A. The object of the decree is not only to stop the conduct against a particular victim or someone who has been victimized, but it also enjoins a defendant from violating the statute again in the future. Finally, in accordance with section 4681, the consent decrees usually specify that any violation of the decree is a crime, which can be prosecuted independently of the civil action provided in the Maine Civil Rights Act.

III. APPLICATION & ANALYSIS

A. Application: Three Actions Brought by the Maine Department of the Attorney General Under Section 4681 of the Maine Civil Rights Act

The sheer number of formal actions brought by the State makes it impossible to discuss the details of each one. Because of this, only three cases have been reconstructed: State v. Levesque, State v. Lear, and State v. Martin.

These cases were chosen for two main reasons. First, each case illustrates the types of conduct and circumstances that can lead to a formal civil action by the State under the Maine Civil Rights Act. Second, each case raises important questions about the effect the Act can have on Maine citizens. Because these cases have not been reported, each was reconstructed from court documents and newspaper reports.

After the cases are presented, an analysis follows of the MCRA.

1. Case One: State v. Levesque

On April 23, 1997, former Maine Legislator Emilien A. Levesque was served a summons issued by the Kennebec County Superior Court. The summons

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defendant’s defense in any criminal prosecution;
g. knowingly approaching within 200 feet of the residences of [victims’ names and addresses omitted];
h. encouraging or causing any person to engage in conduct prohibited in paragraphs (a)-(f) above, or assisting any person in engaging in such conduct.

3. [sic] Pursuant to the Maine Civil Rights Act (5 M.R.S.A. § 4681): ANY PERSON WHO KNOWINGLY VIOLATES THIS ORDER COMMITS A CLASS D CRIME PUNISHABLE BY UP TO ONE YEAR IN JAIL AND A FINE OF UP TO $2,000.

Id. Defendant Walter Smith signed and dated the decree on February 5, 1999. See id.

187. See, e.g., id.
188. See id.
189. See Hammet Interview, supra note 154.
190. See Consent Decree of Walter Smith, Smith (CV-93-63).
informed Levesque of an impending civil action by the State to obtain a permanent injunction against him for a violation of the Maine Civil Rights Act.195

The “Complaint,” drawn by the State against Levesque, recounted the alleged facts of the situation. According to that document, the alleged victim in the action was Elizabeth Watson, a state representative from Farmingdale in Kennebec County, Maine, who sat on the Joint Standing Committee on the Judiciary.196 On April 8, 1997, the Judiciary Committee voted 7-6 to give an “ought not to pass” recommendation on L.D. 535, a bill to ban so-called “late term abortions”—a medical procedure in which a physician partially extracts the fetus from the mother’s birth canal feet first and then aborts the fetus.197 Representative Watson voted with the majority of the committee.198 The bill then was sent to the House for action by the full Legislature, where on Thursday, April 10, 1997, the House defeated the “ought not to pass” recommendation from the Judiciary Committee.199 The next day, Friday, April 11, 1997, the House was not in session.200 Representative Watson nonetheless went to the State House late in the day to check her mail and messages.201 On arriving at her desk, Watson found a handwritten note.202 The note read:

“Elizabeth—You vote for feet first again and you may be the next one.”203

Representative Watson promptly turned the note over to the Maine State Police and informed them that she was “placed in fear by the anonymous note.”204

After an investigation, a detective from the Maine State Police went to the home of Emilien Levesque on the afternoon of April 14, 1997 to discuss the note that he had indeed—and admittedly205—written and left on Representative Watson’s desk in the House Chamber.206

The State asserted in the Complaint that by leaving the note, Levesque had “intentionally interfered or attempted to intentionally interfere through threat of physical force and violence with Representative Watson’s right to free speech and political expression and her right to vote without being subject to improper influence.”207 The State requested that the superior court enter a permanent injunction enjoining Levesque from “threatening, intimidating, coercing or harassing, or attempting to threaten, intimidate, coerce or harass any person because of that person’s

196. See id. at 2.
197. See id. at 2-3.
198. See id.
199. See id.
200. See id. at 3.
201. See id.
202. See id.
203. Id.
204. Id.
206. See Complaint at 3-4, Levesque (CV-97-79). Among other evidence, Levesque had left a signed handwritten note on paper identical to that of the unsigned note on Representative Watson’s House desk earlier in the week, urging her to support L.D. 535. See A. Jay Higgins, Ex-legislator Admits to Threat, BANGOR DAILY NEWS, Apr. 18, 1997, at A1.
207. See id. at 4.
exercise of the right to free speech secured by" the federal and state constitutions.208 The request for relief also asked that Levesque be enjoined from "encouraging or causing any other person to engage in such conduct," that the court declare that Levesque had violated the Maine Civil Rights Act, that he pay plaintiff’s attorney’s fees, and that other “just and proper” relief be granted.209

In theory, the Complaint would have been the first in a series of steps toward the State’s goal of obtaining a permanent injunction against an accused defendant. The formal process of going to trial in court was preempted, however, when Levesque decided instead to enter into a consent decree with the State. One might surmise that his decision was prompted by concern about the publicity that such a formal action would generate, particularly involving such a high-profile Maine political figure. After all, not only is Levesque a former Maine legislator and leader in the House from 1960 to 1970, but he also is a veteran of the armed forces who fought in World War II, who was wounded in action, and who was held in a Nazi P.O.W. camp.210 Levesque also served in the cabinet of three Maine governors211 and had been appointed to the select Blue Ribbon Commission to overhaul the Maine Workers’ Compensation System.212 One may speculate that Levesque wanted to resolve the matter as quietly and efficiently as possible.213

The consent decree originally drafted by the Department of the Attorney General, however, proved problematic for Levesque’s attorney, Janet Mills, leading to the need to redraft the document. Specifically, Mills was troubled by the “boiler plate” language typical of the consent decrees drawn by the State.214 First, there were terms that enjoined Levesque from “threatening” or “attempting to threaten” any person protected under the Maine Civil Rights Act, language that Mills requested be changed to read “intentionally threaten,” with the ambiguous “attempting to threaten” language deleted.215 Mills also asked that language in the decree be deleted that enjoined Levesque from “causing, assisting or encouraging any other person to engage in the … prohibited conduct” for which the former legislator was being enjoined.216 Mills further objected to language enjoining Levesque’s

208. Id.
209. Id. at 4-5.
210. See Ken Brack, Ceremony Honors Former POWs, KENNEBEC JOURNAL, Friday, Apr. 10, 1992, at 3. Levesque served in the Army’s 157th Regiment, 45th Infantry Thunderbird Division. See id.
212. See id.
213. The State seems to have been eager to address the matter in an expedient manner, deciding to pursue the case with a civil—rather than criminal—action via the MCRA. Stating that the MCRA allowed for an “easier and more streamlined” approach, Attorney General Andrew Ketterer further asserted that the criminal process “takes longer and requires the higher standard of proof beyond a reasonable doubt.” See id. This reasoning, incidentally, was not accepted by some, who speculated that the action was pursued civilly rather than criminally for political reasons, and thus sent the wrong message about the seriousness of the conduct. See id. Ketterer further justified his strategy, however, saying that the civil action was appropriate due to Levesque’s “lack of a criminal record and advanced age.” Id. Ketterer added that he had never met Levesque, and thus had no reason to give him special treatment. See id.
214. See Facsimile Cover Letter from Janet Mills to Asst. Attorney General, Apr. 24, 1997 (on file with Author).
215. Id.
216. See id.
attorneys, saying that such persons (herself included) "[o]bviously ... need not be enjoined." 217 Finally, Mills stated that the decree must be clear that Levesque's own free speech rights to redress grievances were not abridged, so long as doing so did not infringe upon the rights of others. 218

In the end the State changed the decree somewhat; however, the word "intentionally" was not inserted as a modifier and the free speech issue was not addressed. 219 Levesque nonetheless signed the order on April 25, 1997, as did a representative for the Attorney General's Office, and Mills, as Levesque's attorney and witness to the signing. 220 An order was subsequently signed by the presiding justice on that same day. 221 From start to finish, it took less than two weeks for the decree to be put into effect.

Representative Watson, who described Levesque as "kind of like a grandfather," later expressed her satisfaction with the way the Department of the Attorney General conducted the investigation and obtained the consent decree. 222 She also was happy that she had the opportunity to have a face-to-face meeting with Levesque, during which the veteran and former legislator apologized. 223

As for Levesque, he admitted that the note contained "a poor choice of words," according to Mills. 224 "Had I the presence of mind for four seconds," Levesque would say later, "it would never have happened." 225

2. Case Two: State v. Lear

State v. Lear 226 is an example of a case in which a defendant did not opt to enter into a consent decree with the State for an alleged violation of the Maine Civil Rights Act. Instead, the Defendant in that case, Phillip Lear, vigorously defended himself against the State action. The case is important because it demonstrates how one superior court has interpreted the Act.

According to the statement of facts in the State's Complaint, "[a] male teacher at the Etma Dixmont Elementary School (K-8), hereinafter referred to as John Smith, taught sixth, seventh and eighth grade students." 227 One of his pupils was the son of Phillip Lear. 228 On February 11, 1998, Lear's son and another pupil "were involved in a physical altercation in John Smith's classroom, after which both students were suspended." 229 The altercation allegedly was preceded by taunts by some of Lear's son's classmates, who called the boy "queer Lear," "faggot," and

217. Id.
218. See id.
220. See id. at 3.
221. See id.
223. See id.
224. Id.
225. Id.
228. See id. at 3.
229. Id.
other such homophobic slurs—a fact Smith suggested he was unaware of at the time.

The next day, on February 12, 1998, Smith observed Lear with his son in the school’s office, and approached Lear to discuss his son’s behavior and resulting suspension. According to the State’s Complaint, “Lear began telling … Smith that the school could not suspend his son and questioned Smith about a recent test on which … Lear’s son had performed poorly.” As this transpired, “Lear, who is a large man, became increasingly agitated and began raising his voice and ultimately yelling at [Smith].”

Defendant Lear told his son that he should do to John Smith what the Defendant himself had once done to a teacher: “punch his lights out.” The Defendant then pointed his finger at John Smith’s face and began moving toward him. Smith began to back up and Defendant continued to move toward him, yelling: “Are you a fucking faggot? Are you fucking gay? Because if you are I don’t want my son taught by a subhuman.” Defendant Lear said these comments with a high-pitched voice and limp wrist gesture.

“At this point, the [school’s] principal intervened and escorted Defendant Lear out of the school.” Smith later claimed he felt threatened by Lear during the incident and believed that Lear was going to strike him. Lear never struck or touched Smith.

The incident eventually was reported to the Maine Department of the Attorney General, which brought a formal action under the Maine Civil Rights Act. The sole count of the Complaint was that Lear had “intentionally interfered through threat of physical force and violence, motivated by reason of bias based upon sexual orientation, with the right of [Smith] to engage in lawful activities.” The State requested a permanent injunction enjoining Lear from “[i]intimidating, coercing or harassing, or attempting to assault, use physical force … or violence, intimidate, etc.”

231. See id. at 41-42 (testimony of John Smith). Excerpted as follows:
   Q. [Lear’s Attorney]: [At the time of the confrontation with Lear,] did [Lear] mention to you that the kids were calling [Lear’s son] “queer Lear”?
   A. [Smith]: Yes, he did. And I said it wasn’t brought to my attention or I would have dealt with it.
   Q. …Well, you told Mr. Lear that you told [Lear’s son] you would deal with it, correct?
   A. I said if it was brought to my attention at the time it happened I would have—I can deal—I will deal with it then, but I was never told who was calling him that.
   Id. at 44-45.
   Even after Lear’s son returned to school after his suspension, however, Smith allegedly never did investigate who was calling Lear’s son the slurs. See id. at 45.
233. Id.
234. Id.
235. Id.
236. Id. at 4.
237. See id.
238. See Transcript of Preliminary Hearing at 39, Lear (No. CV-98-66) (testimony of John Smith). Smith, however, testified that Lear’s pointing his finger at him in such close proximity to his chest constituted a threat to his personal well-being. See id. at 41.
239. See generally Complaint, Lear (No. CV-98-66).
coerce or harass [Smith], motivated by bias based on sexual orientation, race, color, religion, sex, ancestry, national origin, or physical or mental disability."\textsuperscript{241} The State further asked that Lear be enjoined from "assaulting, using physical force or violence, threatening to use physical force or violence or attempting to assault or use physical force or violence on any person motivated by bias based on sexual orientation, race, color, religion, sex, ancestry, national origin, or physical or mental disability."\textsuperscript{242}

Among other requests, the State asked that Lear be barred from trespassing on or causing damage to property belonging to Smith or any other person,\textsuperscript{243} threatening, using force against, harassing or coercing any person testifying in the case,\textsuperscript{244} "speaking to, telephoning or otherwise communicating with" Smith (except through attorneys), and "entering upon the property of the Elma Dixmont Elementary School except with the express permission of school administrators."\textsuperscript{245} Finally, the State asked that Lear be declared to have violated the Maine Civil Rights Act, that he pay a civil fine up to $5,000.00, that he pay plaintiff's reasonable attorneys' fees, and that the court grant "just and proper" relief.\textsuperscript{246}

Lear's attorney, Joseph Baiungo, filed an Answer to the State's Complaint. Tracking the respective paragraphs of the Complaint, the Answer (among other things) asserted that the State lacked standing, that the Maine Civil Rights Act was unconstitutional as applied to the case, and that the statutory authority was "void for vagueness."\textsuperscript{247} Lear further answered that the Act violated his "constitutional right to Equal Protection of the laws," that there was not a compelling State interest in prosecuting the Complaint, and that such prosecution "violates [Lear's] Constitutional right to Freedom of Speech."\textsuperscript{248}

Along with a motion for a preliminary injunction that accompanied the filing of the Complaint,\textsuperscript{249} the State also provided the court with a Memorandum of Law in Support of the Motion for the Preliminary Injunction saying that the State had "satisfied the standards for obtaining a preliminary injunction."\textsuperscript{250} Citing \textit{Ingraham v. University of Maine at Orono},\textsuperscript{251} the State asserted four criteria to be met by the State to support its request for an injunctive order: First, that the "Plaintiff will suffer irreparable harm if an injunction is not granted"; second, that "[s]uch irreparable harm outweighs any harm to the Defendant"; third, that the "Plaintiff has a likelihood of success on the merits" of the Complaint; and last, that "[t]he public interest is not adversely affected by the granting of the relief."\textsuperscript{252} After arguing that it had met all the criteria spelled out in \textit{Ingraham}, the State asserted that all it really needed to show was that the third and fourth criteria announced in \textit{Ingraham} were met, and proffered arguments that it had indeed done so.\textsuperscript{253}

\textsuperscript{241} \textit{Id.} at 4-5.
\textsuperscript{242} \textit{Id.} at 5.
\textsuperscript{243} \textit{See id.}
\textsuperscript{244} \textit{See id.}
\textsuperscript{245} \textit{Id.} at 5-6.
\textsuperscript{246} \textit{See id.} at 6.
\textsuperscript{247} \textit{Answer} at 2, \textit{Lear} (No. CV-98-66).
\textsuperscript{248} \textit{Id.} at 3.
\textsuperscript{249} \textit{See generally} Motion For Preliminary Injunction, \textit{Lear} (No. CV-98-66).
\textsuperscript{250} \textit{See Memorandum In Support of Preliminary Injunction} at 2, \textit{Lear} (No. CV-98-66).
\textsuperscript{251} 441 A.2d 691 (Me. 1982).
\textsuperscript{252} Memorandum in Support of Preliminary Injunction at 3, \textit{Lear} (No. CV-98-66) (citing \textit{Ingraham} v. University of Maine at Orono, 441 A.2d 691, 693 (Me. 1982)).
\textsuperscript{253} \textit{See id.} at 3-4.
In response, Lear filed an Opposition to the Motion for Preliminary Injunction. Lear argued that the State had not supplied the court with information supporting the merits of the Plaintiff’s motion. Lear also asserted that his denials of the “substantive allegations” of the Complaint caused the State’s motion to fail because the State had not satisfied its burden of proving that it would succeed in the case. Lear further argued that the State’s analysis under the Ingraham criteria was inapplicable to preliminary injunctions, and that even if it was, the State had shown neither irreparable harm nor that the public interest would be adversely affected by a failure to grant the injunction. Citing Haskell v. Thurston, Lear then urged the court to deny such an “extraordinary” remedy as a preliminary injunction and instead to hold an evidentiary hearing on the matters central to the case.

The record shows that presiding Justice Francis Marsano agreed with Lear’s request for an evidentiary hearing to review the case. A Motion for an Expedited Hearing, however, filed by the State with the Complaint, was granted. In that motion the State contended that the potential for harm to Smith warranted an expedited hearing in order to speed up the injunctive process. Lear opposed the motion, arguing that the situation had been defused so that he was of no threat to Smith. The court nonetheless granted the State’s motion for the expedited hearing, but in doing so recognized Lear’s previously stated desire to have any case for a permanent injunction tried to a jury.

The evidentiary hearing for the permanent injunction was held on June 10, 1998, before Superior Court Justice Marsano and resulted in an order for a preliminary injunction against Lear providing all of the relief the State asked for in its Complaint. The order also warned that a violation would result in the criminal sanctions provided in the Maine Civil Rights Act. That same day Lear filed a Motion and Demand for Jury Trial, arguing that Article 1, Section 20 of the Constitution of Maine gave him the right to a jury trial “in all civil suits, except in cases where it has heretofore been otherwise practiced.” Citing Harriman v. Maddocks, Lear contended that it was the State’s burden to show that the right to a jury trial did not exist for him.

254. See Opposition to Motion for Preliminary Injunction at 1, Lear (No. CV-98-66).
255. Id.
256. See id. at 1-3.
257. 80 Me. 129 (1888).
258. See Opposition to Motion for Preliminary Injunction at 3, Lear (No. CV-98-66) (citing Haskell v. Thurston, 80 Me. 129, 132 (1888)).
259. See Motion for Expedited Hearing at 1, Lear (CV-98-66).
260. See Opposition to Plaintiff’s Motion for Expedited Hearing at 1, Lear (No. CV-98-66).
262. See Order for Preliminary Injunction at 2-4, Lear (No. CV-98-66).
263. See id. at 4.
264. That section reads as follows: In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced; the party claiming the right may be heard by himself and his counsel, or either, at his election. Me. Const. art. 1, § 20.
265. Motion and Demand for Jury Trial at 1, Lear (No. CV-98-66) (quoting Me. Const. art. 1, § 20).
266. 560 A.2d 11 (Me. 1989).
267. See Motion and Demand for Jury Trial at 1, Lear (No. CV-98-66).
The State took up that burden and argued that because civil actions brought under the Maine Civil Rights Act are equitable in character, Lear had no right to a jury trial.\textsuperscript{268} Citing \textit{Department of Environmental Protection v. Emerson},\textsuperscript{269} the State argued that “[e]quitable actions were traditionally triable to the court . . . [e]ven in cases where monetary damage, such as a civil penalty, are sought.”\textsuperscript{270} The State recognized that some federal courts had construed a right to a jury trial where a civil penalty was involved,\textsuperscript{271} but argued that those cases were not binding on state courts.\textsuperscript{272} The State nevertheless withdrew its request for a civil penalty and instead focused on permanent injunctive relief.\textsuperscript{273}

The court did not grant Lear’s motion for a jury trial and a final hearing for a permanent injunction was heard before Superior Court Justice Andrew Mead on March 18, 1999.\textsuperscript{274} Following that hearing, the State and Lear submitted memoranda to aid in the court’s decision, detailing their positions on the matter of the permanent injunction.

In its memorandum, the State argued that it “need not demonstrate that an individual is a member of a protected category [of the MCRA],” contending that even though the victim in the Lear case was not gay, that fact did not remove the case from the purview of the Act.\textsuperscript{275} Rather, it was enough that Lear’s allegedly violent conduct was motivated by bias toward a protected category under the Act.\textsuperscript{276} The State then argued that “a threat of violence may be demonstrated by the ‘totality of the circumstances’ and need not be manifested by a direct verbal threat.”\textsuperscript{277} Otherwise, the State said, the most egregious conduct would be removed from the scope of the Act and would foreclose liability for “some of the most traditional hate crimes.”\textsuperscript{278} The State urged the court to read the Act broadly and allow for the deduction of the existence of a threat based on the context in which the allegedly threatening conduct occurred.\textsuperscript{279} Such a reading, the State continued, would not render the Act unconstitutional. “The First Amendment,” the State argued, “does not protect threatening conduct.”\textsuperscript{280}

Next, the State asserted that Lear’s conduct violated the Act because all of the witnesses to the incident—and especially Smith—perceived an imminent threat of violence.\textsuperscript{281} The State coupled that conduct with Lear’s speech, which in the State’s view was “anti-gay” and “far from name-calling,” and illuminated “his motivation of anti-gay bias.”\textsuperscript{282} The State concluded its memorandum by saying that even

\textsuperscript{268} See Plaintiff’s Memorandum in Opposition to Defendant’s Motion and Demand for Jury Trial at 1, \textit{Lear} (No. CV-98-66).
\textsuperscript{269} 616 A.2d 1268 (Me. 1992).
\textsuperscript{270} See Plaintiff’s Memorandum in Opposition to Defendant’s Motion and Demand for Jury Trial at 2, \textit{Lear} (CV-98-66).
\textsuperscript{271} See \textit{id.} at 3 (citing \textit{Abbott v. Bragdon}, 882 F. Supp. 181, 182 (D. Me. 1995)).
\textsuperscript{272} See \textit{id}.
\textsuperscript{273} See \textit{id.} at 4.
\textsuperscript{274} See Plaintiff’s Post-hearing Memorandum at 1, \textit{Lear} (No. CV-98-66).
\textsuperscript{275} \textit{id.} at 2.
\textsuperscript{276} See \textit{id.} at 2-3.
\textsuperscript{277} \textit{id.} at 3.
\textsuperscript{278} \textit{id.} at 4.
\textsuperscript{279} See \textit{id.} at 3-6.
\textsuperscript{280} See \textit{id.} at 5.
\textsuperscript{281} See \textit{id}.
\textsuperscript{282} \textit{id.} at 9-10.
though it did not need to “demonstrate a compelling State interest to bring a case for violating” the Act, it nonetheless had a compelling interest to intervene in this case because the “hate-motivated confrontation occurred at an elementary school.”

In his memorandum, Lear countered the State’s positions. First, Lear argued that his conduct did not come within the category of the First Amendment’s “fighting words” exception and was therefore protected. Lear pointed out that he had not acted violently or made express verbal threats of violence, and that his conduct was therefore “communicative” in nature, “subject to First Amendment scrutiny.”

Lear also argued that even if his conduct was unprotected speech, it “was not a ‘threat of violence’ as intended by the [MCRA]” because the Act allowed for a civil action “only if there is an act of violence or threat of violence. Mere insults, taunts, intimidation or offensive conduct does not suffice.” Lear recognized that certain actions could fall within the meaning of “threat” under the Act, even though non-verbal (e.g., “the pointing of a gun”), but that such an analogy was improper because an act such as pointing a gun is an overt threat. Contrarily, Lear had not made any such act (save for pointing his finger at Smith).

Lear then urged the court to construe the Act narrowly because of the Act’s imposition of a criminal penalty for a violation of a civil order. Lear also pointed out that if the court were to broadly construe the Act, defendants “would not be put on notice as to the type of conduct that could conceivably subject them to prosecution.” Lear criticized the State’s broad “totality of the circumstances” rationale, saying that such a “totality” analysis would leave a vague idea of what future conduct is prohibited and lead to a “chilling effect” on protected speech. Alternatively, a narrow construction of the Act’s use of the term “threat” to mean explicit threats would prevent a “gray area” in the law and would align with the legislature’s intent not to make “intimidation” and “coercion” actionable under the Act.

Lear concluded by arguing that his conduct was motivated by his “disappointment with the school’s procedures and his frustration with the fact that he did not feel as though his concerns were being addressed” and that there was insufficient evidence to prove that his actions were bias-motivated. Lear contended that the “two snide comments made at the end of the argument” that formed the basis of the State’s civil rights case did not warrant a civil action, particularly because he made statements of frustration and in attempt to analogize the teasing that his son was enduring in [Smith’s] class by being called ‘queer Lear.’” Moreover, Lear stated, his “personal and amicable relationships with other homosexuals counters

283. Id. at 11-12.
284. See Defendant’s Brief in Aid of Decision at 1-3, Lear (No. CV-98-66).
285. Id. at 1 (citing State v. Drake, 325 A.2d 52, 55 (Me. 1974)).
286. Id. at 3.
287. Id.
288. See id.
289. See id. at 4 (citing State v. Hills, 574 A.2d 1357 (Me. 1990)).
290. Id.
291. Id.
292. See id.
293. Id. at 5-6.
294. Id.
any suggestion that [the] interaction can be characterized as threats of violence motivated by sexual orientation.\textsuperscript{295}

The court was not convinced by Lear’s arguments. On April 6, 1999, Superior Court Justice Andrew M. Mead granted a Final Order for a permanent injunction.\textsuperscript{296} Justice Mead wrote in an accompanying Findings of Fact that he agreed with the State’s rationale that Lear’s “physical actions … combined with his statements … placed [Smith] in reasonable fear that an assault … may imminently take place,” given the “totality of the circumstances.”\textsuperscript{297} Concluding that this “totality” showed that Lear was motivated by “hostility toward [Smith’s] sexual orientation,” Justice Mead stated that “the issuance of an appropriate Order”—with all of the relief requested by the State—was “justified.”\textsuperscript{298}

Lear did not appeal the permanent injunction order. His attorney subsequently moved to remove himself from the case, with the permission of the court.\textsuperscript{299} The State, however, proceeded to pursue Lear for attorneys’ fees, a matter still unsettled as of this writing.\textsuperscript{300}

3. Case Three: State v. Martin

The last case involving alleged bias-motivated conduct that will be discussed here is State v. Campbell, Martin & Smith\textsuperscript{301} (State v. Martin). The discussion of this case will focus on the case against Defendant Martin because the case now has developed into one implicating just that child. As the following account will show, this appears to be largely because some of the central facts of the case stated in the State’s Complaint were later proven to be inaccurate or unsubstantiated.

In its Complaint, the State identified three Defendants—Michael Campbell, Ryan Martin, and Aaron Smith,\textsuperscript{302} all children and residents of Dexter, Maine.\textsuperscript{303} The three Defendants, all students at the town’s middle school, ranged in age from 13 to 15 years of age.\textsuperscript{304} The alleged victim was identified as “a male fourteen year old student … perceived as a homosexual by the Defendants.”\textsuperscript{305}

The Complaint alleged that since September 1998 the Defendants “have harassed the victim in school and on the school bus by calling him derogatory names,
including ‘fag’ and ‘faggot.’”306 Martin also allegedly stated to another student that “all gays should be shot,”307 and later, in the first week of October 1998, allegedly “punched, threatened and chased the victim, stating ‘I’m going to beat you, faggot.’”308

At a dance later that same month, the Complaint continued, Defendant Martin “kicked and pushed the victim and called him ‘faggot’ and ‘cock sucker,’ while Defendant Campbell ‘pushed the victim and called him a ‘faggot.’”309 After a disc jockey broke up the alleged altercation, the alleged victim left the dance “because he was afraid for his safety.”310

The Complaint next stated that in December 1998 the three Defendants “conspired … to lure the victim into a bathroom at Dexter Middle School for the purpose of beating him.”311 As part of this conspiracy the Defendants allegedly “brought chains to school and discussed how they would use them as weapons to beat the victim in the bathroom.”312 The alleged victim, seemingly suspicious of the Defendants’ motives, reported the attempt to lure him into the bathroom to a teacher and to the school principal.313

On two later occasions Defendant Smith allegedly told other students of his intent to beat the alleged victim.314 Because of that and the other incidents, the Complaint reported, “[t]he victim [was] afraid for his own safety,” and had taken to leaving school early and avoiding the school bus “out of fear that the Defendants would assault him.”315

Those facts formed the basis of the State’s request for the court to enjoin the children316 from bias-motivated conduct or threats of conduct violating the Act against the alleged victim, as well as any other citizens.317 The request also included the usual “boiler plate” language, including a $5,000.00 civil penalty, the State’s reasonable attorney’s fees, and other relief as is “just and proper.”318 The State also filed a Motion for a Preliminary Injunction at that time.319

Defendant Martin’s attorney and guardian ad litem, Mary K. Brennan, filed an Answer to the State’s Complaint.320 Then, on May 13, 1999, in response to the Complaint and Motion for the Preliminary Injunction, Brennan filed a Motion to Dismiss and Opposition to the Motion for a Preliminary Injunction. In that motion, Martin alleged that the State’s Complaint failed to set forth allegations sufficient to meet the statutory requirements of the Maine Civil Rights Act.321 Martin

306. Id.
307. Id.
308. Id.
309. Id. at 3.
310. Id.
311. Id.
312. Id.
313. See id.
314. See id.
315. Id.
316. See id at 4.
317. See id.
318. Id. at 4-5.
319. See generally Motion for Preliminary Injunction, Martin (CV-99-80).
320. See generally Answer of Defendant Ryan Martin, Martin (CV-99-80).
321. See Motion to Dismiss and Opposition to Motion for Preliminary Injunction at 1, Martin (CV-99-80).
also asserted that “[h]arassment cannot include actions which are protected under law including ... Martin’s right of free speech.” 

Finally, Martin claimed that the action, if maintained, would deprive him of his “constitutional rights under the U.S. Constitution § 5 and the 14th Amendment, [and] § 6-A and § 6 of the Maine Constitution” because he was facing juvenile criminal charges for the same allegations that formed the basis of the State’s civil action. “Requiring [Martin] to defend himself on the civil complaint prior to the disposition of the criminal matter,” the motion concluded, “constitutes a deprivation of due process, and equal protection.”

Martin also filed an Opposition to the State’s Motion for Preliminary Injunction, the arguments of which were presented at greater length in a Memorandum of Law in Support of Ryan Martin’s Motion to Dismiss and Opposition to Motion for a Preliminary Injunction. In that latter memorandum, Martin made two brief initial points: first, that his speech was protected speech, and second, that he was not legally competent to stand as a defendant in a civil action because of his status as a minor.

The memorandum asserted that the State had failed to state a cause of action upon which relief could be granted because there had been “no averment regarding [the alleged victim’s] sexual orientation” that would make the Maine Civil Rights Act applicable. Instead, Martin pointed out that the documents that comprise part of the police report in the case “suggest that [the] alleged events arose out of a dispute among friends at the beginning of the school year” after either the alleged victim or someone else had started a rumor that Martin “had performed oral sex on” the alleged victim. It was around the time when Martin learned about the rumor that the alleged bias-motivated incidents took place. Noting those circumstances, Martin then posited that, even if true, the accusations that formed the basis of the State’s Complaint did “not rise to the level of a ‘hate crime,’” but were rather simply “a dispute among 8th graders.”

Addressing the requested injunctive relief, Martin then argued that because preliminary injunctions should be used “sparingly” and in “extraordinary” cases a “more appropriate resolution” would be to involve “trained school personnel such as guidance counselors or therapists to help these children resolve the matter.”

Martin also argued that an injunctive order was not needed because the alleged

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322. Id.
323. Id.
324. It is significant to note that all three of the criminal charges brought against the Defendant—charges on which he was arraigned three separate times—were dismissed for “insufficient evidence.” State v. Martin, 99-JV-17, 99-JV-18, 99-JV-19. Dismissal [M.R. Crim. P. 48(a)] (Me. Super. Ct., Pen. Cty., July 1, 1999) (Mead, J.).
325. Motion to Dismiss and Opposition to Motion for Preliminary Injunction at 1, Martin (No. 99-80).
326. Id.
327. Memorandum of Law in Support of Ryan Martin’s Motion to Dismiss and Opposition to Motion for Preliminary Injunction at 1, Martin (No. CV-98-80).
328. Id.
329. Id. at 2. Martin’s peer also reported that the victim propositioned him by asking [Martin’s peer] to allow [the victim] to perform fellatio." Id.
330. See id.
331. Id.
332. Id. at 3.
victim continued to attend school and there had been “no recent allegations regarding harassment, threatening or physical violence,” thereby showing that “the individuals involved in the alleged dispute ... have gotten the message.”

Martin concluded the memorandum opposing the injunction by raising public policy arguments, and asking how an injunction, if ordered, could ever be followed:

    How would the boys play sports in gym class or in [extracurricular] activities if [Martin] is not allowed to communicate with [the victim]? How could [Martin] to [sic] play basketball, football, soccer or any other sport involving [the victim], and not risk being accused of intentionally assaulting or using physical force against [him]? [Martin] would have to change schools in order to avoid the possibility of doing something that could be construed as contempt.

    ....

    How do children learn to discuss and resolve problems when there is a legal prohibition against contact?

    What redress is there for [Martin], a 13 year old child, who was wrongly and unjustly accused of performing a sexual act on another boy and who now is unjustly accused of a hate crime?

The State offered a memorandum opposing Martin’s motion to dismiss. The State first argued that Maine and federal law “plainly contemplate that minors may be parties to civil actions,” and that despite the allowance of a guardian ad litem in certain circumstances, “the rules do not suggest that a minor cannot be sued in his or her individual capacity.”

The State then contended that a cause of action did indeed exist under the Maine Civil Rights Act, describing Martin’s presumption that the Act protects only members of certain groups as “erroneous.” Rather, the State said,

    [t]he Act provides the same protection to all people, including both heterosexuals and homosexuals, men and women, and people of all races, colors, religions, ancestries and national origins. A heterosexual who is subjected to intentional threats and violence motivated by reason of sexual orientation is entitled to the same relief under the Act as a similarly victimized homosexual .... In other words, there are no ‘protected classes’ under the Maine Civil Rights Act, and membership in such a class is not necessary to ‘qualify’ for relief.

The State then said that the issue to be resolved in the case was “whether the Defendant’s conduct was motivated by the Defendant’s ... perceptions and his belief regarding the victim’s sexual orientation”—something the State thought should be determined by weighing the merits of the case at trial.

The State next addressed Martin’s First Amendment claim and characterized it as “groundless.” “The law is well established,” said the State, “that ‘fighting

333. Id. at 4.
334. Id.
335. Id. at 5.
336. State’s Memorandum of Law in Opposition to Defendant Ryan Martin’s Motion to Dismiss at 1-2, Martin (No. CV-99-80).
337. Id. at 2-3.
338. Id. at 3.
339. See id.
340. See id. at 4.
words,' defined as those words 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace,' are not protected by the [F]irst [A]mendment."341 In the situation involving the children, the State posited:

the Defendant called the victim derogatory homophobic slurs (including "fag," "faggot," and "cocksucker") in public while in the course of intentionally harassing, threatening and beating the victim, and conspired with others to lure the victim into a bathroom to beat him with chains. The Defendant's speech falls within the ambit of "fighting words" in that it was integrally related to a pattern of conduct designed to inflict injury and incite an immediate breach of the peace.342

The State concluded its memo by asserting that it had satisfied the criteria necessary for obtaining a preliminary injunction. Responding to Martin's claim that the State's likelihood of success was minimal, the State argued it had satisfied that criterion because the evidence in the case "tend[ed] to prove that [Martin's] aggression against the alleged victim was motivated by reason of sexual orientation."343 The State also contended that it had "demonstrated that the public interest will not be adversely affected by the injunction" and "would merely restrain the Defendant from engaging in conduct that would constitute further violations of the Maine Civil Rights Act or harassment of the victim."344

The Preliminary Injunction Hearing took place on June 29, 1999. The State called a host of witnesses, each of whom were cross-examined by the three Defendants' attorneys.

A number of important facts evinced at the hearing related to the allegations set forth in the State's Complaint. For one, the State alleged in its Complaint that "since September 1998, the Defendants have harassed the victim in school and on the school bus by calling him derogatory names, including 'fag' and 'faggot.'"345 The alleged victim, however, testified on direct examination by the State that Defendant Smith had never called him names on the bus346 and that Defendant Martin did not even ride on the same bus.347 As to Defendant Campbell, there was testimony that Campbell had called him names on the school bus on two occasions.348

Next, the State alleged in its Complaint that Martin stated that "all gays should be shot."349 Yet on direct examination the alleged victim admitted that the statement was not made to him, but rather to another student.350

341. Id. (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
342. Id. at 1-2.
343. Id. at 6.
344. Id.
345. Complaint at 2, Martin (No. CV-99-80).
347. See id. at 46.
348. See id. at 47.
349. Complaint at 2, Martin (CV-99-80).
350. See [Vol. I] Transcript of the Preliminary Injunction Hearing at 58-59, Martin (No. CV-99-80). That testimony is excerpted as follows:
Q. (by Defendant Campbell's Attorney): Ever call anyone a homosexual or queer—faggot?
A. (by alleged victim): Under my breath, but I'd never say it to them, because—
Q.: Under your breath?
The State’s Complaint also had alleged that Martin had punched, threatened, and chased the alleged victim, stating “I’m going to beat you faggot.” In fact, the alleged victim testified that when Martin punched him, no words were said at all to him at the time of that incident. As for the allegation that Martin had chased and threatened the alleged victim, that was an incident in the afternoon on the day of the alleged punch in the hallway, when Martin and a classmate were running on a public way behind the alleged victim.

A.: Right, because I know—
Q.: Did you hear defendant Ryan Martin say to another student, “All gays should be shot”?
A.: I’ve heard that several times.
Q.: You heard—you heard Ryan Martin say that to—
A.: Yeah.
Q.: —another student?
A.: One at lunch.
Q.: Several times?
A.: Not—not just by him, but by other people, too. But, yeah, he did say that.

Id.
351. Complaint at 2, Martin (No. CV-99-80).
352. See [Vol. 1] Transcript of the Preliminary Injunction Hearing at 19, Martin (No. CV-99-80) (testimony of alleged victim).
Q. (by AAG): ... Let’s move forward to the first week of October. Was there some point during the first week of October when Ryan Martin did something more to you than just name calling?
A. (by alleged victim): Yeah. I was comin’ out of Mrs. Sherburne’s home room, and he punched me in the side.
Q.: How hard did he punch you?
A.: Pretty hard.
...
Q.: Did he tell you why he punched you?
A.: No, he just kept walking.
Q.: Did he say anything to you?
A.: Nope.

Id.
353. See id. at 19-20.
Q. (by AAG): ... [L]ater that day [after the episode of the punch by Martin], did you have any other problems with Ryan Martin?
A. (by alleged victim): Yeah. In—
Q.: What happened?
A.: I was walkin’ home—well, not home—down to catch a ride with my mom from work, and they chased—him and Josh [last name omitted by Author]—chased me down the—down a path, and—
Q.: Was this after school?
A.: Yeah.
Q.: Okay.
A.: And they called me a faggot, and a queer, and they said they were going to beat me, and—
Q.: Now, you said this was Ryan Martin, as well as another person named Josh [last name omitted by Author]?
A.: Yes.
Q.: Do you specifically remember Ryan Martin calling you a fag?
A.: Yeah.
Q.: Do you specifically remember whether Ryan Martin said that he was going to beat you?
A.: Yeah.
Further, the State alleged in its Complaint that Martin had kicked the alleged victim at a dance and called him “faggot” and “cocksucker,” and that Defendant Campbell had pushed the alleged victim and called him “faggot.” According to the alleged victim, however, this too was not accurate. First, neither Defendant Campbell nor Defendant Smith was even at the dance in question. Second, the alleged victim said that there had not been physical contact between Martin and him at the dance, but only a verbal confrontation when Martin asked the alleged victim about rumors the alleged victim allegedly had started that Martin and he had engaged in sexual relations. Later in his testimony, however, the alleged

Q.: Did they catch you?
A.: No.
Q.: How—how did it end up that day?
A.: I don't know. I just kept on walkin' like I normally do, and I turned back and they were gone.

*Id.*

354. Complaint at 3, Martin (No. CV-99-80).
356. See id. at 20-24.

Q. (by AAG): Can you tell us about that dance? What happened when you were there?
A. (by alleged victim): Ryan came up to me, because he said that he heard a rumor about some stuff. And I can't even remember some of it, but—and—and then me and Rachel were dancing, and we kept getting kicked and—
Q.: Let me slow you down a minute. When you said “Rachel,” who is that?
A.: Rachel [last name omitted by Author].
Q.: Okay. Is she a friend of yours?
A.: Yeah—

Q.: Okay. So the two of you were dancing at this dance in Garland. When—you—you said before that that Ryan had come up to you and talked to you about a rumor.
A.: Right.
Q.: What was his—what was his attitude? What was his behavior like when he came up to talk to you about the rumor?
A.: He was very mad.
Q.: Mad at who?
A.: Me.
Q.: Did he say why he was mad?
A.: All he said was that he'd heard rumors and stuff.

Q.: Did he touch you?
A.: No, 'cause [the DJ] came over and talked to him.

Q.: Okay. And then you went and danced with Rachel. I think you were just starting to tell us. What happened?
A.: And some of Ryan's friends were kicking us, and they were like sticking up for him.

Q.: ... Do you remember whether Aaron Smith or Michael Campbell were either of the friends that were kicking you on that night?
A.: No, they were—neither of them were there that night.
Q.: Okay. But you remember that it was Ryan's friends who were kicking you?
A.: Yeah.
Q.: What were they saying?
A.: They didn't say anything. They just kept kicking me.
victim said that Martin had kicked him and scraped the top of his foot. At a subsequent point in the hearing, a person who was dancing with the alleged victim at the dance and who was called as a witness by the State testified that there was no physical contact between Martin and the alleged victim at the dance.

Q.: What was Ryan doing while his friends were kicking you?
A.: He was dancing with someone else.
Q.: Was he involved in the kicking at that time?
A.: No.
Q.: Did you have any physical confrontation with Ryan at the dance at Garland?
A.: No.
Q.: Nothing happened at all physically between the two of you?
A.: No.
Q.: Do you remember whether Ryan called you any names at the dance?
A.: Yeah, he called me a queer.
Q.: Anything else?
A.: No.
Q.: Did he make any threats to you?
A.: Yeah, he said that after the dance that he was—him and his friends were gonna gang up on me and stuff.
Q.: And stuff. Did he say what was gonna happen?
A.: No.
Q.: But he said that he and his friends were gonna gang up on you?
A.: Yeah.
Q.: Did he make any direct threats of what he was gonna do to you?
A.: No.

Id.

In later testimony, the alleged victim admitted that the rumors concerned sexual activity between Martin and the alleged victim. Id. at 64. According to witness Scott [last name omitted], who was later called by Defendant Martin, these rumors were started by the alleged victim during a sleepover, where he told the witness that “he had oral sex with Ryan and that it was okay to do that stuff.” [Vol. I] Transcript of the Preliminary Injunction Hearing at 76, Martin (No. CV-99-80) (testimony of Scott [last name omitted by Author]).


358. See id. at 120-21 (testimony of Rachel [last name omitted by the Author]).

Q. (by AAG): Did you see anything physical happen between the two of them?
A. (by State's witness “Rachel”): No.
Q.: Any pushing? Any kicking?
A.: No.
Q.: And how did that end?
A.: [The alleged victim] just walked off.
Q.: Did you see [the alleged victim] do anything to provoke Ryan?
A.: No.
Q.: And after—after [the alleged victim] walked off, was that more or less the end of it?
A.: Yeah....

Q.: ... Did you see any physical stuff going on between [the alleged victim] and anyone else that evening?
A.: No.
Q.: ... Did you see anybody pushing or kicking [the alleged victim] that evening?
A.: No.

Id.
Finally, the Complaint alleged that the three Defendants had "conspired" amongst themselves and other students, "to lure the victim into a bathroom...for the purpose of beating him."359 According to the alleged victim, the three Defendants—as well as two other students who were not named in the Complaint—planned to coax the alleged victim into a bathroom during the three minute time period between lunch and afternoon classes.360 The alleged victim testified that on the day of the alleged conspiracy, he was approached by a classmate named "Brandon," who said he wanted to talk to him in the bathroom about Brandon's girlfriend,361 who the alleged victim had been calling.362 The alleged victim, however, stated that he thought Brandon's motives were suspect when he saw the three Defendants come around the corner as they were leaving the lunchroom with the rest of the student body.363 Contrary to the State's Complaint, however, the alleged victim testified that none of the three Defendants were carrying chains.364 The alleged victim said that he felt he was in danger and declined Brandon's invitation to talk in the bathroom.365

The State later called Brandon as a witness for its case against the Defendants to talk about the alleged bathroom "conspiracy." According to Brandon, however, he was completely unaware of any of the Defendants' presence in or near the bathroom, saying that he "wasn't paying attention to any of 'em," but rather, "was more concerned about talkin' to [the alleged victim]" about his calls to Brandon's girlfriend.366 Brandon also testified that the only prior discussion about any plan to harm the alleged victim had occurred "about a week and a half before,"367 but even then there was not a specific plan set in place to do so, i.e., there was not a conspired plot.368 Rather, Brandon said that his sole intention was to talk to the alleged victim and tell him that he was angry with him for calling Brandon's girlfriend.369

Even more significantly, Brandon testified he did not have a chain and was unaware that any of the Defendants had chains with them on the day of the bath-

359. Complaint at 3, Martin (CV-99-80).
360. See [Vol. I] Transcript of the Preliminary Injunction Hearing at 49-50, Martin (CV-99-80) (testimony of alleged victim); see also id. at 81.
361. See id. at 49-50.
362. See [Vol. I] Transcript of Preliminary Injunction Hearing at 129, Martin (CV-99-80) (testimony of Brandon [last name omitted by Author]).
364. See id.
365. See id.
366. See id. (testimony of Brandon [last name omitted by Author]).
367. Id. at 132-33.
368. See id. at 134.
369. See id. at 156.
370. See id. at 136-37.
371. See id. at 135-36.
room incident, although they had in fact discussed the possibility of bringing chains. Moreover, Brandon later admitted in his testimony that he himself had brought a 9-inch tire chain to school to beat up the alleged victim at a time after the bathroom “conspiracy.”

Following the testimony, presiding Justice Mead opined on the case. Justice Mead stated that the case was “very difficult and complicated,” and that he was troubled with the school’s failure to intervene in the matter amongst the students involved, particularly in light of testimony that faculty and administration members were aware of the ongoing incidents of name-calling. “This is something that affects the educational setting. The school has a duty to step in when these things occur. And, in my opinion, [it did not do so adequately].” The Justice continued by assessing the facts, which in his opinion showed “a continuing, very aggressive course of harassment by the defendants, and the central theme of that harassment was [the alleged victim’s] actual or perceived sexual orientation.” Citing his decision in Lear, Justice Mead inferred from all of the circumstances of the case that a bias-motivated threat had occurred.

Justice Mead then reviewed the facts of each alleged incident. With regard to the bathroom “conspiracy,” the Justice said that because nothing actually happened, no conspiracy could be proven. Moreover, because “the remainder of the evidence is no stronger of physical force or violence, or threat thereof, as regards Defendants Smith and Campbell,” the cause of action against them was dismissed. Justice Mead said, however, that Martin’s case was “a little bit different” because there was evidence of an act of violence—the punch in the hallway at school—that, taken in conjunction with biased speech, led the Justice to believe that the State had satisfied its burden under the Act.

The Justice stated that he was disappointed that there had to be a State action in the case rather than the issuance of “a couple of protection from harassment orders” to protect each of the parties involved. Yet because this did not occur Justice Mead rendered his decision, denying the State’s motion for preliminary injunctions against Defendants Campbell and Smith, but enjoining Martin.

Martin then filed a demand for a jury trial to determine the issuance of a permanent injunction. In response, the State moved for a trial by the court.

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372. See id. at 139-40. Interestingly, the only evidence that the Defendants Campbell or Martin ever carried chains was testimony by Brandon that some of them owned wallet chains, a fashion trend popular amongst many teenagers. See id. at 144. Brandon also testified that, several months after the alleged bathroom incident, Defendant Smith had a large chain with him at school to wear for a “70’s” dress-up day, and allegedly for the purpose of beating up the alleged victim. Id. at 145.


374. See id. at 109.

375. Id.

376. Id.

377. See id. at 110.

378. See id. at 110-11.

379. Id. at 111.

380. Id.

381. Id.

382. See id. at 112.

383. See State’s Motion for Trial by the Court Instead of by Jury at 1, Martin (No. CV-99-80).

384. See id.
asserting in a memorandum that “there is no right to a jury trial in an action seeking
injunctive relief and attorney’s fees under the Maine Civil Rights Act,” particularly “in light of the equitable nature of the issue presented and the relief
sought” by the State. The State also contended that the State’s additional re-
quest for Attorney’s fees did “not trigger the right to a jury trial.” Finally, the
State contended that “the interests of justice and judicial economy dictate against a
jury trial” and that there was no need in “spending another full day presenting the
same evidence [from the preliminary hearing] a second time.”

Martin opposed the motion for trial by the court, arguing in a memorandum to
the court that “[t]he basic nature of the claim as evidenced by the nature of the
pleadings in [the case] is that [Martin] threatened and assaulted [the victim].” Claiming that “[t]he State confuses the concept of remedy with relief,” Martin
argued that the historical remedy under common law is that parties are entitled “to
a jury trial in actions for threats or physical assaults.” In view of this, Martin
claimed, the remedy required by the Maine Civil Rights Act in a State civil action
entitled a defendant to a jury trial.

Martin then questioned the impact a trial by the court in the civil action could
have on subsequent civil actions that might be brought by the alleged victim against
him:

[D]oes Ryan [Martin] get another trial on those factual issues? Are the issues res
judicata? Is the law of the case applied? Since [Martin] would be entitled to a
jury trial if the first case filed had been a civil action by [the alleged victim]
against [Martin] for monetary damages, a suit by the Attorney General on behalf
of [the alleged victim] on those same issues must be with a jury .... Clearly
common sense dictates that if [Martin] is entitled to a jury trial on the underlying
issues of the assault and threats in a civil action by [the alleged victim], he is
entitled to a jury trial on those same issues in the instant matter.

Martin concluded by noting that Rule 38(a) of the Maine Rules of Civil Pro-
dure provides that “[t]he right of trial by jury as declared by the Constitution of the
State of Maine or as given by a statute shall be preserved to the parties invio-
late.”

In the end, however, the State’s argument prevailed. In an Order dated Oc-
tober 5, 1999, Superior Court Justice Mead granted the State’s motion for a trial by
the court and allowed the State to amend its Complaint to strike its request for civil
penalties.

As of this writing, the State’s effort to permanently enjoin Martin is pending.
There is one aspect of the Martin case that deserves some attention before
moving on and that is Martin’s Motion to Impound in which he asked the court to
suppress the record of the case. This motion was a result of the Attorney General’s

385. Id. at 2.
386. Id. at 3.
387. Id.
388. Id. at 4.
389. Defendant’s Opposition to State’s Motion for Trial by Court at 2, Martin (No. CV-99-80) (emphasis in original).
390. Id. at 2-3.
391. See id. at 4.
392. Id.
393. Id. (quoting M.R. Civ. P. 38(a)).
394. See Order at 1, Martin (No. CV-99-80).
395. See Motion to Impound Civil Docket No. 99-80 at 1, Martin (No. CV-99-80).
issuance of a press release regarding the pending action against the children.  
Martin filed the motion to impound all the documents pertaining to the case, and argued that because of his young age—and in light of the public policy of the State to protect the identity of minors implicated in juvenile crime situations—the court should not allow the press access to the court record.  
Martin warned the court that the Attorney General was attempting “to try [the] case in the media,” and said that such a course would result in the protections of the juvenile system being lost.  
Martin concluded by contending that the publicity the case would generate would cause him “irreparable emotional harm” and would serve no other purpose than to carry out “the political and public relations goals of the Attorney General’s Office.”

The State opposed Martin’s Motion to Impound, arguing that the record in the case “should not be impounded because there is no legislative mandate requiring the Court to do so, and because the Defendant’s privacy interests do not outweigh the public interest in allowing public access to the record.”  
The State recognized that the Maine Juvenile Code restricts public access to certain kinds of juvenile proceedings, but nonetheless contended that the action against Martin was not a juvenile proceeding and that the State was therefore not obligated to abide by the strictures of the Code.  
In closing its argument, the State invoked a First Amendment argument, stating that the public’s right to know and judicial access outweighed the 13-year-old Martin’s right to privacy.

The court denied the Martin’s impoundment motion, but the media interest in the story had diminished considerably by that time, quelling the concern that the Defendant children would be negatively affected.

B. Analysis of the Enforcement and Constitutionality of the Maine Civil Rights Act

Having examined three formal actions arising under the Maine Civil Rights Act, one may better understand how the statute is enforced by the Maine Department of the Attorney General. The following analysis addresses aspects of enforcement practices—and the Act in general—that deserve greater attention.

The analysis will consist of three sections. In the first section, the analysis will focus on the consent decrees and permanent injunctions used by the State in enforcing the Act. The premise of this section is that the terms of consent decrees and permanent injunctions suffer from problems of overbreadth and vagueness, particularly in view of the legislative aims of the statute.

The second section of the analysis discusses how the Maine Civil Rights Act relates to the holdings in three United States Supreme Court cases—Chaplinsky v. 

396. See Telephone Interview with Mary K. Brennan, Attorney and Guardian ad Litem for Defendant Martin (Mar. 9, 2000) (notes on file with Author).
397. See Motion to Impound Civil Docket No. 99-80 at 1, Martin (No. CV-99-80).
398. Id.
399. Id. at 2.
400. State’s Memorandum in Opposition to Defendant Ryan Martin’s Motion to Impound at 1, Martin (No. CV-99-80).
401. See id. at 1-2.
402. See id. at 3-6. A question might be raised as to whether the State had standing to advocate in this way on behalf of the press on First Amendment grounds.
403. See Telephone Interview with Mary K. Brennan, Attorney and Guardian ad Litem for Defendant Martin (Mar. 9, 2000) (notes on file with Author).
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New Hampshire,404 Near v. Minnesota,405 and R.A.V. v. City of St. Paul.406 The premise in this Section is that there are fundamental constitutional problems with the Act, particularly in light of its First Amendment implications. This Section also touches upon other First Amendment considerations and concludes by arguing that despite the good intentions underlying the Maine Civil Rights Act, the Act may fundamentally undermine free speech and expression rights.

The third Section of the analysis briefly addresses public policy concerns related to the Department of the Attorney General's practice of bringing civil actions under the Maine Civil Rights Act against children.

1. Overbreadth and Vagueness Problems with Enforcement Mechanisms of the Maine Civil Rights Act

a. Overbreadth

Some courts have struggled with the issue of permanent injunctions and consent decrees that have been sought under the Act.407 That is because those courts have found the breadth of the injunctions and consent decrees troublesome, particularly because the injunctions and decrees often enjoin defendants from violating the Act against anyone protected under the statute in the future.408 As has been discussed and illustrated above, the consent decrees and injunctions are often read so broadly.

But the decrees and injunctions are also overbroad because they often enjoin not only a defendant in an action but also third parties from ever violating the Act. As was evident in the initially proposed consent decree in the Levesque case, there can be language in the decrees and injunctions enjoining a defendant’s agents, employees, servants, and even attorneys. That language is, of course, often standard in injunctions issued pursuant to the Maine Rules of Civil Procedure.409 It is an open question, however, whether those third-parties enjoined under the Act would be subject to the statute’s criminal penalty were they to violate the law in the future, regardless of whether the third-parties themselves had ever previously been defendants in a State civil action brought under the Maine Civil Rights Law.

b. Vagueness

The consent decrees and injunctions used by the Department of the Attorney General also often suffer from vague language. Even though the Maine Civil Rights Act specifies that the Act applies to deprivation of rights because of acts or threats of violence,410 the language often used in the decrees and injunctions enjoin defendants from ever “intimidating,” “coercing,” or “harassing” the victim or any other person protected under the Act.411

404. 315 U.S. 568 (1942).
405. 283 U.S. 697 (1931).
407. See Harnett Interview, supra note 154.
408. See id.
409. See Me. R. Civ. P. 65(d).
411. E.g., Consent Decree of Wanda Clark at 2, Clark (No. CV-92-1010); see also Default Judgment and Permanent Injunction of Charles Brown at 2, Brown (CV-97-29); Consent Order of Walter Smith at 2, Smith (CV-93-63).
That language is problematic for two main reasons. First, what do the terms “intimidate,” “coerce,” or “harass” mean? Is it “intimidating” a person to raise an eyebrow at that person or look at a person in the “wrong” way? Is it “coercing” someone to open a door for the person to pass through? Is it “harassing” someone to wink at him or her or look in his or her direction? As Lear showed, the mere pointing of a finger at someone can constitute a threat or act of violence. It stands to reason that such a gesture could be construed by a court to be “intimidating,” “coercive,” or “threatening” conduct enjoined by a court order, thereby opening the door for the imposition of the criminal sanction that is provided in the Act.

Second, and perhaps more problematic, is that the terms “coerce” and “intimidate” were intentionally eliminated from the original language of the Act by the Legislature when the Act was amended in 1992. The legislative history shows that the reason for the elimination of the language was to narrow the conduct that would fall into the scope of the Act to include only threats or acts of violence or trespassing or threats of trespassing on property. Yet the Department of the Attorney General has imported the “intimidation/coercion” language long-advocated by the Maine Civil Liberties Union into the consent decrees and injunctions—terms that the Legislature specifically, purposefully and unambiguously eliminated when it amended the Act in 1992.


In analyzing the rationale underlying the Maine Civil Rights Act and its application and enforcement, questions may be raised about its fundamental constitutionality, particularly in light of the principles embodied in three First Amendment cases: Chaplinsky v. New Hampshire, Near v. Minnesota, and R.A.V. v. St. Paul.

a. Chaplinsky v. New Hampshire

Chaplinsky v. New Hampshire announced the so-called “fighting words exception” to the First Amendment’s protection of free speech. In Chaplinsky, the defendant was arrested for calling a law enforcement officer a “God damned racketeer” and “a damned Fascist,” in violation of a New Hampshire law that made it unlawful to “address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name.” The defendant was found guilty of violating the statute, and the judgment of conviction was affirmed by the New Hampshire Supreme Court. An appeal was made to the United State Supreme Court.

In an opinion written by Justice Murphy, the Court stated that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” Those classes of speech include “the lewd and obscene, the profane, the

412. See supra Part II: HISTORY AND ENFORCEMENT.
413. See supra Part II: HISTORY AND ENFORCEMENT.
414. 315 U.S. 568 (1942).
415. Id. at 569.
416. See id.
417. See id.
418. Id. at 571-72.
libelous, and the insulting or ‘fighting’ words,” which the Court defined as “those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”419 The Court then carved out an exception to the First Amendment’s protection of free speech by deeming fighting words as outside that Amendment’s scope, thereby holding that the New Hampshire statute was constitutional.420

According to authors James B. Jacobs and Kimberly Potter, the Chaplinsky opinion “seemingly opened the door to laws prohibiting the utterance of racial, religious, or ethnic insults, because arguably they would ‘by their very utterance inflict injury.’”421 In the years following the decision, however, the Court narrowed the definition of fighting words to utterances tending to incite an immediate breach of the peace. Further, the Court stated that in order to constitute “fighting words,” the words must “naturally tend to provoke violent resentment,” or an “immediate breach of the peace” and must be directed at an individual, rather than at a general group. The Court defined “immediate breach of the peace” to mean more than a mere offensive remark or a breach of decorum: to be legally punishable, the words had to tend to incite the addressee to violent action.422

Jacobs and Potter further point out the remarkable fact that, since Chaplinsky, the Supreme Court has never sustained a conviction under the fighting words doctrine. In other words, every time a state or local government has sought to use criminal law to punish someone for offensive speech that might provoke violent retaliation, the Court has ruled against the government and reversed the conviction. This pattern has led constitutional scholars to doubt the continuing validity of the fighting words exception.423

That Chaplinsky has never been followed is not accidental. In light of the holdings in Brandenburg v. Ohio,424 New York Times v. Sullivan,425 and Cohen v. California,426 each of which broadened the protections of speech, Chaplinsky seems a relic from an earlier time.427 Under current constitutional law, the Maine Act therefore should be narrowly construed to prohibit, at most, a threat of violence by a speaker were it to occur in the immediate presence of an addressee and create the potential for imminent violence.428

Yet such a narrow interpretation has not occurred. Speech not falling within the narrow “fighting words exception” has been used by the Maine Department of

419. Id. at 572.
420. See id. at 573-74.
422. Id.
423. Id.
424. 395 U.S. 444 (1969) (forbidding the State from suppressing the “advocacy of the use of force or of law violation except where such advocacy is directed to incite or produce such action”).
425. 376 U.S. 254 (1964) (holding that “a State cannot under the First and Fourteenth Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves 'actual malice'”).
426. 403 U.S. 15 (1971) (ruling that “[a]bsent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display … [of offensive words] a criminal offense”).
427. See Conversation with James Friedman, Professor of Constitutional Law at the University of Maine School of Law, in Portland, Maine (April 2000).
428. See id.
the Attorney General to show the motivation of bias in connection with unlawful conduct. For example, as was seen in Martin, the State linked the conduct of Defendant Martin (the punch in the hallway outside of a classroom, an incident in which no words were stated) to Martin's speech before and after the incident (e.g., the "all gays should be shot" comment; the alleged threats made on the public way). And by virtue of accepting the link that the State made between the speech and the unlawful conduct, the court in the Martin case not only punished the Defendant's conduct, but also penalized the boy's otherwise protected speech that was expressed in totally different contexts and times.

Such a judicial approach does not align with constitutional free speech principles. Speech that suggests bias, while morally reprehensible, is nonetheless legally protected, so long as it does not fall within the narrowly drawn "fighting words exception" to the First Amendment found in the arguably obsolete case of Chaplinsky.

b. Near v. Minnesota

The doctrine of prior restraint typically applies in the context of the publication of news but also can be applied to instances in which the State restrains free speech, as occurs when the injunctive remedies available to the State under the Maine Civil Rights Act are issued and enforced.

The doctrine of prior restraint was announced in the foundational case of Near v. Minnesota. In that case, a Minnesota statute declared that one who engages in the business of regularly and customarily producing, publishing or circulating, having in possession, selling or giving away (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance and all persons guilty of such nuisance may be enjoined, as hereinafter provided. Among other provisions, the law gave the State Attorney General the power to "maintain an action in the district court of the county in the name of the State to enjoin perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it." Furthermore, the statute provided that an action under the law is to be "governed by the practice and procedure applicable to civil actions for injunctions," and after trial the court may enter judgment permanently enjoining the defendants found guilty of violating the Act from continuing the violation and, "in and by such judgment, such nuisance may be wholly abated." The court is empowered, as in other cases of contempt, to punish disobedience to a temporary or permanent injunction by fine of not more than $1,000 or by imprisonment in the county jail for not more than twelve months.

In Near the County Attorney of Hennepin County brought an action "to enjoin the publication of a malicious, scandalous and defamatory newspaper, magazine and periodical known as "The Saturday Press." The Complaint alleged that the periodical had maliciously defamed, among other persons, "members of the Jew-

429. 283 U.S. 697 (1931).
430. Id. at 702.
431. Id. at 702-03.
432. Id. at 703 (quoting Mason's Minnesota Statutes, 10123-1 to 10123-3 (1927)).
433. Id.
ish race,” members of an empanelled grand jury, the Minneapolis Tribune, and various public officials.434

After making various findings of fact, the District Court determined that The Saturday Press was indeed a publication falling under the Minnesota statute, and that it fell within the definition of being a “public nuisance.”435 This resulted in the periodical being “perpetually enjoined from producing, editing, publishing, circulating, having in their possession, selling, or giving away any publication whatsoever.”436 On appeal, the Minnesota State Supreme Court affirmed the judgment.437 The United States Supreme Court granted certiorari.438

Writing for the Court, Chief Justice Hughes applied a four-part analysis and determined that the statute was not aimed at punishment but rather, that its intent was to suppress future publication.439 This led the Chief Justice to further write that the “statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship.”440 Given the statute’s operation, Chief Justice Hughes concluded:

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter ... and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship.441

Because of that resulting censorship, the Chief Justice determined that the statute was unconstitutional.442 In so holding Chief Justice Hughes noted that the unconstitutionality of the law did not mean that the grievances of the persons whom it was intended to protect would remain beyond punishment of the law. “[W]hatever wrong the appellant has committed or may commit...the State appropriately affords both public and private redress by its libel laws.”443

The larger principles evinced in Near that underlie the First Amendment’s guarantee of a press free from injunctions also are applicable to that Amendment’s free speech guarantee. It follows then that the injunctive remedies used by the Department of the Attorney General pursuant to the Maine Civil Rights Act themselves also act as unconstitutional prior restraints on speech.

To illustrate this assertion, one may consider the following statement made by the State Assistant Attorney General to the court at the preliminary injunction hearing in the Martin case:

The harder case, I submit, is made out not on [Defendant] Ryan Martin, but with respect to [Defendants Smith and Campbell]. And the reason for that is simply that, to date, there has not been an incident of direct physical violence from either

434. See id.
435. Id. at 706.
436. Id.
437. See id.
438. See id. at 707.
439. See id. at 711.
440. Id. at 712.
441. Id. at 713.
442. See id. at 722-23.
443. Id. at 715.
of those defendants to [the alleged victim]. Not yet. I submit the reason for this
case [i.e., the formal action against Campbell and Smith] is to ensure that that
does not happen in the future. 444

The implications of this statement are profound. What the Department of the At-
torney General is saying is that despite the fact that the defendants have only ex-
pressed biased statements and not made any overt acts or threats of violence, they
nonetheless should be enjoined under the Maine Civil Rights Act so that they will
not violate the Act in the future. That reasoning is similar to that underlying the
statute in Near in that the State is asking for punishment of something that has yet
to occur based only on the speech that has been made manifest.

To be sure, it was not speech but potential conduct that the Department of the
Attorney General was arguing should be enjoined with regard to Defendants
Campbell and Smith in the Martin case. Therefore, the principles embodied in
Near would seemingly be inapplicable because of the intent of the Act to punish
conduct. 445

Yet the intent of the Act as a “hate crime” law is not just to enjoin any kind of
conduct, but conduct motivated by bias against any person by reason of the pro-
tected categories identified in the Act. The question of the moment then is, how is
bias to be determined? The only plausible answer is that bias can only be deter-
mined by an evaluation of speech and expression. This demands explanation.

There are, no doubt, instances in which bias may be inferred from conduct
alone. A hypothetical situation 446 demonstrating this would be, for example, a
person of one race approaching a person of another race who is a total stranger,
and assaulting that other person out of the blue and without saying anything what-
soever. In such a case an argument could be made that the assault was racially
motivated because of the different races of the actors involved.

Such an analysis, however, would be superficial. Determining bias simply
based on the respective races of the actors is simplistic because of the inability
truly to know the thoughts motivating the person assaulting the victim. Without an
express statement a dispositive analysis is not possible to make.

More realistically, then, bias likely would need to be determined based upon
the speech used prior to, during, or after the unlawful conduct. In effect, a nexus
between the speech and the conduct would have to be found for there to be made a
more telling determination of bias.

A hypothetical demonstration of this kind of analysis is perhaps more easily
imagined. Take, for example, a person who assaults another person whom he does
not even know and, while doing so, hurls racial epithets at the person. The nexus
of speech and conduct there is easily discernable: the conduct is immediate, as is
the speech, and because of their lack of affililation in any way, bias can reasonably
be inferred as a motivating factor.

A difficulty arises even in this case, however, if there is the added fact that

444. [Vol. II] Transcript of the Preliminary Injunction Hearing at 6A, Martin (No. CV-99-80)
(statement of AAG to the Court).

445. See Harnett Interview, supra note 154.

446. The Author was inspired, in part, for the ideas related to the following hypotheticals by
a conversation with Stephen Wessler, Director of the Center for the Study and Prevention of
Hate Violence at the University of Southern Maine. See Conversation with Stephen Wessler,
Director of the Center for the Study and Prevention of Hate Violence, in Portland, Me. (Oct.
1999) (on file with Author).
there was a connection between the actor and the victim—if, for example, they were former friends or coworkers who became angry with each other for some reason. In that instance it would be difficult to determine whether or not the racial epithets used during the assault were said out of “genuine” bias or were simply angry words made in the heat of the moment. That difficulty would be made greater in direct proportion to the connection between the individuals involved in the incident: the closer the connection, the greater the chance that something other than bias may have motivated an actor to conduct himself toward the victim unlawfully. Such a possibility was perhaps best evidenced in Lear. There the court determined that Lear’s speech and conduct were biased, or hatefully motivated, and stretched the requisite nexus between speech and conduct to take account of the “totality of the circumstances.” But couldn’t Lear simply have been reacting out of frustration and anger because of his son’s suspension from school?

One discovers, then, that an analysis of whether conduct was bias-motivated is a difficult one to make. What is not so difficult to see is that the prior, present, or future speech or expression of a defendant likely would have to be evaluated to make a dispositive finding that bias motivated the unlawful conduct.

Enter Near. Because speech must be examined by the Attorney General to determine whether unlawful conduct was bias-motivated, the effect of the injunctions and decrees enjoining a defendant is to give that person no real meaningful choice but to refrain from future biased speech altogether. This is because of the enjoined defendant’s awareness that any biased speech spoken by the defendant again might be used against him or her by the Attorney General to prove that some possible future unlawful act was bias-motivated, and therefore in violation of a decree or injunction. The knowledge of a defendant that such a violation would carry with it criminal penalties, including (conceivably) a jail sentence, no doubt curbs the expression of certain thoughts and ideas considered to be of a biased nature. In all practical effect, a chilling effect on speech results.

C. R.A.V. v. City of St. Paul

The last First Amendment case that is relevant to a constitutional analysis of the Maine Civil Rights Act is R.A.V. v. City of St. Paul.447 In that 1992 case, the defendant violated a city ordinance, which provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.448

The defendant in R.A.V. “allegedly assembled a crudely made cross” made of broken chairs, and proceeded to burn the cross inside the fenced yard of a black family.449 The trial court granted the defendant’s motion to dismiss on the grounds that the ordinance was overbroad and therefore “facially invalid under the First Amendment.”450 The Minnesota Supreme Court, however, reversed the lower

448. Id. at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)).
449. Id. at 379.
450. Id. at 380.
court's ruling, finding that the ordinance was sufficiently limited in scope to words that would qualify as "fighting words." The highest court of the state also held that the ordinance "was not impermissibly content-based because ... 'the ordinance is a narrowly tailored means toward accomplishing the compelling government interest in protecting the community against bias-motivated threats to public safety and order.'

After reviewing the case on certiorari, however, the United States Supreme Court found otherwise. Delivering the opinion of the Court, Justice Scalia found that it was unnecessary to address the "fighting words" rationale found by the Minnesota Supreme Court and advanced by the respondent State in the case.

Assuming, arguendo, that all of the expression reached by the ordinance is proscribable under the "fighting words" doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.

In writing the opinion, Justice Scalia recognized that the government has permitted, and may permit, restrictions on the content of speech, and that such restrictions were allowed in the statute at issue in Chaplinsky v. New Hampshire. The Justice asserted, however, that the fighting words doctrine does not allow the government to take sides in political debate by forbidding one side from using certain reprehensible words. Doing so would allow the government in effect to favor a political message by censorship. "The government," he wrote, "may not regulate use [of words] based on hostility—or favoritism—towards the underlying message expressed."

The Justice further noted that the government may regulate the content of certain speech:

A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages .... [Likewise,] the Federal Government can criminalize only those threats of violence that are directed against the President .... But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities .... [Finally,] a State may choose to regulate price advertising in one industry but not in others, because of the risk of fraud .... But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.

Justice Scalia then applied those principles to the St. Paul ordinance and found that the law was "facially unconstitutional." The ordinance, he wrote, made clear that its application is only to "fighting words" that are directed at members of the categories specified therein. This amounted to not only content discrimination, but also viewpoint discrimination:

451. Id.
452. Id. at 380-81 (quoting In re Welfare of R.A.V., 464 N.W.2d 507, 511 (Minn. 1991)).
453. See id. at 381.
454. Id. at 382-83.
455. See id. at 383-84.
456. Id. at 386.
457. Id. at 388.
458. Id. at 391.
459. See id.
Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—would seemingly be useable \textit{ad libitum} in the placards of those arguing \textit{in favor} of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents.\footnote{460}

This reasoning lead to Justice Scalia’s perhaps most memorable conclusion in the \textit{R.A.V.} opinion: “St. Paul has no...authority to license one side of a debate to fight free-style, while requiring the other to follow Marquis of Queensberry Rules.”\footnoteref{461} Later in the discussion, the Justice elaborated on this idea, saying that “[s]electivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility alone would be enough to render the ordinance presumptively invalid.”\footnote{462} Further, he wrote that “the only interest distinctively served by the content limitation is that of displaying the city council’s special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids.”\footnoteref{463}

Justice Scalia concluded the opinion by assuring that the holding was not in any way meant to condone the activities of the defendant. “Let there be no mistake about our belief that burning a cross on someone’s front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.”\footnote{464} The Court thereby reversed the Minnesota Supreme Court’s holding.\footnote{465}

The Court’s holding in \textit{R.A.V.} has significant ramifications on the Maine Civil Rights Act. This is because the Act, like the City of St. Paul’s ordinance, identifies and is legislatively intended to protect specific categories of people. \textit{R.A.V.} shows that when it comes to speech, basing a law on the premise of protecting only specified categories of people is not constitutional on First Amendment grounds because of the discriminating effect that such a law would have. Although the State can be concerned with and take steps to protect the well-being of its historically vulnerable citizens, it cannot do so by a means that infringes on First Amendment free speech protections—or, for that matter, principles of equal protection.

There are perhaps two responses to this criticism. The first is that the Maine Act is aimed at punishing conduct, not speech. Yet as discussed above, speech must be tied to the unlawful conduct the Department of the Attorney General is seeking to enjoin. A First Amendment analysis is thus viable because of the connection that speech must have to unlawful conduct in order for the State to show that the conduct was bias-motivated.

The other response to the criticism that the Act violates the principle of \textit{R.A.V.} is that the Act is applicable to everyone, whether they fall into one of the protected categories or not. Yet this response is not intellectually honest. For one, if the Act protects \textit{all} citizens, then what would the purpose of the law be other than to protect persons from threats and conduct that are \textit{already} unlawful? In fact the history of the Act clearly shows that the legislature intended the Maine Civil Rights Act to

\footnotetext{460}{\textit{Id.}}\footnotetext{461}{\textit{Id. at} 392.}\footnotetext{462}{\textit{Id. at} 394.}\footnotetext{463}{\textit{Id. at} 396.}\footnotetext{464}{\textit{Id.}}\footnotetext{465}{\textit{Id.}}
protect groups who have historically been victimized by bias-motivated acts.

Yet the legislature’s intent to narrow the scope of the Maine Civil Rights Act to protect only specified categories of people is precisely at odds with the holding in R.A.V. In saying only bias-motivated conduct is going to be subject to injunctive actions brought by the Attorney General, the legislature has (to paraphrase Justice Scalia) licensed the language that some speakers can use with unlawful conduct, while requiring other speakers to follow Marquis of Queensberry Rules.

Make no mistake about it: unlawful conduct that is motivated by bias and hate is morally wrong. R.A.V., however, requires the legislature to make a choice and either deem all bias motivations accompanying unlawful conduct worthy of enjoinder under the Act (something that would be impractical and that would fundamentally undermine the Act as a “hate crime” law) or make no such distinction at all. Indeed, it is undoubtedly true that the pain felt by a teenage victim of unlawful conduct who was threatened or assaulted because of his race or religion is felt with equal force by a teenage victim selected because of his being poor, not fashionably dressed, or overweight. Yet by specifying the persons to be protected by the Act, the legislature has made such a distinction, treating the former victim’s plight as more worthy of the State’s injunctive powers. The holding in R.A.V. suggests that such a distinction is unconstitutional. The State cannot say, to paraphrase George Orwell, “All bias-motivated unlawful conduct is equal, but some is more equal than others.”

It is significant to note that criminal laws of the State of Maine (most, if not all, of which predate the Maine Civil Rights Act) provide ample remedies to protect all persons from violence, threats, and harassment. These laws make assaults,466 harassment,467 threats,468 stalking,469 terrorizing,470 trespass,471 vandalism and destruction of property,472 and violations of protective/restraining orders473 among like actions—unlawful. They are statutes that apply universally to ensure that the sovereignty and dignity of all citizens are protected. Principles of equal protection demand that the laws governing society operate in such a manner to ensure that justice indeed be blind and be equitably administered to all victims of crimes, and that all perpetrators of such crimes be punished once the crime has been proven.

And yet—contrary to both the principles underlying equal protection and the rationale and holding of R.A.V.—the legislature amended the Maine Civil Rights Act in 1993 to make distinctions in the law that provide remedies to some but not all citizens of unlawful conduct. For the reasons discussed above, however, such distinctions are not constitutional.

470. See id. § 210 (Terrorizing statute).
471. See id. § 402 (Criminal Trespass statute).
Because the Maine Civil Rights Act generally necessitates a showing that unlawful conduct was motivated by bias, and that that bias can only ultimately be determined by evaluating speech, then speech (and thought, for that matter) is effectively punished through civil injunctive actions brought by the Department of the Attorney General under the Act. That outcome is precarious in light of the First Amendment’s protection of expression. If such a conjunction of conduct and speech can form the basis of an injunctive action, then the next step could be to criminalize speech itself. Such a dramatic development may seem unimaginable; however, there arguably are elements of such a development in each of the three actions brought by the Department of the Attorney General in *Levesque, Lear*, and *Martin*.

Speech is a barometer of society, indicating trends of thought and the conditions of the relationships among citizens. Without free expression, we lose a vital ability to measure where we stand as a people and nation. But more than that, we lose the ability to understand how and where to mend the fabric of our society.

Formal injunctive actions brought under the Maine Civil Rights Act, although well intentioned, potentially inhibit free expression and diminish the effectiveness of speech as a gauge of society’s values and climate. Granted, the Legislature’s intent in passing the Act was undoubtedly to stop bias-motivated unlawful conduct. But in its legitimate efforts to protect historically marginalized and victimized citizens from such conduct, the State may not in the process directly or indirectly restrain, enjoin, or inhibit free expression.

Mere deterrence through suppression of expression is not a remedy to cure the awful cancer of hate and bias that plagues our society. Bias and hate that are manifest in a person will not simply dissipate because it is not expressed. In fact there is the opposite danger that bias and hate might fester in a person because of that person’s inability to express thoughts out of fear that the State will use those thoughts against him or her in the future to prove that bias motivated an unlawful act. Thus, suppression of expression ironically—and tragically—may result in more serious unlawful conduct without biased expression accompanying it at all. One must wonder if this is not a more menacing prospect with which to live.

3. A Public Policy Consideration

There are bound to be many public policy considerations regarding the Maine Civil Rights Act. This Section will briefly focus on only one: the Department of the Attorney General’s commencement of civil actions brought under the Act against school-aged children, such as those who were Defendants in *Martin*.

According to the Department of the Attorney General, half of the formal actions brought by the State under the Act involve minors.\(^{474}\) The *Martin* case is one such action and aptly illustrates the Department’s method of intervening in disputes among teenagers and attempting to solve those conflicts through civil litigation.

The question must be raised as to whether such intervention is a good thing. Litigation is a stressful and even traumatic experience for anyone to undergo, never mind children. And yet it is litigation to which these teenagers are being sub-

\(^{474}\) Maine Department of the Attorney General Internet site, *Civil Rights Team Project*, (visited Oct. 21, 1999) <www.state.me.us/ag/crt/description.htm>.
jected. Why? Mainly because, in their conflicts with one another, the children have used derogatory references to one of the diverse groups protected under the Act.

To be sure, such derogatory references should not be condoned in any school setting and should be swiftly addressed by school personnel once they are noticed. Any decent-minded person would agree with such a proposition, as well as with the notion that teenagers should be accountable for any act that is criminal in nature. Yet in the absence of criminal conduct, students should be encouraged to resolve issues among themselves rather than through attorneys. Further, it is no doubt healthier for children to learn to get along with each other with perhaps the help of a guidance counselor or another such school-level mediator than to be parties to a civil injunctive suit initiated by the Attorney General. Children should be able to experience the joys and pains of growing up without the prospect that their disputes might be subject to State action and be reported in newspapers.475

The alternative is to continue the present course and send the message to school-aged children that lawsuits are the most effective means to solve disputes in life rather than through reasonable dialogue. Society already is litigious enough without that idea being communicated to children by the State.

IV. CONCLUSION

The Maine Civil Rights Act is a difficult law to criticize. Indeed, the very name of the law conjures up associations with notions of social justice and equality, causing one to proceed with great trepidation in finding faults with the statute. Moreover, the public policy goals of the statute that likely prompted the legislature to pass the Maine Civil Rights Act are assuredly noble and good ones for which to aim. In principle, the Maine Act is a law that hopes to reflect the values of Maine society.

Yet the difficulties with the Maine Civil Rights Act are not so much found in the values on which the law is founded, but rather in the intricacies of how the law, in reality, works and is applied. This Comment has identified through both illustration and analysis that there are problems in the application—and even constitutional foundations—of the statute. It is the hope of the Author that by identifying those problems, they may be addressed through meaningful dialogue.

Reasonable and decent citizens would agree that we should strive for a society free of bias and hate, and in which there is harmony amongst all diverse citizens who appreciate and have compassion for the fundamental, common humanity that binds us. Moreover, there is assuredly likewise agreement that conduct that is proven to have caused harm to the bodies and dignity of other human beings should never go unpunished. Despite such consensus, however, the legal issues surrounding the Maine Civil Rights Act that have been identified in this Comment may eventually have to be addressed.

Christopher Parr

475. For another perspective on this and other matters related to the Maine Civil Rights Act, see Mary K. Gonya Brennan, AG's obsolete system, BANGOR DAILY NEWS, March 29, 2000.