Western New England Law Review

Volume 29 *29 (2006-2007)*
Issue 3

Article 6

1-1-2007

MUNICIPAL LAW—HOW BROAD A REMEDY? MUNICIPAL LIABILITY AND THE MASSACHUSETTS CIVIL RIGHTS ACT

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MUNICIPAL LAW—How Broad a Remedy? Municipal Liability and the Massachusetts Civil Rights Act

Introduction

Jane and Lena both live in Massachusetts, where, in identical situations, each was threatened with arrest for lawful activity in violation of her civil rights. Afterward, both filed lawsuits against the individuals who made the threat, as well as the individuals' employers. Jane's suit was successful. The individual perpetrator was judgment-proof, but the employer paid damages. After paying the damages, the employer implemented a new training program to prevent future employee violations.

Lena was also awarded damages, but she never received a dime. The individual was judgment-proof, and her case against the employer was dismissed before trial. The employer made no changes to training or supervision to prevent future incidents.

What caused the different outcomes on nearly identical facts? In Jane's case, the employee was a security guard who worked for a private employer, while in Lena's case, the employee was a police officer employed by a municipal corporation.

Did the Massachusetts legislators who passed the Massachusetts Civil Rights Act (MCRA)[1] in 1979 intend such disparate outcomes? Is it possible that they were concerned only with the prejudice of private individuals and did not wish to provide incentives for cities and towns to protect the civil rights of all Massachusetts citizens? This Note argues that the answer to both questions is no: the legislature intended to pass a bill that would provide protections for the civil rights of Massachusetts citizens in as broad a range of settings as possible, including settings in which the employer is a municipal entity. Specifically, this Note argues that municipal corporations should be treated as any other "persons," subject to the same liability, including respondeat superior liability, as individuals and non-municipal employers under the MCRA, and that such a reading is consistent with the Act's intended purpose.

Part I of this Note explores the historical background of the MCRA, beginning with an exploration of 42 U.S.C. § 1983 (§ 1983),

1. Mass. Gen. Laws ch. 12, §§ 11H, 11I (2004).

the federal civil rights act on which the MCRA was modeled.[2] A brief overview of the legislative history of § 1983 is followed by a discussion of § 1983 case law, culminating with the 1978 Supreme Court decision, *Monell v. Department of Social Services*.[3] The Note then addresses the legislative history of the MCRA and case law relevant to a discussion about whether the word "person," as used in the MCRA, includes municipalities.

Part II of this Note analyzes the competing considerations at play when determining legislative intent and argues that the Massachusetts state and federal district courts have erred in entirely excluding municipalities from the reach of the MCRA. Excluding municipalities from the reach of the MCRA deprives some plaintiffs of a remedy available to other plaintiffs—damages from the employer of an employee who violated the plaintiff's civil rights while on the job. A further result is that municipalities have less liability for the civil rights violations committed by their employees than do private employers and, therefore, less financial incentive to ensure that employees are properly trained and supervised to avoid violations. Although municipalities are liable under § 1983, they are generally not subject to vicarious liability for the acts of employees.[4] As a result, the harms of excluding municipalities from the reach of the MCRA are not remedied by the existence of limited federal liability for municipalities.

I. HISTORICAL BACKGROUND ON FEDERAL AND STATE CIVIL RIGHTS LEGISLATION

A. *Brief Overview of the Legislative History of 42 U.S.C. § 1983*

The history of the MCRA begins with 42 U.S.C. § 1983. The core statutory language of § 1983 was originally passed as part of the Ku Klux Act, now also called the Civil Rights Act of 1871.[5] As the original title suggests, the Act was passed in response to the racially motivated violence for which the Ku Klux Klan was known.[6] The first section of the Civil Rights Act of 1871, since

2. *Id.*

3. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

4. *See infra* notes 56-58 and accompanying text.

5. James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 410 (2003).

6. 1 BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 591 (Bernard Schwartz ed., 1970).

codified as § 1983,[7] permitted a person who had been deprived of his or her civil rights "under color of any law" to bring suit in federal court against the person who had caused the deprivation.[8]

This new civil cause of action complemented the existing federal criminal penalty for civil rights violations, thus providing a remedy for victims even where local law enforcement refused to act.[9] After little debate, section 1 of the Civil Rights Act of 1871

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7. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2000)). Other sections of the Civil Rights Act of 1871 have been codified. Section 2 is codified as amended at 18 U.S.C. § 241 (2000) and 42 U.S.C. § 1985(3) (2000); section 6 is codified as amended at 42 U.S.C. § 1986 (2000).

8. The text of section 1 of the Civil Rights Act of 1871 (Ku Klux Klan Act) provided:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2000)).

9. Section 2 of The Civil Rights Act of 1866 provided:

> That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866). Similar language is now codified at 18 U.S.C. § 242. The introductory language was clearly the source for the analogous language in section 1 of the Civil Rights Act of 1871. *See supra* note 5. However, the rights protected in 1866, prior to the enactment of the Fourteenth Amendment, were based in the statute itself, rather than the Constitution.

was passed as introduced.[10] There was, however, considerable debate about various versions of section 6 of the Civil Rights Act of 1871, especially the Sherman Amendment.[11] Those debates have fueled judicial disagreement about the interpretation of the word "person" in § 1983.[12]

Under Senator Sherman's proposed amendment, all residents of a "county, city, or parish" were made liable for damages caused by "any persons riotously and tumultuously assembled."[13] The Senate approved the Sherman Amendment, but the House of Representatives rejected it.[14] Later, the Conference Committee disseminated a revised version that would have made the "county, city, or parish" itself liable for the damages.[15] Legislators in the House gave significant attention to the Conference Committee version of the Sherman Amendment before, again, rejecting it.[16] Ultimately, Congress adopted section 6 of the Civil Rights Act of 1871, which allowed suits against those who had power and knowledge but failed to act to prevent civil rights violations.[17] As revised, section 6 made individuals with the ability to prevent civil rights violations liable for any violations that occurred, and eliminated the type of collective liability suggested by Senator Sherman.[18] In 1961, the Supreme Court ruled that the rejection of the second version of the Sherman Amendment showed that the legislature did not intend municipalities to be liable under the Civil Rights Act of 1871.[19] In 1978, however, the Supreme Court revisited the meaning of the de-

10. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 665-66 (1978) (citing CONG. GLOBE, 42d Cong., 1st Sess. 522); *see also* Monroe v. Pape, 365 U.S. 167, 171 (1961) (citing CONG. GLOBE, 42d Cong., 1st Sess. 568).

11. For a thorough discussion of the Sherman Amendment, its sources, and the debate surrounding its adoption, see Russell Glazer, Note, *The Sherman Amendment: Congressional Rejection of Communal Liability For Civil Rights Violations*, 39 U.C.L.A. L. REV. 1371, 1394-1406 (1992).

12. *Monroe*, 365 U.S. at 188-91.

13. CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871).

14. Glazer, *supra* note 11, at 1401 (citing CONG. GLOBE, 42d Cong., 1st Sess. 663).

15. *Id.* (citing CONG. GLOBE, 42d Cong., 1st Sess. 663, 707, 725).

16. *Id.* at 1402 n.161, 1403.

17. Civil Rights Act of 1871, ch. 22, § 6, 17 Stat. 13, 15 (1871) (codified as amended at 42 U.S.C. § 1986 (2000)). Specifically, section 6 allowed suits, brought within a year, against a "person or persons, [who] having knowledge that any of the wrongs conspired to be done . . . [was] about to be committed, and having power to prevent or aid in the preventing of same neglect or refuse so to do." *Id.*

18. *Id.*

19. Monroe v. Pape, 365 U.S. 167, 172-83 (1961); *see also infra* notes 35-41 and accompanying text.

bate about the Sherman Amendment, and came to a different conclusion.[20]

B. *Interpreting § 1983:* Monroe *and* Monell

In *Monroe v. Pape*, the plaintiffs brought suit against the City of Chicago and a group of its police officers alleging that the officers violated their civil rights guaranteed under the United States Constitution.[21] The complaint alleged that in the early hours of the morning, a group of thirteen Chicago police officers, acting without a warrant, entered their apartment, woke them and their children, and made them stand naked in their living room.[22] The officers proceeded to "ransack[ ] every room, emptying drawers and ripping mattress covers."[23] One of the plaintiffs, Mr. Monroe, claimed he was held at the police station for ten hours without access to an attorney and with no opportunity to call his family, in further violation of his civil rights.[24] The district court dismissed the claims against the city and the officers, holding that § 1983 was not violated because the officers' actions were illegal and therefore not carried out "under color of" state law.[25]

When the district court entered its ruling, case law interpreting the phrase "under color of state law" limited application of the statute to challenges of written policies that, on their face, violated individuals' federal rights.[26] The Supreme Court had, however, rejected a similarly narrow interpretation of the same phrase used in a criminal context in 18 U.S.C. § 242.[27] Under § 242, state of-

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20. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 664-83 (1978); *see also infra* notes 55-58 and accompanying text.

21. *Monroe*, 365 U.S. at 168-69.

22. *Id.* at 169.

23. *Id.*

24. *Id.*

25. *Id.* at 170.

26. Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 Nw. U. L. REV. 277, 283-84 (1965) (noting that Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, 273 U.S. 536 (1927); and Myers v. Anderson, 238 U.S. 368 (1915) all involved acts by officials enforcing unconstitutional state laws).

27. United States v. Classic, 313 U.S. 299, 326 (1941) (finding, in a criminal case, that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law"). 18 U.S.C. § 242 reads in full:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an

ficers are presumed to have acted "under color of" state law, even if their activities violated state law, so long as their "possession of some state authority" facilitated their illegal acts.[28] In *Monroe*, the Court adopted that interpretation of § 1983, explaining that both § 1983 and § 242 took the phrase "under color of" state law from the Civil Rights Act of 1866 and, therefore, the "phrase should be accorded the same construction in both statutes."[29] The Court also noted that the legislature had ample time to reword either statute in the years since the phrase was given an expansive meaning under 18 U.S.C. § 242.[30]

Thus, *Monroe* enabled plaintiffs to bring suit against government officers whose actions did not comply with state law. However, *Monroe* also made it more difficult for some victims to get relief. After adopting a broader definition of "under color of state law," the Supreme Court went on to narrow the meaning of the word "person" as used in § 1983, holding that municipalities were not "persons" who could be sued under the statute.[31] As a result, *Monroe* made it impossible for plaintiffs to sue a municipal government directly under § 1983, even if employees acting in the course of their employment caused the civil rights violation.[32]

> alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 242 (2000). Section 242 is derived from the second section of the Civil Rights Act of 1866 and, as noted by Justice Douglas in *Monroe*, the "under color of any law" language is identical to the language in § 1983. *Monroe*, 365 U.S. at 185.

28. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 288-89 (1913) (defining "state action" as used in the Fourteenth Amendment). The definition was applied to 18 U.S.C. § 242 in *United States v. Classic*, 313 U.S. 299 (1941). The correlation between the interpretation of "state action" and "under color of state law" was explicitly noted by the Supreme Court when it decided *United States v. Price*, 383 U.S. 787, 794 n.7 (1966).

29. *Monroe*, 365 U.S. at 185.

30. *Id.* at 186-87 (quoting Screws v. United States, 325 U.S. 91 (1945)).

31. *Id.* at 190-92 (permitting suit against individual police officers but dismissing claims made directly against the city for whom the officers worked).

32. Harold F. McCart, Jr., Case Note, *Damages May Be Recovered From a Police Officer Who Conducts an Unlawful Search and Seizure*, 12 MERCER L. REV. 410, 412 (1961) (evaluating the impact of *Monroe*).

Writing for the Court, Justice Douglas interpreted the word "person" in light of the debates about the second version of the Sherman Amendment,[33] and the ultimate adoption of different language in section 6.[34] According to Douglas, the rejection of the Sherman Amendment showed that a majority in Congress was against making municipalities liable for deprivations of civil rights occurring within their borders.[35] Because "[t]he response of the Congress to the proposal to make municipalities liable . . . was so antagonistic," Justice Douglas concluded "we cannot believe that the word 'person' was used in [§ 1983] to include [municipalities]."[36]

In addition to relying on the Sherman Amendment debates, the Court could have looked to An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof (hereinafter Federal Dictionary Act).[37] The Federal Dictionary Act, which was adopted just months before the Civil Rights Act of 1871, established definitions for words used in federal laws.[38] Under the Act, the definition of "person" "extend[ed] and . . . appl[ied] to bodies politic and corporate."[39] Since municipalities, also known as municipal corporations,[40] are both political and corporate bodies and § 1983 applies equally to all persons, adoption of the Act's definition of "person" would have subjected municipalities and individuals to the same liability under § 1983.[41]

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33. *See supra* notes 11-18 and accompanying text.

34. *Monroe*, 365 U.S. at 188-91.

35. *Id.*

36. *Id.* at 191.

37. An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof, ch. 71, 16 Stat. 431 (1871) (current version at 1 U.S.C. § 1 (2000)) [hereinafter Federal Dictionary Act]. Congress adopted a revised set of definitions in 1947. General Provisions, ch. 388, § 1, 61 Stat. 633, 633 (1947); Rules of Construction for Acts of Congress, ch. 645, § 6, 62 Stat. 859 (1948). Currently "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (2000).

38. The Federal Dictionary Act, ch. 71, 16 Stat. 431, was enacted February 25, 1871, and the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 18 U.S.C. §§ 241-42, 42 U.S.C. § 1983 (2000)), was enacted April 20, 1871.

39. Ch. 71, 16 Stat. 431 (1871).

40. A municipality is a municipal corporation or "[t]he governing body of a municipal corporation." BLACK'S LAW DICTIONARY 1043 (8th ed. 2004). A municipal corporation is, in turn, "a city, town, or other local political entity." *Id.* at 1042.

41. Indeed this was the conclusion reached by the Supreme Court when it decided *Monell v. Department of Social Services of New York*, 436 U.S. 658, 688-89 (1978).

But the Federal Dictionary Act, Justice Douglas argued, "merely [provided] an allowable, not a mandatory" definition for the word "person."[42] In other words, the Federal Dictionary Act provided a presumptive definition that could be disregarded by demonstrating an alternative legislative intent.[43] Justice Douglas wrote that the debate about the second version of the Sherman Amendment provided ample evidence that the legislature intended to use a narrower definition of the word "person" than the one recently codified.[44]

Justice Douglas's analysis did not hold up. In 1978, following a seventeen year assault on *Monroe*,[45] the Supreme Court overruled *Monroe*'s exclusion of municipal liability, in *Monell v. Department of Social Services*.[46] In *Monell*, a group of female employees sued the school board and its chancellor, the Department of Social Services along with its commissioner, and the City of New York for damages after they were forced to take medically unnecessary, unpaid leave during pregnancy.[47] The district court found that the policy of forced leave violated the plaintiffs' constitutional rights.[48] However, the court denied their claims for back pay because the City would have had to pay the damages and, as a municipality, the City was not liable under *Monroe*.[49] The Court of Appeals for the Second Circuit affirmed, specifically holding that neither the City, the Department of Social Services, nor the Board of Education were "persons" who could be reached by § 1983.[50] The Supreme Court reversed.[51]

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42. Monroe v. Pape, 365 U.S. 167, 191 (1961); *see also* ch. 71, 16 Stat. 431, § 2 ("The word 'person' may extend and be applied to bodies politic and corporate.").

43. *See Monroe*, 365 U.S. at 191.

44. *Id.* at 187-90.

45. *See, e.g.*, Karen M. Blum, *From* Monroe *to* Monell*: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L. REV. 409, 412-14 (1978); *see also infra* note 217 and accompanying text. Some lower courts challenged *Monroe* either by recognizing the scholarly critique of *Monroe*, or by carving out exceptions to the general rule against municipal liability articulated in *Monroe*. *See, e.g.*, Carter v. Carlson, 447 F.2d 358, 369-70 (D.C. Cir. 1971) (carving out an exception to the *Monroe* rule against municipal liability in the case of the District of Columbia); Hogge v. Hedrick, 391 F. Supp. 91, 96 n. 3 (1975) (noting the scholarly criticism of the legislative history analysis that formed the basis of *Monroe*).

46. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

47. *Id.* at 660-61.

48. *Id.* at 661-62. The policy, in fact, had been changed while the litigation was pending. *Id.*

49. *Id.* at 662.

50. *Id.*

51. *Id.* at 702.

Writing for the Court, Justice Brennan thoroughly reviewed the debate surrounding the Sherman Amendment and the wording eventually adopted in section 6 of the Civil Rights Act of 1871.[52] He concluded that the *Monroe* Court had incorrectly identified the concerns legislators had with the Sherman Amendment[53] and that neither the debates about the Sherman Amendment nor those about § 1983 provided clear evidence that legislators intended to define "person" as excluding municipalities.[54]

Justice Brennan wrote in the first part of his opinion: "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies."[55] Since the civil rights violations at issue in *Monell* resulted from a municipal policy, the Supreme Court reversed the lower courts' decisions not to award back pay.[56] The Court's decision could have ended here and *Monell* would have opened the door for municipal liability in a wide range of contexts, including respondeat superior liability.[57] Instead, in the second part of the opinion, Justice Brennan indicated that municipal liability for employee conduct should be limited to those acts that furthered "a government's policy or custom."[58]

The importance of the dicta concerning the "policy or custom" requirement was unclear at the time *Monell* was decided because those terms were not defined.[59] *Monell* did, however, eliminate a

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52. *Id.* at 665-83.

53. *Id.* at 679.

54. *Id.* at 688.

55. *Id.* at 690. In his analysis, Justice Brennan noted that the definition of "person" found in the Federal Dictionary Act should apply to § 1983 in part because the Federal Dictionary Act was "passed only months before the Civil Rights Act was passed." *Id.* at 688.

56. *Id.* at 695.

57. Respondeat superior is "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY, *supra* note 40, at 1338. Vicarious liability is "[l]iability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties" and includes respondeat superior liability. *Id.* at 934.

58. *Monell*, 436 U.S. at 694.

59. The *Monell* "policy or custom" test has come to mean that "municipalities may not be held vicariously liable for the conduct of municipal employees but rather can be held liable only when municipal policy is the moving force behind the violation." Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627, 627 (1998-99). While the rule may be restated relatively easily, it has resulted in "a highly complex body of interpretive law." Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 430 (1997) (Breyer, J., dissenting). Both the "policy or custom" test and

clear barrier to bringing a successful § 1983 claim against a municipality. Using the definition of "person" appearing in the Federal Dictionary Act, the Court overruled *Monroe* and brought municipalities under the scope of § 1983.

C. *Enactment of the Massachusetts Civil Rights Act*

Six months after the Supreme Court decided *Monell*, upon the petition of Attorney General Francis X. Bellotti, members of the Massachusetts General Court introduced House Bill 3135 (H.R. 3135), "to further regulate the protection of the civil rights of persons in the Commonwealth."[60] H.R. 3135 passed without debate or amendment by voice votes in the Senate and House of Representatives.[61] The governor signed the bill into law less than two weeks after it arrived on his desk.[62] The bill added both civil remedies and criminal penalties for certain types of civil rights violations.[63] Two civil remedies provided by the bill make up the Massachusetts Civil Rights Act. The first authorizes the Massachusetts attorney general to bring a civil suit for injunctive or other equitable relief "[w]henever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or at-

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the *Monell* limitation on municipal liability have been criticized by Justices of the Supreme Court and in numerous law review articles. *See, e.g.*, *id.* at 430-31 (Breyer, J., dissenting); *id.* at 430 (Souter, J., dissenting); Oklahoma City v. Tuttle, 471 U.S. 808, 834 (1985) (Stevens, J., dissenting); *see also* Beermann, *supra*; Stephen J. Shapiro, *Public Officials' Qualified Immunity in Section 1983 Actions Under* Harlow v. Fitzgerald *and its Progeny: A Critical Analysis*, 22 U. MICH. J.L. REFORM 249 (1989); Blum, *supra* note 45. Additionally, determining whether the "policy or custom" test applies in a particular case, by at least one estimate, saps significant resources from federal district courts. David F. Hamilton, *The Importance and Overuse of Policy and Custom Claims: A View From One Trench*, 48 DEPAUL L. REV. 723, 724-25 (1998-99). Together, these factors indicate why Massachusetts plaintiffs would be significantly helped by inclusion of municipalities within the MCRA.

60. JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF MASSACHUSETTS 1979, at 2856 (1979); Legislative Packet for 1979 Mass. Acts 915, 171st Gen. Court, Leg. Sess. (on file at the Massachusetts Archives) (copy on file with *Western New England Law Review*).

61. *Id.* Had there been any proposed amendments, debate, or a roll call vote, the published legislative history would contain references to the procedural processes involved. Specifically, if there had been a roll call vote, the specific results would have been printed. The Senate passed H.R. 3135 on July 31, 1979, and the House of Representatives passed H.R. 3135 on November 4, 1979. *Id.*

62. *Id.*

63. The bill had two sections: the first provided civil remedies through two amendments to chapter 12 of the Massachusetts General Laws, and the second provided criminal penalties through an amendment to chapter 265 of the Massachusetts General Laws. H.R. 3135.

tempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured" under federal or state law.[64] The second enables victims of the same type of conduct to sue the perpetrator directly.[65]

The Massachusetts Supreme Judicial Court stated in *Batchelder v. Allied Stores Corp.* that the legislature intended the MCRA to "provide enhanced protection of civil rights."[66] Tracing the intended reach of the MCRA is difficult because the legislative record does not include records of debates or discussions concerning the scope of the bill.[67] However, some information about the purpose of H.R. 3135 and the response generated as the bill worked its way through the legislature survives in the Governor's File[68] and the published record of the legislative action.[69]

Among the materials in the Governor's File are three documents that provide the most authoritative information about the scope of H.R. 3135 intended by the attorney general.[70] In a letter to two members of the General Court, Attorney General Bellotti stated the purpose of the bill in broad terms, writing that H.R. 3135 was "a comprehensive bill to protect the civil rights and civil liberties of persons in the Commonwealth."[71] He described how the bill would address the needs of both the attorney general's office and individual victims by authorizing the attorney general to act, while allowing individuals to pursue justice for themselves.[72] Robert H. Bohn, Jr., Chief of the Civil Rights-Civil Liberties Division of the Department of the Attorney General, reiterated those points in tes-

64. MASS. GEN. LAWS ch. 12, § 11H (2004).

65. MASS. GEN. LAWS ch. 12, § 11I (2004).

66. Batchelder v. Allied Stores Corp., 473 N.E.2d 1128, 1129-30 (Mass. 1985). For a discussion of *Batchelder*, see *infra* text accompanying notes 84-96.

67. Legislative Packet for 1979 Mass. Acts 915, 171st Gen. Court, Leg. Sess. (on file at the Massachusetts Archives) (copy on file with *Western New England Law Review*). The file contains the text of the bill, a listing of actions taken, brief statements from the Senate Committee on the Judiciary and the Senate Committee on Senate Ways and Means recommending passage, and a record of passage in both the House and the Senate. *Id.*

68. Governor's File for 1979 Mass. Acts 915 (on file at the Massachusetts Archives).

69. JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF MASSACHUSETTS 1979, at 2856 (1979).

70. Governor's File for 1979 Mass. Acts 915.

71. Letter from Francis X. Bellotti, Att'y Gen. of the Commonwealth of Mass., to Sen. Alan D. Sisitsky & Rep. Michael Flaherty, Joint Comm. on the Judiciary (Mar. 7, 1979) (on file at the Massachusetts Archives in the Governor's File for 1979 Mass. Acts 915) (copy on file with *Western New England Law Review*).

72. *Id.*

timony before the Joint Committee on the Judiciary.[73] Thomas R. Kiley, First Assistant Attorney General, echoed Bellotti and Bohn when he urged the governor to sign H.R. 3135 in a letter dated November 8, 1979.[74]

Also among the papers in the Governor's File are a number of letters urging adoption of H.R. 3135.[75] These letters provide contemporary impressions of the purpose and reach of the language that became the MCRA and indicate that public debate about H.R. 3135 included discussion of federal civil rights laws like § 1983.[76] Several letters supported the creation of a state civil cause of action to supplement federal law, not simply because the state law would reach private actors, but because the law would give victims access to state courts.[77] The only letter urging the Governor to veto H.R.

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73. Robert H. Bohn, Jr., Chief of the Civil Rights-Civil Liberties Division of the Dep't of the Attorney Gen. of the Commonwealth of Mass., Testimony Regarding House Bill No. 3135 Before the Joint Comm. on the Judiciary (Mar. 7, 1979) (on file at the Massachusetts Archives in the Governor's File for 1979 Mass. Acts 915) (copy on file with *Western New England Law Review*). Bohn also explained that while it was important to provide the Civil Rights-Civil Liberties Division in the Department of the Attorney General specific authority to initiate court action to remedy or enjoin civil rights violations, the individual civil remedy was important to shifting some of the enforcement burden away from the Department. *Id.*

74. Letter from Thomas R. Kiley, First Assistant Att'y Gen. of the Commonwealth of Mass., to Neil Lynch, Counsel to the Governor 3 (Nov. 8, 1979) (on file at the Massachusetts Archives in the Governor's File for 1979 Mass. Acts 915) (copy on file with *Western New England Law Review*).

75. Governor's File for 1979 Mass. Acts 915. Specifically, the Senate Committee on the Judiciary received letters supporting the bill from Greater Boston Legal Services, the Civil Liberties Union of Massachusetts, and the League of Women Voters. *Id.* Thomas McGee, Speaker of the House of Representatives, received letters from Action for Boston Community Development, Massachusetts Federation of Teachers, the Superintendent of the Boston Public Schools, and the Boston Police (signed by both the mayor and police commissioner). *Id.* The Governor received letters from the Massachusetts Law Reform Institute, the Boston City Council (including a copy of a resolution in favor of the bill approved by the Boston City Council), and Action for Boston Community Development. *Id.*

76. *See generally* Governor's File for 1979 Mass. Acts 915.

77. *See, e.g.*, Letter from Robert M. Coard, Exec. Dir., Action for Boston Cmty. Dev., to Thomas W. McGee, Speaker of the Mass. H. of Reps. (Aug. 6, 1979) (on file at the Massachusetts Archives in the Governor's File for 1979 Mass. Acts 915) (copy on file with *Western New England Law Review*) (supporting H.R. 3135 because it would enable poor people to seek redress in state rather than federal courts); Letter from Am. Jewish Cong. to Gov. Edward J. King (Nov. 8, 1979) (on file at the Massachusetts Archives in the Governor's File for 1979 Mass. Acts 915) (copy on file with *Western New England Law Review*) (referring to federal civil rights proceedings as slow and cumbersome); Letter from Allan G. Rodgers, Dir., Mass. Law Reform Inst. to Governor's Legal Counsel (Nov. 9, 1979) (on file at the Massachusetts Archives in the Governor's File for 1979 Mass. Acts 915) (copy on file with *Western New England Law Review*) (noting the difficulties of litigating civil rights violations in federal court).

3135 also addressed the relationship between federal and state civil rights law, asserting that the adequacy of federal law made state legislation unnecessary.[78]

Other documents in the Governor's File indicate that the Governor also evaluated H.R. 3135 in reference to federal civil rights law.[79] The documents include an article by Justice Brennan urging states to adopt civil rights protections beyond those afforded by the federal government,[80] the Fourteenth Amendment, 18 U.S.C. § 242, 42 U.S.C. § 1983, and 42 U.S.C. § 2000a-5, and information on recent Supreme Court cases.[81] Taken together, these materials provide a snapshot of contemporary thoughts, inside and outside state government, that influenced the enactment of the MCRA and provided the basis for later judicial interpretation of its scope.[82]

D. *Judicial Interpretation of the MCRA*

Courts have interpreted the scope of the MCRA in cases involving a number of related issues.[83] Later cases have built on the earlier analyses, notably that of *Batchelder v. Allied Stores Corp.*[84] *Batchelder* involved a request for attorney's fees pursuant to the MCRA[85] by a plaintiff who had previously received declaratory re-

78. Letter from Katherine P. Healy, Vice Pres., Mass. Citizens for Life, Inc. to Gov. Edward J. King (Nov. 13, 1979) (on file at the Massachusetts Archives in the Governor's File for 1979 Mass. Acts 915) (copy on file with *Western New England Law Review*) (urging veto because federal laws were adequate and state law, as drafted, was unconstitutionally broad).

79. *See* Governor's File for 1979 Mass. Acts 915.

80. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

81. Governor's File for 1979 Mass. Acts 915.

82. Batchelder v. Allied Stores Corp., 473 N.E.2d 1128, 1129-30 (Mass. 1985) (citing Governor's File for 1979 Mass. Acts 915) ("The Legislature passed this statute to respond to a need for civil rights protection under State law.").

83. *See, e.g.*, Duarte v. Healy, 537 N.E.2d 1230 (Mass. 1989) (addressing whether the MCRA implicitly incorporated qualified immunity modeled on federal qualified immunity (yes)); Chicopee Lions Club v. Dist. Att'y for Hampden Dist., 485 N.E.2d 673 (Mass. 1985) (addressing whether MCRA includes absolute prosecutorial immunity (yes)); Sarvis v. Boston Safe Deposit & Trust Co., 711 N.E.2d 911 (Mass. App. Ct. 1999) (addressing whether the MCRA holds private employers liable for employees' civil rights based on respondeat superior liability (yes)).

84. *Batchelder*, 473 N.E.2d at 1128, *cited with approval in* Bally v. Ne. Univ., 532 N.E.2d 49 (Mass. 1989); *Duarte*, 537 N.E.2d 1230; *Sarvis*, 711 N.E.2d 911; Howcroft v. City of Peabody, 747 N.E.2d 729 (Mass. App. Ct. 2001).

85. Chapter 12, section 11I of the Massachusetts General Laws provides individuals with a right to bring private actions seeking remedies for the civil rights violations described in that section. MASS. GEN. LAWS ch. 12, § 11I (2004). In addition to authorizing such actions, section 11I provides that "[a]ny aggrieved person or persons who prevail in an action . . . shall be entitled to an award of the costs of the litigation and

lief on state constitutional grounds.[86] The trial court denied the plaintiff's request for attorney's fees because the judgment for the plaintiff was only based on constitutional grounds, not on the MCRA claim.[87] The Supreme Judicial Court reversed, ruling that the definition of "prevail" used in the MCRA has its source in 42 U.S.C. § 1988.[88]

Based on the legislative history and wording of the MCRA, the *Batchelder* court asserted that the MCRA was modeled after § 1983.[89] As a result, the court concluded, interpretations of terms and ambiguities in the federal law should be applied to the MCRA.[90] The court also wrote that, following canons of construction, the MCRA, like other civil rights statutes, should be construed broadly to reflect the remedial intent of the legislature.[91] Thus, *Batchelder* identified two guides for determining the scope of the MCRA.[92] First, courts could look to federal civil rights laws because the private remedy authorized by the MCRA was meant to be "coextensive" with § 1983, except that the MCRA also applies to

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reasonable attorney's fees in an amount to be fixed by the court." *Id.*; *see also supra* text accompanying notes 64-65.

86. *Batchelder*, 473 N.E.2d at 1128; *see also* Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 590-91 (Mass. 1983). The plaintiff in *Batchelder* filed suit after a private security guard at a private mall told him he was not permitted to solicit signatures and distribute leaflets in support of his candidacy for Congress. *Batchelder*, 445 N.E.2d at 591. In his suit, Batchelder alleged that the security guard's actions violated his rights under both the MCRA and the Massachusetts state constitution. *Id.* at 590-91. Batchelder sought a declaratory judgment that he had a right to solicit signatures and distribute literature in the mall. *Id.* at 591. The lower court denied relief and Batchelder appealed. *Id.* The Supreme Judicial Court granted Batchelder declaratory relief solely on constitutional grounds. *Id.* at 590-91. The court was only considering a request for declaratory relief at that time so it did not need to consider whether the MCRA would have provided grounds for additional relief. *Id.* at 591 n.2.

87. *Batchelder*, 473 N.E.2d at 1129.

88. *Id.* at 1130. The relationship between 42 U.S.C. § 1988 and 42 U.S.C. § 1983 is analogous to the relationship between chapter 12, section 11I and section 11H of the Massachusetts General Laws, in that § 1988, like section 11I, establishes a right to attorneys' fees for plaintiffs who successfully pursue claims under the associated section.

89. *Id.* at 1128-30. "[T]he Legislature intended to provide a remedy under [chapter 12, section 11I of the Massachusetts General Laws], coextensive with 42 U.S.C. § 1983, except that the Federal statute requires State action whereas its State counterpart does not." *Id.* at 1131 (citation omitted); *see also* Lyons v. Nat'l Car Rental Sys., Inc., 30 F.3d 240, 246 (1st Cir. 1994), *overruled by Sarvis*, 711 N.E.2d 911 (refusing to permit MCRA liability based on respondeat superior because MCRA mirrors § 1983 under which respondeat superior is not a basis for liability); Chaabouni v. City of Boston, 133 F. Supp. 2d 93, 100-01 (D. Mass. 2001) (citing to *Batchelder* for the proposition that the MCRA and § 1983 provide similar protections).

90. *Batchelder*, 473 N.E.2d at 1130.

91. *Id.* at 1130-31.

92. *Id.*

private actors.[93] Second, courts could construe the terms of the MCRA broadly because the MCRA, like other civil rights statutes, was remedial in nature.[94] In *Batchelder*, both interpretive approaches led to the same outcome.[95] By adopting the federal definition of "prevail," the court also provided a liberal interpretation of that term in the MCRA.[96] However, later cases have shown that adopting interpretations from federal civil rights law can sometimes conflict with a liberal interpretation of the MCRA.[97]

In *Duarte v. Healy*, the Supreme Judicial Court advanced the view that § 1983 case law should apply to the MCRA.[98] In *Duarte*, the plaintiff, a former firefighter, sought damages from the city manager and fire chief who ordered drug testing that violated his civil rights.[99] The Supreme Judicial Court determined that the qualified immunity for discretionary functions[100] enjoyed by public em-

93. *Id.* at 1131. Additionally, as the court noted, the MCRA contains a requirement that any actionable interference with a person's civil rights be "by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion." MASS. GEN. LAWS ch. 12, § 11H (2004). Section 1983 does not contain such a requirement. 42 U.S.C. § 1983 (2000).

94. *Batchelder*, 473 N.E.2d at 1130-31.

95. *Id.*

96. *Id.* (allowing plaintiff to recover attorneys' fees by adopting the definition of "prevail" from 42 U.S.C. § 1983).

97. *Compare* Duarte v. Healy, 537 N.E.2d 1230 (Mass. 1989) (dismissing complaint because Massachusetts legislature intended to import federal concept of qualified immunity in the MCRA, even though the text mentions no immunities and such immunities limit victims' ability to recover damages), *with* Sarvis v. Boston Safe Deposit & Trust Co., 711 N.E.2d 911 (Mass. App. Ct. 1999) (allowing plaintiff to recover because Massachusetts legislature intended private employers to be subject to respondeat superior liability for employees' violations even though employers are not subject to respondeat superior liability under § 1983).

98. *Duarte*, 537 N.E.2d 1230.

99. *Id.* at 1231-32.

100. At common law, various governmental officials enjoyed different levels of immunity from liability for actions carried out while working. Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 449-50 (2000). Though § 1983 contains no mention of immunity for governmental actors, the Supreme Court has incorporated the concept into § 1983 jurisprudence since 1967. *Id.* (citing Pierson v. Ray, 386 U.S. 547 (1967)). The idea that government employees should be immune from liability for most discretionary actions, which are those actions that are within the scope of employment but not clearly required, was later reaffirmed. *Id.* (citing Wood v. Strickland, 420 U.S. 308 (1975)). The rationale for such immunity is that government employees should generally be free to use discretion in carrying out job functions without fear of liability. *Id.* The defense is unavailable to government employees who act maliciously in violating a person's rights or where the rights violated have been "clearly established." *Id.* A more detailed discussion of the concept of qualified immunity for discretionary functions is beyond the scope of this Note. For a further discussion of immunity under § 1983, see *id.* at 449-55.

ployees under § 1983 applied equally to the MCRA.[101] Presuming the legislature was aware of the case law establishing qualified immunity under § 1983, the Supreme Judicial Court ruled that by patterning the MCRA on § 1983, the legislature intended to adopt analogous immunity, even though the language of the MCRA does not mention immunities.[102]

The United States Court of Appeals for the First Circuit followed the *Duarte* reasoning in *Lyons v. National Car Rental Systems, Inc.*[103] There the court rejected a claim against a private employer based on respondeat superior liability because *Monell*, which predated the MCRA, had also rejected respondeat superior liability.[104] The First Circuit ruled that *Monell* applied equally to private employers because the ruling addressed "the language and legislative history of section 1983, not . . . principles—such as sovereign or qualified immunity—applicable only to governmental entities."[105] The court said that because the state legislators who adopted the MCRA modeled it on § 1983, they intended to follow *Monell* and reject respondeat superior liability.[106]

In 1999, the Massachusetts Appeals Court rejected the federal court's *Lyons* reasoning in *Sarvis v. Boston Safe Deposit & Trust Co.*[107] *Sarvis* involved a suit by the children of a man who defaulted on the mortgage of their home.[108] An affiliate of the bank obtained the home at a foreclosure sale and employees of the bank took actions to sell the house.[109] The bank did not, however, take

101. *Duarte*, 537 N.E.2d at 1232 (citing Wood v. Strickland, 420 U.S. 308 (1975), as the source of qualified immunity under § 1983).

102. *Id.* Indeed this paralleled the process in the Supreme Court where the common law immunity doctrine was grafted onto § 1983 despite the absence of any mention of immunity in § 1983. Wilson, *supra* note 100, at 449-50.

103. Lyons v. Nat'l Car Rental Sys., Inc., 30 F.3d 240 (1st Cir. 1994) (applying Massachusetts law in a diversity case that included a claim under the MCRA).

104. *Id.* at 246.

105. *Id.* at 246-47. The court recognized that the *Monell* discussion of the legislative history of § 1983 explicitly applied only to governmental entities. *Id.* However, the court said that the *Monell* reading of the legislative history of § 1983 showed "that Congress declined to make municipalities vicariously liable under § 1983, despite arguments that vicarious liability would reduce the incidence of unconstitutional acts and would spread the cost of injuries throughout the community." *Id.* According to the court, such a rejection indicated an unwillingness to hold employers liable and spread liability costs, concerns equally applicable to private employers. *Id.*; *see also* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 693-94 (1978).

106. *Lyons*, 30 F.3d at 246.

107. Sarvis v. Boston Safe Deposit & Trust Co., 711 N.E.2d 911, 920-21 (Mass. App. Ct. 1999).

108. *Id.* at 915.

109. *Id.*

proper steps to evict the plaintiffs from the home.[110] Instead of instituting summary process proceedings against the plaintiffs, an employee of the bank and a real estate agent hired by the bank took various steps to cause the plaintiffs to vacate the house, including having the locks changed, charging the plaintiffs with trespassing, sending cleaning personnel to remove the plaintiffs' belongings, and threatening the plaintiffs with arrest.[111]

The *Sarvis* court allowed the plaintiffs to recover damages from the bank, holding that the bank was vicariously liable for the acts its employee and real estate agent carried out in its service.[112] The court explicitly found that the MCRA had a broad remedial purpose and, as a result, should receive a "liberal construction."[113] In this case, that meant permitting respondeat superior liability, even though it would conflict with § 1983 case law predating the MCRA. Rather than framing the issue as whether the legislature intended to incorporate the *Monell* limit on vicarious liability, the court asked whether the legislature intended to exclude liability long established under the common law, even as it introduced a new remedy.[114] The court justified applying the established common law to the MCRA because expanding the reach of the MCRA was consistent with its remedial purpose.[115]

In addition to relying on the established nature of respondeat superior liability in Massachusetts and the remedial intent of the legislature, the court based its decision on the actual language of the statute.[116] The court focused on the application of the MCRA to "persons."[117] Like the federal government, Massachusetts defines words commonly appearing in legislation in a "dictionary" statute (hereinafter MDS).[118] According to the preamble of the

110. *Id.* 915-16.
111. *Id.*
112. *Id.* at 920-21.
113. *Id.*
114. *See id.*
115. *Id.*
116. *Id.* at 920.
117. *Id.*
118. MASS. GEN. LAWS ch. 4, § 7 (2004). The abbreviation "MDS" for "Massachusetts dictionary statute" is used here for simplicity, though the statute itself does not have an official title. The MDS was first codified in its current form and location in 1921. Mass. Gen. Laws ch. 4, § 7 (1921). In using the definition from the MDS to guide interpretation of a term in the MCRA, the court was making an argument similar to that made by Justice Brennan in *Monell*, that the Federal Dictionary Act should be the source of the meaning of the word "person" as used in § 1983. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 688-89 (1978). While Justice Brennan emphasized the

MDS, the defined terms "*shall* have the meanings [therein] given, unless a contrary intention *clearly* appears."[119] Since 1921 the MDS has provided that "'[p]erson' or 'whoever' shall include corporations, societies, associations and partnerships."[120] According to the court in *Sarvis*, the MDS establishes that the MCRA applies to corporations (and societies, associations, and partnerships) even though they can act only through their agents.[121] Without respondeat superior liability, the MCRA would apply to corporations and yet be unable to reach them.[122] To prevent this frustration of the MCRA, the court concluded that private employers were subject to respondeat superior liability for their employees' MCRA violations.[123]

Sarvis directly addressed only private employers.[124] However, in a footnote the court suggested public employers might not be subject to respondeat superior liability under the MCRA because "person" has not "ordinarily be[en] construed to include the State or political subdivisions thereof."[125] *Sarvis* was not the first case to ask whether the MCRA applies to municipalities. In 1996, the Supreme Judicial Court explicitly declined to decide the question in *Swanset Development Corp. v. City of Taunton*.[126] Writing for the court, Justice Greaney explained that the court had transferred the case "principally to consider whether a municipality should be considered a 'person' for the purposes of liability under the [MCRA]," but, because the issue had not been adequately briefed, the court declined to decide the question.[127] Since *Swanset*, the Supreme Judicial Court has not addressed the issue; however, in 2001 both the United States District Court for the District of Massachusetts and the Massachusetts Appeals Court held that municipalities are not "persons" subject to liability under the MCRA.[128]

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temporal proximity of the passage of the Federal Dictionary Act and § 1983, the Massachusetts court glossed over the many years that separated the passage of the MDS definition of "person" from the enactment of the MCRA. *Id.*; *Sarvis*, 711 N.E.2d at 920.

119. MASS. GEN. LAWS ch. 4, § 7 (emphasis added).

120. *Id.* cl. 23.

121. *Sarvis*, 711 N.E.2d at 920.

122. *Id.*

123. *Id.* at 920-21.

124. *Id.*

125. *Id.* at 920 n.10.

126. Swanset Dev. Corp. v. City of Taunton, 668 N.E.2d 333, 334 (Mass. 1996).

127. *Id.*

128. Chaabouni v. City of Boston, 133 F. Supp. 2d 93, 102-03 (D. Mass. 2001); Howcroft v. City of Peabody, 747 N.E.2d 729, 744 (Mass. App. Ct. 2001).

The United States District Court for the District of Massachusetts, in deciding *Chaabouni v. City of Boston*, dismissed an MCRA claim against the City of Boston, finding that it was not a "person" for the purposes of the MCRA.[129] The plaintiff in *Chaabouni* filed suit after several city police officers allegedly violated his constitutional rights during a traffic stop.[130] He sought to recover damages from the city under both § 1983 and the MCRA.[131] The court dismissed his § 1983 claim for failure to allege that his injury was related to an unconstitutional official policy or custom.[132] Based on the § 1983 dismissal, the City argued the MCRA claim should also be dismissed because the MCRA and § 1983 "'are parallel statutes, coextensive with each other.'"[133]

The court found the City's argument "facially appealing," but "fundamentally flawed,"[134] noting significant differences between § 1983 and the MCRA.[135] According to the court, *Sarvis* added to these differences when it rejected the use of the "custom or policy" test in the case of private employers.[136] Although *Sarvis* undercut the city's argument, it was also the basis for the court's dismissal of the claims against the city because the city is not a "person" under the MCRA.[137] The court relied on the *Sarvis* holding that the MDS definition of "person" applies to the MCRA and *Sarvis* dicta suggesting that "person" does not include municipal corporations.[138]

As noted above, the MDS definition of "person" includes corporations, societies, associations, and partnerships.[139] Massachusetts courts have generally held that the word "corporation" as used in the definition of "person" and "whoever" does not encompass

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129. *Chaabouni*, 133 F. Supp. 2d at 93, 103.

130. *Id.* at 94-95. In his complaint, the plaintiff alleged that city police officers "pulled him from his vehicle and proceeded to handcuff, assault, and beat him." *Id.* at 94. Plaintiff's complaint included five counts. *Id.* at 94-95. This Note only addresses the court's analysis of the fifth count in which plaintiff alleged his State and Federal civil rights were violated. *Id.* at 99-103.

131. *Id.*

132. *Id.* at 99.

133. *Id.* at 101 (quoting Canney v. City of Chelsea, 925 F. Supp. 58, 68 (D. Mass. 1996)).

134. *Id.*

135. *Id.* As the court noted, the MCRA applies to private actors and applies only where the civil rights violation involves "threats, intimidation, or coercion." *Id.*

136. *Id.*

137. *Id.* at 101-03.

138. *Id.* at 101-02.

139. *See supra* text accompanying notes 118-121.

municipal corporations.[140] The words "corporation" and "person" as used in other statutes have also been found to exclude municipal corporations, despite the text of the MDS.[141]

One exception to this rule occurred when the Supreme Judicial Court decided *Attorney General v. City of Woburn*.[142] In *Woburn*, the court held that the Department of Public Health could fine the City pursuant to a law that applied to "[w]hoever permits the entrance or discharge into any part of the . . . river . . . of sewage or of any other substance injurious to public health or tending to create a public nuisance."[143] The statute did not explicitly include government entities or municipalities among the entities defined by "whoever," yet the court held that the statute must be read to include municipalities because to do otherwise would frustrate the purpose of the statute.[144]

Without mentioning *Woburn*, the *Chaabouni* court adopted the *Sarvis* conclusion that "[t]here is nothing in the MCRA to indicate clearly that the legislature did not intend the term 'person' to take on the statutory definition appearing in [the MDS]."[145] The court observed that if the legislature intended the MCRA to abrogate common law sovereign immunity for municipalities, it would have used explicit language to indicate its intent.[146]

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140. Commonwealth v. Voight, 556 N.E.2d 115, 116-17 (Mass. App. Ct. 1990) (holding that the legislature's inclusion of corporations as "persons" does not extend to municipal corporations); *see also* City of New Bedford v. New Bedford, Woods Hole, Martha's Vineyard, & Nantucket Steamship Auth., 107 N.E.2d 513, 517 (Mass. 1952) (stating that the statutory definition of "person" does not include municipalities); Howard v. Chicopee, 12 N.E.2d 106, 110 (Mass. 1938) (construing MASS. GEN. LAWS ch. 4, § 7 definition of "person" to exclude municipalities). *But see* Att'y Gen. v. City of Woburn, 79 N.E.2d 187 (Mass. 1948) (holding statute applied to municipal corporations despite use of the word "whoever" because excluding municipalities would undermine the purpose of the statute).

141. O'Donnell v. N. Attleborough, 98 N.E. 1084, 1085-86 (Mass. 1912) (relying on history and organization of statutes to show that legislature distinguishes between "private or moneyed" from "public or municipal" corporations and that therefore "person or corporation" does not include municipalities).

142. *City of Woburn*, 79 N.E.2d 187.

143. *Id.* at 188.

144. *Id.* at 188-89. The purpose of the statute was to prevent pollution in the river, a purpose which could only be achieved if all parties, including municipalities, were prohibited from polluting the river. *Id.*

145. Chaabouni v. City of Boston, 133 F. Supp. 2d 93, 102 (D. Mass. 2001) (quoting Sarvis v. Boston Safe Deposit & Trust Co., 711 N.E.2d 911, 921 (Mass. App. Ct. 1999)).

146. *Id.* at 102-03. In its cursory discussion of the relationship between the MCRA and the "ancient protection of sovereign immunity," the court suggested that because there was a long tradition of common law sovereign immunity for municipalities, any legislature wishing to abrogate that immunity would have done so quite explic-

Several months after *Chaabouni*, the Massachusetts Appeals Court also concluded, in *Howcroft v. City of Peabody*, "that a municipality is not a 'person' covered by the [MCRA]."[147] The plaintiff in *Howcroft* was a former police officer in the City of Peabody.[148] While employed as a police officer, the plaintiff sought to have state restrictions on smoking in public buildings enforced in the police station where he worked.[149] The plaintiff's superiors did not respond to his legitimate complaints and instead retaliated by subjecting him to additional smoke in the workplace and wrongly punishing him for supposed abuse of sick leave policies.[150] Eventually, the plaintiff filed a four-count complaint against the city and the individual officers alleging violation of his civil rights under both § 1983 and the MCRA, intentional infliction of emotional distress, and intentional interference with advantageous relationships.[151] The trial court allowed the defendants' motions for summary judgment on all counts.[152] On appeal, the court upheld the dismissal of all claims against the city and the officers in their official capacities, but reversed and remanded all claims against the officers in their individual capacities.[153]

In its ruling, the Appeals Court first addressed the relationship between the municipal liability allowed under § 1983 and the MCRA.[154] According to the court, municipalities are liable under § 1983 because of the specific legislative history relating to its use of the word "person," including passage of the Federal Dictionary Act, as explained in *Monell*.[155] The court, however, did not adopt the § 1983 position.[156] Instead, it stated "[t]hat legislative history has no bearing on the MCRA" because the word "person" as defined by the MDS does not apply to political subdivisions.[157] The

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itly. *Id.* Although the court discussed the Massachusetts Tort Claims Act, which largely abrogated that traditional sovereign immunity elsewhere in its opinion, it does not note the temporal proximity between the passage of the Massachusetts Tort Claims Act, in 1977, and the MCRA, in 1979.

147. Howcroft v. City of Peabody, 747 N.E.2d 729, 744 (Mass. App. Ct. 2001).

148. *Id.* at 733.

149. *Id.* at 733-39.

150. *Id.* at 734-37.

151. *Id.* at 733, 748. Specifically, Howcroft alleged "that his First Amendment right to speak out on a matter of public interest had been infringed." *Id.*

152. *Id.* at 744.

153. *Id.* at 733, 748.

154. *Id.* at 744.

155. *Id.*; *see also supra* note 55 and accompanying text.

156. *Howcroft*, 747 N.E.2d at 744; *see also supra* note 55 and accompanying text.

157. *Howcroft*, 747 N.E.2d at 744.

court concluded that the legislature would have used explicit language if it intended the MCRA to apply to "persons" not defined as such in the MDS.[158]

II. ANALYSIS

Despite the conclusions of the *Howcroft* and *Chaabouni* courts, evidence suggests that the legislature intended municipalities to be liable under the MCRA. The available legislative history indicates that the MCRA was viewed as a broad, remedial statute.[159] Excluding municipal liability would frustrate that purpose, indicating that the legislature intended the word "person" to have a less restrictive definition than the one in the MDS.[160] Additionally, the legislature modeled the MCRA after § 1983, indicating the intent to reach the actors subject to § 1983 liability, including municipal corporations, and those "not acting under color of law" who would be beyond the reach of § 1983.[161] The introduction of the MCRA occurred shortly after the Supreme Court decided *Monell*.[162] At that time, municipal corporations had been brought under the reach of § 1983, and subsequent cases had not yet limited the reach according to the "policy or custom" test.[163] Together, the modeling and the timing further indicate the legislature's intent to reach municipal corporations. Therefore, explicit language limiting common law sovereign immunity was unnecessary. For these reasons, the MCRA should be recognized as applying to municipal corporations.

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158. *Id.* at 745.

159. *See supra* Part I.C.

160. Not only would eliminating liability for municipal employers have reduced the effectiveness of the MCRA as a deterrent against future civil rights violations, it would have been out of step with recent changes to sovereign immunity in Massachusetts. In 1977, the Massachusetts Supreme Judicial Court had abrogated the state's sovereign immunity doctrine, opening the door to tort liability for government entities, including municipalities. Whitney v. City of Worcester, 366 N.E.2d 1210, 1220 (Mass. 1977). The following year the Massachusetts legislature responded by enacting the Massachusetts Tort Claims Act, modeled on the Federal Tort Claims Act. Mark L. Van Valkenburgh, Note, *Massachusetts General Laws Chapter 258, Section 10: Slouching Toward Sovereign Immunity*, 29 NEW ENG. L. REV. 1079, 1092 (1995). Under the Massachusetts Tort Claims Act, public employers became liable for certain actions of their employees for the first time in Massachusetts history. *Id.*

161. MASS. GEN. LAWS ch. 12, § 11H (2004).

162. *Monell* was decided on June 6, 1978, and H.R. 3135 was introduced in January of 1979. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978); JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF MASSACHUSETTS 1979, at 2856 (1979).

163. *See infra* notes 209-210 and accompanying text.

A. *Available Legislative History Indicates Intent for MCRA to Include Municipal Liability*

Circulated copies of H.R. 3135, the bill that became the MCRA, bore the description "BILL for the protection of the civil rights of persons in the commonwealth."[164] The description does not suggest that the protections are limited to violations by individuals and private employers. The documents from the Department of the Attorney General are also silent as to the exclusion of municipal liability.

As described above, the three documents from the Department of the Attorney General include two letters and a transcript of testimony provided to the Joint Committee on the Judiciary between the writing of the two letters.[165] The attorney general's views about the scope of H.R. 3135 are especially relevant because the attorney general petitioned for the bill.[166] Additionally, at least some members of the legislature considered H.R. 3135 to be the "Attorney General's Civil Rights Bill."[167]

In the earliest letter, dated March 7, 1979, Massachusetts Attorney General Bellotti described the purpose of H.R. 3135 in a single sentence. He wrote: "If enacted, this bill would provide needed access to the courts and effective remedies in matters in-

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164. H.R. 3135, 171st Gen. Court (Mass. 1979) (on file at the Massachusetts Archives in the Legislative Packet for 1979 Mass. Acts 915) (copy on file with *Western New England Law Review*). The Massachusetts Supreme Judicial Court has recognized that the title of a bill can be considered when a court is interpreting a statute. Commonwealth v. Graham, 445 N.E.2d 1043, 1046 (Mass. 1983) ("While the title to an act cannot control the provisions of the statute, the title may be used for the purpose of ascertaining its proper limitations."); *see also* Lynn Teachers Union, Local 1037 v. Mass. Comm'n Against Discrim., 549 N.E.2d 97, 102 (Mass. 1990) (holding that a statute entitled "An Act relative to the dismissal of certain persons from employment or the refusal to employ such persons due to age" should not be applied to limit the protections available to victims of other types of discrimination).

165. Letter from Francis X. Bellotti, Att'y Gen. of the Commonwealth of Mass., to Sen. Alan D. Sisitsky, & Rep. Michael Flaherty, Joint Comm. on the Judiciary, *supra* note 71, at 1; Robert H. Bohn, Jr., Chief of the Civil Rights-Civil Liberties Division of the Dep't of the Att'y Gen. of the Commonwealth of Mass., Testimony Regarding House Bill No. 3135 Before the Joint Comm. on the Judiciary, *supra* note 73, at 3; Letter from Thomas R. Kiley, First Assistant Att'y Gen. of the Commonwealth of Mass., to Neil Lynch, Counsel to the Gov., *supra* note 74, at 3.

166. JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF MASSACHUSETTS 1979, at 2856.

167. Memorandum from House Staff to Rep. Michael Flaherty, Chairman, Joint Comm. on the Judiciary (Nov. 16, 1979) (on file at the Massachusetts Archives in the Governor's File for 1979 Mass. Acts 915) (copy on file with *Western New England Law Review*) (referring to the bill as "House Bill No. 3135—Attorney General's Civil Rights Bill").

volving deprivation of constitutional and statutory rights by persons acting under color of state law or otherwise."[168] By using the phrase "persons acting under color of state law or otherwise," Bellotti indicated that he expected H.R. 3135 to provide a remedy against both private parties and those acting in an official capacity. The phrase also implies a connection to § 1983, which uses similar language,[169] and signals that H.R. 3135 would cover all persons subject to § 1983, as well as those acting in a purely private capacity who would not otherwise be subject to suit. Private actors who could not be reached under § 1983 are not singled out as the special targets of the proposed legislation.[170] Instead, the attorney general emphasized that H.R. 3135 would supply his department something it lacked—specific authority to take either criminal or civil action to address civil rights violations.[171]

Finally, he stressed that the deterrent effect H.R. 3135 would have if adopted.[172] He argued that providing his department and victims of civil rights violations with "[s]pecific authority to institute suit would . . . discourag[e] future similar violations by persons acting under color of state law or otherwise."[173] If, as Bellotti suggested at the end of his letter, H.R. 3135 was intended to deter those acting on their own and those acting in their official capacities, it seems reasonable that the bill would reach municipal employers. After all, unless municipalities were made liable for the tortious conduct of their employees, the municipality would have little incentive to provide the type of training and oversight necessary to prevent future abuses.[174]

That first letter was delivered to the legislature by Robert Bohn, Chief of the Civil Rights-Civil Liberties Division of the Department of the Attorney General, who reiterated Bellotti's points in his testimony before the Joint Committee on the Judiciary on

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168. Letter from Francis X. Bellotti, Att'y Gen. of the Commonwealth of Mass., to Sen. Alan D. Sisitsky & Rep. Michael Flaherty, Joint Comm. on the Judiciary, *supra* note 71, at 1.

169. 42 U.S.C. § 1983 (2000) (using the phrase, "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State").

170. *Id.*

171. *Id.* at 2.

172. *Id.*

173. *Id.*

174. Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 927 (1976) (arguing "[t]he threat of monetary judgments against governmental units may . . . spur higher officials to design their hiring and training programs, disciplinary procedures, and internal rules so as to curb misconduct").

March 7, 1979.[175] Bohn concluded his testimony by suggesting that legislators consider two points in their deliberations.[176] First, he pointed out that H.R. 3135 would provide the Civil Rights-Civil Liberties Division with specific authority and responsibility, something its employees had lacked since the division had been created by earlier legislation.[177] Second, Bohn noted that H.R. 3135 would not place all of the power and responsibility for enforcement on the Department of the Attorney General.[178] One of the main benefits of providing a private right of action, as Bohn saw it, was to leave the "Attorney General . . . free to fulfill his statutory responsibility of representing state agencies."[179] This wording is somewhat ambiguous in that Bohn could have been referring to either the general duties of the attorney general or the specific obligations the attorney general would have to represent state agencies in suits brought under the provisions of the MCRA. However, a similar phrase used in the department's second letter written in support of H.R. 3135 suggests that Bohn was speaking about the specific suits that might occur if H.R. 3135 were adopted.[180]

The second letter, written in November 1979 by Thomas Kiley, the then-First Assistant Attorney General, was addressed to Neil Lynch, Counsel to the Governor.[181] Kiley's letter responded to a request for the position of the Department of the Attorney General regarding H.R. 3135.[182] The letter included language almost identical to that used by Bohn in his testimony.[183] Like Bohn, Kiley indicated that the attorney general had been unable to support earlier state civil rights bills because all enforcement was left to his department.[184] Kiley went further than either the attorney general or Bohn, emphasizing the importance of the provision of the bill that allowed private attorneys to bring suits, "thus leaving the Attorney General free to fulfill his statutory responsibility . . . to represent state agencies should they be sued under the new statute for alleged

175. Robert H. Bohn, Jr., Chief of the Civil Rights-Civil Liberties Division of the Dep't of the Att'y Gen. of the Commonwealth of Mass., Testimony Regarding House Bill No. 3135 Before the Joint Comm. on the Judiciary, *supra* note 73.

176. *Id.* at 2.

177. *Id.* at 3.

178. *Id.*

179. *Id.*

180. *See infra* text accompanying notes 183-186.

181. Letter from Thomas R. Kiley, First Assistant Att'y Gen. of the Commonwealth of Mass., to Neil Lynch, Counsel to the Gov., *supra* note 74, at 1.

182. *Id.*

183. *Id.*

184. *Id.* at 3.

civil rights violations.[185] Here, Kiley explicitly referred to the responsibility of the attorney general to defend state agencies in cases brought under the proposed statute, not simply the attorney general's routine obligations.

As indicated by Kiley's phrasing, the scope of H.R. 3135 as envisioned by the attorney general included the possibility that suits would be filed against state agencies. Such suits would, of course, only be possible if the MCRA waived the protections of sovereign immunity. Since the sovereign immunity protection for municipalities emanates from the power of the state, it seems unlikely that the state would choose to waive its own liability while leaving municipalities immune.[186] Additionally, there is nothing in the statute to suggest that municipalities and the state should receive different treatment. Together, the documents from the Department of the Attorney General indicate that the sponsor of H.R. 3135 viewed the bill as providing a broad remedy to citizens whose rights had been violated. Such an intent is incompatible with the exclusion of municipal liability.

B. *Applying the MDS Definition of "Person" to the MCRA Would Improperly Frustrate the Purpose of the Statute*

The MDS does not require the use of its definition of "person" where the legislature clearly expresses a desire to use another definition.[187] The text of the preamble specifies that the definitions set forth shall not apply if "a contrary intention clearly appears" in a statute.[188] When a statute contains its own set of definitions or expressly adopts a definition from elsewhere, this standard is obviously met.[189] Both *Howcroft* and *Chaabouni* treat the absence of specific language in the MCRA adopting a contrary definition as sufficient proof that the MDS definition, excluding municipal cor-

185. *Id.*

186. In *Whitney v. City of Worcester*, the court noted that forty-five states had at least partially eliminated immunity as a defense for municipalities, while thirty-seven states had limited or eliminated the defense for actions against those states. Whitney v. City of Worcester, 366 N.E.2d 1210, 1213 (Mass. 1977). Following *Whitney*, and shortly before the enactment of the MCRA, the Massachusetts legislature enacted the Massachusetts Tort Claims Act, which partially eliminated the immunity defense for all public employers, a category that includes, amongst other entities, the state, counties, cities, and towns. MASS. GEN. LAWS ch. 258, §§ 1-11 (2004).

187. MASS. GEN. LAWS ch. 4, § 7, cl. 23.

188. *Id.* § 7.

189. *Cf.* Glass v. Glass, 157 N.E. 621, 622 (Mass. 1927) (disregarding the definition of "inhabitant" found in Mass. Gen. Laws c. 4, § 7 because the provisions of the relevant statute were controlling).

porations, should apply.[190] However, the very purpose of the law suggests a contrary intention.

The *Woburn* case demonstrates how the legislature can implicitly adopt a non-MDS definition. In that case, the state Department of Public Health sought to enjoin the City of Woburn from polluting the Aberjona River and its tributaries.[191] The Department's asserted authority came from a statute that "authorized and directed" the Department of Public Health to prohibit the pollution of the Aberjona River and its tributaries and to fine "[w]hoever permits the entrance or discharge [of sewage] into any part of" the River.[192] The statute did not explicitly include government entities or municipalities, yet the Supreme Judicial Court decided that the Department of Health could use the statute to compel a municipality to change its behavior.[193]

In justifying its decision to read the statute as applying to municipalities, the Supreme Judicial Court said: "Manifestly the purpose of the legislation is the protection of public health. The attainment of this object would hardly be possible if cities and towns were free to . . . [pollute] the river."[194] The court found this intent even though the statute did not explicitly create liability for cities, towns, municipalities, municipal corporations, or governmental subdivisions.[195] In fact, the word "whoever" provides the only indication of the parties that the law can reach.[196]

The court based its holding in part on the fact that the statute used the word "whoever" rather than "persons."[197] This distinction is unimpressive, however, because the two words are defined together and identically in the MDS.[198] Thus, the court's rationale that legislative intent could signal a different meaning than the one used in the MDS would have been equally applicable had the word "person" been used. Both "whoever" and "person" apply to the

190. *See supra* text accompanying notes 145, 155-158.

191. Att'y Gen. v. City of Woburn, 79 N.E.2d 187 (Mass. 1948).

192. *Id.* at 188 n.2 (citing 1911 Mass. Acts 252).

193. *Id.* at 189.

194. *Id.*

195. The full text of the statute (1911 Mass. Acts 252) appears in *Attorney General v. City of Woburn*. *Id.* at 188 n.2.

196. *Id.*

197. *Id.* at 189 (suggesting that had the statute referred to "persons," it would not have been less clear whether the statute was applicable to municipalities, but not finding the use of the word "whoever" sufficient to determine that the statute did not apply to municipalities).

198. MASS. GEN. LAWS ch. 4, § 7, cl. 23 (2004) ("'Person' or 'whoever' shall include corporations, societies, associations and partnerships.").

same entities, including corporations.[199] Earlier cases involving the terms "person" and "corporation" were consistently interpreted as exclusive of municipalities.[200] However, the *Woburn* court implied that other definitions could be legitimate, at least some of the time.[201]

Indeed, there is a single substantive point underlying the court's finding that the statute "as a whole manifests an intention to include municipalities."[202] The substantive argument is that "[c]ities and towns are quite as capable of causing the mischief which the statute is designed to prevent as are private persons and corporations."[203] Despite the absence of explicit statutory language including municipalities, the *Woburn* court looked to the whole purpose of the anti-dumping statute at issue in that case. Similarly, courts should look to the entire, remedial purpose of the MCRA and not apply the restrictive MDS definition of the word "person."

The MCRA was enacted "for the protection of the civil rights of persons in the commonwealth."[204] Its scope was not limited to private actors, as the phrase "whether or not acting under color of law" demonstrates.[205] To exclude municipalities from liability under the MCRA would compromise the purpose of the statute in the same way that allowing the City of Woburn to continue dumping would have frustrated the purpose of the anti-dumping stat-

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199. *Id.*

200. *See, e.g.*, City of New Bedford v. New Bedford, Wood's Hole, Martha's Vineyard, & Nantucket Steamship Auth., 107 N.E.2d 513, 517 (Mass. 1952) (quoting *O'Donnell v. N. Attleborough*, 98 N.E. 1084 (Mass. 1912) for the proposition that regulation of corporations does not extend to municipal corporations); Donahue v. City of Newburyport, 98 N.E. 1081 (Mass. 1912) (holding that the statute making "persons" liable for certain accidents did not extend liability to municipal corporations); O'Donnell v. N. Attleborough, 98 N.E. 1084, 1085 (Mass. 1912) ("It has been a general rule in our legislation that statutes passed for the regulation of the rights and liabilities of corporations are to be applied only to private or moneyed corporations and not to public or municipal corporations or quasi corporations."); Commonwealth v. Voight, 556 N.E.2d 115 (Mass. App. Ct. 1990) (holding that plaintiff did not violate the statute criminalizing harassing phone calls because calls to a municipal emergency number were not made to a "person").

201. Att'y Gen. v. City of Woburn, 79 N.E.2d 187, 188-89 (Mass. 1948). Specifically, the court noted that the traditional approach was "usually" adopted, implying that sometimes municipalities are "persons" or "corporations." *Id.*

202. *Id.* at 189.

203. *Id.*

204. H.R. No. 3135, 1979 Gen. Court (Mass. 1979) (on file at the Massachusetts Archives in the Legislative Packet for 1979 Mass. Acts 915) (copy on file with *Western New England Law Review*).

205. MASS. GEN. LAWS ch. 12, § 11H (2004).

ute.[206] If the statute had not applied to Woburn, the city would have had little incentive to stop dumping waste and the river would have remained polluted, even if all private parties quit dumping. Similarly, if municipalities are relieved from liability under the MCRA, they will have less incentive to properly train and supervise their employees. As a result, the risk that an employee will unknowingly abuse her power or authority in violation of the civil rights of another will remain.

C. *The Timing and Text of the MCRA Strongly Suggest the Legislature Intended the MCRA to Include Municipal Liability*

Massachusetts courts have repeatedly found that the MCRA was modeled on § 1983.[207] In *Batchelder*, the Supreme Judicial Court "presumed" the legislature was "aware of the use and meaning" of the term "prevail" in an analogous federal civil rights statute.[208] Since the statute was modeled on § 1983 and the legislature knew about the federal meaning given to "prevail," the court assumed that the legislature had intended to use the federal meaning in the MCRA.[209] Four years later, in *Duarte*, the Supreme Judicial Court held that the legislature was aware of current § 1983 case law when it adopted the MCRA and therefore the contemporary "clearly established" § 1983 case law was incorporated into the MCRA.[210] *Batchelder* and *Duarte* both assume that the legislature knew about the case law interpreting federal civil rights legislation and intended to incorporate that body of law into the MCRA.[211] Applying this assumption to the question of the intended meaning of the word "person" in the MCRA means finding that the legislature was aware of recent changes to the meaning of "person" as used in § 1983, and intended to adopt those changes in the MCRA.

In June of 1978, approximately six months before H.R. 3135 was introduced in the Massachusetts legislature, the Supreme Court

206. *City of Woburn*, 79 N.E.2d at 189 (stating that the purpose of the statute at issue in that case, preventing pollution of the Aberjona River, would be frustrated if municipalities were free to continue polluting the river).

207. *See, e.g.*, Batchelder v. Allied Stores Corp., 473 N.E.2d 1128, 1131 (Mass. 1985) (finding that the MCRA was "intended to provide a remedy . . . coextensive with 42 U.S.C. § 1983"); Duarte v. Healy, 537 N.E.2d 1230, 1232 (Mass. 1989) (finding the legislature "chose to pattern the [MCRA] after § 1983").

208. *Batchelder*, 473 N.E.2d at 1130; *see also* 42 U.S.C. § 1988 (2000).

209. *Batchelder*, 473 N.E.2d at 1130.

210. *Duarte*, 537 N.E.2d at 1232.

211. *See supra* notes 89-94, 100-102 and accompanying text.

decided *Monell*, overruling *Monroe* to hold that municipalities were "persons" within the meaning of § 1983.[212] The ability of plaintiffs to successfully sue cities was subsequently restricted by the requirement, introduced in *Monell*, that municipalities would be liable only to the extent of a "policy or custom."[213] However, at the time H.R. 3135 was introduced, the scope of the "policy or custom" requirement articulated in *Monell* was not yet clear.[214] Therefore, applying the assumptions made about the knowledge of the legislature in *Batchelder* and *Duarte*, it seems that the legislature was aware of the change and intended to incorporate it into the MCRA.[215]

The import of the change wrought by *Monell* further supports the assumption that the legislature was aware of this particular aspect of the case law regarding § 1983 at the time they considered the MCRA.[216] *Monell* came seventeen years after *Monroe*. During these seventeen years, the limits to plaintiff recovery caused by the restrictive definition of "person" adopted in *Monroe* were repeatedly challenged in the pages of law reviews,[217] in courts,[218] and even by state legislatures.[219]

Plaintiffs continued to try to reach responsible municipalities,[220] and the case law evolved as parties and courts found a number of approaches to do so. One approach offered some courts a relatively clear way around the limitations on § 1983 articulated in

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212. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 701 (1978).

213. Susanah M. Mead, *42 U.S.C. § 1983, Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517, 554-66 (1987) (discussing the extent to which the "policy or custom" test has impaired the ability of plaintiffs to bring suits and recover damages).

214. Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1711, 1760 n.188 (1978) (viewing the *Monell* decision as allowing municipalities to be sued without clear restrictions); Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 564 (1989) (discussing the initial confusion of lower courts about the significance of the "policy or custom" requirement articulated in *Monell*, because there was no statutory basis for the requirement).

215. *See supra* text accompanying notes 88-93, 98-102.

216. *See supra* text accompanying notes 45-59.

217. *E.g.*, Shapo, *supra* note 26, at 277; Don B. Kates, Jr. & J. Anthony Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 132 (1972); Ronald M. Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1483 (1977).

218. *See infra* note 226.

219. *See infra* note 223.

220. Blum, *supra* note 45, at 414-20.

Monroe.[221] During the 1960s and 1970s, a number of states modified their common law rules of sovereign immunity to allow suits against municipalities, the state, or both.[222] By 1971, seventeen states had acted to make local governments liable for the torts of their officials, and in another seven states municipalities were similarly liable, though only to the extent of their insurance coverage.[223] Massachusetts eventually became part of this trend when, the year before the legislature passed the MCRA, the Massachusetts Tort Claims Act was adopted.[224] Adoption of the Massachusetts Tort Claims Act suggests that the legislature was concerned with the harm done to its citizens by traditional sovereign immunity exclusions.

Given the high profile of the restrictive definition of "person" advanced in *Monroe*, the legislators were likely to have known about the rejection and replacement of the definition in *Monell* as they considered the adoption of the MCRA. Although the Supreme Court supported its decision to overrule the *Monroe* definition of "person" with a thorough review of the relevant legislative history, the result ultimately served a pragmatic purpose, on its face improving the ability of § 1983 to protect citizens from civil rights violations.[225] Given the intense criticism of the *Monroe* definition that preceded *Monell*, it is likely that the Massachusetts legislature intended to make cities liable under the MCRA.

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221. Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1218 (1971) [hereinafter *Developing Governmental Liability*]. The approach was not completely free of pitfalls. Reconciling § 1983, § 1988, and state law was analytically tricky because § 1983 had been interpreted as excluding liability and § 1988 expressly allowed the incorporation of state law only where consistent with federal law. *Id.* The courts that followed this approach essentially had to see the exclusion in § 1983 as a gap, rather than an intentional exclusion. *Id.* at 1218-19.

222. *Id.* at 1216-17 n.75.

223. *Id.* In Arizona, California, Hawaii, Iowa, Minnesota, Nevada, New York, North Carolina, Washington, and Wisconsin, both the state and the political subdivisions were liable. *Id.* In Alaska, Florida, Illinois, Michigan, New Jersey, Oklahoma, and Virginia, only municipalities were liable. *Id.* at 1217. Legislatures imposed liability in California, Florida, Hawaii, Iowa, Minnesota, Oklahoma, Nevada, New York, North Carolina, Virginia, and Washington. *Id.* at 1216-17. In the other states—Arizona, Illinois, Michigan, New Jersey, and Wisconsin—liability was imposed via judicial decision. *Id.* Additionally, statutes in Idaho, Missouri, New Hampshire, New Mexico, North Dakota, Vermont, and Wyoming made municipalities with insurance liable up to the amount of insurance coverage. *Id.* at 1217.

224. 1978 Mass. Acts 842 (codified as amended at MASS. GEN. LAWS ANN. ch. 258, §§ 1-11 (2004)).

225. Eric Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 213-15 (1979) (describing practical problems with *Monroe*, including that the damages available were often inversely proportional to the seriousness of the violation).

The second approach was to bring a § 1983 action against the individual perpetrator and then join to it a claim, directly under the Constitution, against the municipality.[226] Some courts in jurisdictions that explicitly allowed suits against municipalities adopted a second approach, permitting recovery under state law in federal court.[227] Courts using this approach read § 1983 together with 42 U.S.C. § 1988.[228] Under § 1988, state remedies must be applied where federal civil rights law lacks an appropriate remedy so long as the state's law furthers the purpose of federal civil rights law and is consistent with the Constitution and other federal law.[229]

CONCLUSION

The decisions of the federal district court and Massachusetts Appeals Court that municipalities are not "persons" subject to liability under the MCRA avoid the issue of whether municipal corporations, like private employers, should be subject to respondeat superior liability. Instead, municipal corporations have limited liability under § 1983, and no liability under the MCRA. As a result, the reach of the MCRA is reduced, plaintiffs whose rights have been violated by municipal employees are less likely to recover appropriate damages, and there is less incentive for cities and towns to try to prevent employee violations through training and discipline. Narrowing the scope of the MCRA in this way frustrates the purpose of the law to provide a broad remedy for civil rights violations.

Although the legislature did not explicitly reject the MDS definition of "person" that excludes municipalities from liability under the MCRA, the text of the bill and circumstances of its passage support a more inclusive definition. The asserted purpose of the statute, its resemblance to § 1983, and the timing of its introduction all indicate that the legislature meant for the MCRA to reach both private actors and those people who are liable under § 1983 because their actions were "under color" of state law.[230] Therefore, the holdings of *Howcroft* and *Chaabouni* should be overturned and

226. *E.g.*, Brault v. Town of Milton, 527 F.2d 730, 732 (2d Cir. 1975); Hostrop v. Bd. of Junior Coll. Dist. No. 515, 523 F.2d 569 (7th Cir. 1975); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975); Traylor v. City of Amarillo, 492 F.2d 1156 (5th Cir. 1974).

227. *Developing Governmental Liability*, *supra* note 221, at 1214-16.

228. *Id.* at 1214.

229. *Id.* at 1201-02, 1215-16.

230. 42 U.S.C. § 1983 (2000); MASS. GEN. LAWS ch. 12, § 11H (2004).

courts should expand on *Sarvis*[231] so that all Massachusetts employers—including municipalities—are held liable under the MCRA for the acts of employees, thus increasing incentives for municipal corporations to train employees to comply with the law.

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231. *See supra* text accompanying notes 112-123.

* I would like to thank my family and friends for their support. Thanks also to the rest of the Western New England Law Review staff and to Professor John Egnal for his assistance in developing this Note.