

9-1-1989

## Vanessa Redgrave v. Boston Symphony Orchestra: Federalism, Forced Speech, and the Emergence of the Redgrave Defense

Marjorie Heins

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### Recommended Citation

Marjorie Heins, *Vanessa Redgrave v. Boston Symphony Orchestra: Federalism, Forced Speech, and the Emergence of the Redgrave Defense*, 30 B.C.L. Rev. 1283 (1989), <http://lawdigitalcommons.bc.edu/bclr/vol30/iss5/2>

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**VANESSA REDGRAVE V. BOSTON SYMPHONY  
ORCHESTRA: FEDERALISM, FORCED SPEECH,  
AND THE EMERGENCE OF THE REDGRAVE  
DEFENSE†**

Marjorie Heins\*

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*When in 1982 the Boston Symphony Orchestra cancelled a contract with the actress Vanessa Redgrave, in response to vociferous protests of her political beliefs, Redgrave wanted to sue for more than just contract damages. The ensuing litigation under the Massachusetts Civil Rights Act consumed seven years, produced three appellate decisions, and gave birth to a potent new defense for private employers in cases involving political retaliation against employees. This article analyzes the famous case in terms of constitutional law, political liberty, and artistic choice. Its structure encompasses a narrative of the events from two opposing perspectives — Peter Sellars's and Seiji Ozawa's; an historical exploration of political blacklisting; and an analysis of the legal doctrines that ultimately determined the outcome of the Redgrave case.*

**I. SELLARS'S STORY**

The Boston Symphony Orchestra "is quite simply one of the outstanding cultural institutions in the world," said Peter Sellars, testifying as the lead-off witness in the 1984 federal court trial of *Vanessa Redgrave v. Boston Symphony Orchestra*. "[A]mong symphony

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Thanks to Arthur Berney for perceptive comments on an earlier draft of this article.

orchestras, a case can be made for it being . . . the best in this country and really in a league with a handful in western Europe."<sup>1</sup>

Sellars was only 25 but already known as a promising, creative theater director when, in February 1981, Thomas Morris, the General Manager of the Boston Symphony Orchestra, asked him to submit a proposal for staging Igor Stravinsky's opera-oratorio, *Oedipus Rex*. Stark and formal, *Oedipus Rex* was to be the featured work at the BSO's 1982 centenary celebration: three concerts at Symphony Hall in Boston, two at Carnegie Hall in New York, and more the following summer at Tanglewood. Soprano Jessye Norman was to sing the role of Jocasta; tenor Kenneth Riegel was to be Oedipus.<sup>2</sup>

The BSO had chosen an all-Stravinsky program because of the composer's historical associations with the Symphony. The other work on the program was to be Stravinsky's *Symphony of Psalms*, which Serge Koussevitzky, then the BSO's conductor and a longtime friend of Stravinsky's, had commissioned in 1930 to commemorate the Orchestra's 50th birthday.<sup>3</sup> A deeply religious work, *Symphony of Psalms* was composed, in Stravinsky's words, "for the glory of God [and] dedicated to the Boston Symphony Orchestra."<sup>4</sup> Both *Symphony of Psalms* and *Oedipus Rex* had their American premières at the BSO.<sup>5</sup>

Sellars told the *Redgrave* jury of Stravinsky's importance to contemporary music. "From his sensation in Paris, total sensation, *The Rite of Spring*, when there were riots at the first performance and . . . the audience was stampeding, Stravinsky had to be whisked out of the back door of the hall and into a taxicab to the other side of the city, things have been very lively."<sup>6</sup> Stravinsky took cultural

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<sup>1</sup> Trial Transcript at vol. 1, afternoon session, 46, *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189 (D. Mass. 1985) (C.A. No. 82-3193-K).

<sup>2</sup> *Id.* at vol. 11, 12-13.

<sup>3</sup> E.W. WHITE, STRAVINSKY 98-99, 359 (1984).

<sup>4</sup> *Id.* at 359.

<sup>5</sup> *Id.*; Trial Transcript at vol. 11, 12, vol. 1, afternoon session, 50; Memorandum from Thomas Morris to Abram T. Collier, President of BSO Trustees (Mar. 30, 1982) (trial exhibit 19); Dyer, *Extending the Language of Music*, Boston Globe, Dec. 6, 1988, at 79 (describing composer Elliot Carter's participation in BSO premiere of *Oedipus Rex* while a student at Harvard).

<sup>6</sup> Trial Transcript at vol. 1, afternoon session, 47. Sellars may have been exaggerating the famous story of the 1913 *Rite of Spring* premiere in Paris. Although the audience virtually rioted, the performance was completed, and at 2:00 A.M. Stravinsky, Cocteau, Diaghilev, and Nijinsky "piled into a cab and were driven to the Bois de Boulogne in search of fresh air and quiet." E.W. WHITE, *supra* note 3, at 45.

myths (like *Oedipus Rex*) and "made them very powerful for a modern audience."<sup>7</sup>

*Oedipus Rex*, with music by Stravinsky and libretto by Jean Cocteau, retells the ancient and much-psychoanalyzed Greek myth in a stately, rigorous oratorio form. Like *Symphony of Psalms*, composed three years later, *Oedipus Rex* was to be performed in Latin, to give it a "monumental" quality.<sup>8</sup> Sellars's stage plan included an eight-foot platform for the soloists, above the chorus and orchestra, and an industrial-size elevator that would raise Jocasta as much as twenty-five feet higher.<sup>9</sup> Sellars thought this height crucial to the production.

Sellars insisted that *Symphony of Psalms* be performed after *Oedipus Rex*, even though in concerts the "big staged work" usually comes last.<sup>10</sup> He wrote General Manager Morris:

The two Stravinsky pieces have the exact relation to each other as Sophocles' *Oedipus Rex* and *Oedipus at Colonus*: the latter is the benediction of the former and to reverse their order is to go against every grain of content . . . . *Oedipus Rex* is the journey toward knowledge which we must pass through before we are ready "to enter in" to the elevated, visionary level of experience attained and presented by *Symphony of Psalms*.<sup>11</sup>

<sup>7</sup> Trial Transcript at vol. 1, afternoon session, 49.

<sup>8</sup> *Id.* at 50. In a July 1981 letter to Thomas Morris, Sellars compared *Oedipus Rex* to the Japanese Noh plays, which are also "deliberately set in archaic language not understood by the audience, eschewing trivial psychologizing soap-opera detail, and elevating the tragedy to the highest level. This is the 'aspect monumental' called for in *Oedipus Rex*, and the reason Stravinsky chose Latin." Letter from Peter Sellars to Thomas Morris 2 (July 9, 1981) (trial exhibit 501). According to one critic, Stravinsky

liked the idea of moving backward from a "secular" to a "sacred" language, which is why he had Jean Cocteau's text [for *Oedipus Rex*] translated into Ciceronian Latin . . . . Oratorio suited his desire to petrify the urgency and activism of Wagner's music drama: he wanted a "still life," he told Cocteau . . . . Stravinsky quoted André Gide's remark that "classical works are beautiful only by virtue of their subjugated romanticism." So it is with *Oedipus*: oratorio serves to discipline and formalize opera. Despite its classical language and the undramatic rigidity of the action, the characters — the dangerously arrogant Oedipus and the babbling Jocasta — are demon-infested romantics. Oratorio as written by Stravinsky is opera in a straitjacket.

P. CONRAD, A SONG OF LOVE AND DEATH: THE MEANING OF OPERA 76 (1987).

<sup>9</sup> Sellars's letter to Morris, *supra* note 8, at 2.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Id.*

Sellars wanted a bird of peace or dove to fly over the orchestra at the end of *Symphony of Psalms*, though Morris thought that touch "a little hokey."<sup>12</sup>

*Oedipus Rex* had a narrator — the only part not spoken in Latin. Sellars viewed this small role as critical: "the device of the narrator is clearly included to bring this tragedy sharply into the tangible, quotidian, localized experience of the audience: an affirmation of the present tense."<sup>13</sup> For the BSO production, Sellars wanted someone contemporary, who spoke forcefully on current events. His first choice was Ted Koppel, a newsman who possessed what Sellars described as "uncanny . . . equilibrium as he announces world catastrophes," and a "complex . . . sense of irony . . . an extraordinary example of Sophoclean and Stravinskian self-control and detachment."<sup>14</sup>

Whatever may have been his level of Sophoclean detachment, Koppel was not available to narrate *Oedipus Rex*. Nor were other journalists whom Sellars had in mind, and when, in early March 1982, Sellars, Morris, and the BSO's Artistic Administrator, William Bernell, met in Paris with the Orchestra's Music Director, Seiji Ozawa, the narrator still had not been cast. Rehearsals for *Oedipus Rex* were to start on April 12 for performances on April 15, 16 and 17 in Boston and April 21 and 22 in New York.

Sellars recalled the Paris meeting as

quite a hectic and frenetic brainstorming session . . . . In the course of the flurry, the name of Vanessa Redgrave came up. And I must say, the sun shown for a moment. We were all quite elated. Here was somebody whose gifts as a performer were beyond questioning and beyond compare and who had the kind of phenomenal intensity that could make a very short part come off to very impressive effect because, in fact . . . there are only three or four very brief speeches for the narrator.<sup>15</sup>

Redgrave, Sellars told the jury, had the "ability to charge a very small amount of material with a very great amount of meaning, which is a special quality that some performers have and is very

<sup>12</sup> Trial Transcript at vol. 5, 55 (Morris testimony), vol. 4, morning session, 11, 14 (Ozawa testimony).

<sup>13</sup> Sellars's letter to Morris, *supra* note 8, at 6. The idea for the narrator was Cocteau's; Stravinsky at first disliked it. E.W. WHITE, *supra* note 3, at 329-30.

<sup>14</sup> Sellars's letter to Morris, *supra* note 8, at 6.

<sup>15</sup> Trial Transcript at vol. 2, 14-15.

crucial in the case of *Oedipus Rex*." Redgrave was "not only a fiery personality but one of the great classical actresses of the British stage."<sup>16</sup>

Sellars, Morris, and Bernell were aware that Redgrave's ardent support of the Palestine Liberation Organization made her controversial.<sup>17</sup> They quickly agreed, however, that her political activities were irrelevant to the hiring decision. In this instance, moreover, where the BSO wanted "something exciting, something that would be talked about and something that would also bring the orchestra sharply into the twentieth century and be an event for television," the political intensity of Redgrave's presence would if anything be an advantage.<sup>18</sup>

When contacted, recalled Sellars, Redgrave's agents were at first "extremely rude and said, 'the Boston Symphony? What's that?'"<sup>19</sup> But Redgrave knew very well what it was, and was thrilled to get the offer.<sup>20</sup> Although famous internationally for such movie roles as *Isadora*, *Morgan*, *The Trojan Women*, *Blow-up*, and *Julia*, Redgrave had begun her career (assisted by her father, Sir Michael Redgrave)

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<sup>16</sup> *Id.* at 16. Redgrave came to international attention in 1965 with the offbeat British movie *Morgan*. Ismail Merchant, who later produced *The Bostonians* with Redgrave in a starring role, testified at trial that *Morgan* had first set him on her trail: "I . . . absolutely was riveted by her performance, and I thought this is an actress I want to work with." *Id.* at vol. 8, 131. Film director Sidney Lumet also testified on her uniqueness: "She has lyricism which is extremely rare . . . [a] combination of strength and delicacy, . . . [and] a complete intangible . . . just the depth of the talent itself." *Id.* at vol. 9, morning session, 51-53. One critic wrote of Redgrave's Oscar-winning performance in the film *Julia*: "This saintly Freudian Marxist queen, on easy terms with Darwin, Engels, Hegel, and Einstein, might have been a joke with almost anyone but Vanessa Redgrave in the role . . . Redgrave is so well endowed by nature to play queens that she can act simply in the role (which doesn't occupy much screen time) and casually, yet lyrically, embody Lillian Hellman's dream friend." P. Kael, *A Woman for All Seasons?*, in *WHEN THE LIGHTS GO DOWN* 306-07 (1975).

<sup>17</sup> Redgrave testified that her political activities ranged from running for Parliament in 1974 on the Workers' Revolutionary Party ticket to sponsoring a nursery school in London. Trial Transcript at vol. 6, morning session, 14, 24. She produced and appeared as a newscaster in a 1977 film, *The Palestinian*, which was shot in Lebanese refugee camps, and distributed a second film, *Occupied Palestine*, in the early 1980s. *Id.* at vol. 5, 105, vol. 6, morning session, 23, vol. 7, afternoon session, 2. Pressed on cross-examination about her political views by defense attorney Robert Sullivan, she told the jury that she opposed Zionism but not the existence of the State of Israel: "I never said there is no room for Israel. I never said that the State of Israel should be liquidated or overthrown. I don't believe it. That's not what I advocate." *Id.* at vol. 7, morning session, 90.

<sup>18</sup> *Id.* at vol. 2, 18. Morris testified in detail about his heightened hopes for television broadcasts once the media announced Redgrave's involvement. *Id.* at vol. 3, 112, 135-36, 170, 176.

<sup>19</sup> *Id.* at vol. 2, 20. Bernell testified that Redgrave's agent, Bert Taylor, was "rather short with me" but called back the next day to apologize. *Id.* at vol. 11, 31-32.

<sup>20</sup> *Id.* at vol. 7, afternoon session, 24, vol. 5, 93.

as a classical actress, both in London theater and in concerts. She knew the history of the Stravinsky-Cocteau work, and knowledgeably discussed with Bernell what recordings were available for her to study by way of preparation.<sup>21</sup>

Negotiating the deal was not difficult. Morris, according to Sellars, believed that securing Redgrave

was such an exciting coup for the symphony that it was worth going . . . a little beyond the limits that . . . had previously been thought of financially for this . . . because all of us felt that she was, indeed, the solution to this evening and really the last missing link in what we were all convinced would be one of the most exciting projects we had ever worked on.<sup>22</sup>

The Orchestra announced the engagement of Redgrave on March 25, 1982; the next day the *Boston Globe* reported that the BSO had "scored a theatrical coup" by hiring her.<sup>23</sup>

That same day, March 26, protests began. The BSO staff initially fielded them coolly, telling angry callers, in accordance with Morris's instructions, that Redgrave had been hired "exclusively on artistic grounds."<sup>24</sup>

The BSO was hardly the first to have been assaulted by an anti-Redgrave campaign. In 1978, Jewish Defense League activists had protested her Academy Award for *Julia*, then burned her effigy outside the auditorium where she was to receive the prize.<sup>25</sup> In 1979, CBS-TV withstood pressures to fire Redgrave from its production of *Playing for Time*, a holocaust docudrama. The network disputed the protesters' contention that it should have considered Redgrave's political views in making the casting choice. It quoted the screenwriter, Arthur Miller, as saying:

If this attack is solely upon her past views and actions it ought to stop short, it seems to me, at trying to drive her out of a role which can only lift the suffering of the Jews,

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<sup>21</sup> *Id.* at vol. 11, 47-48.

<sup>22</sup> *Id.* at vol. 2, 21. Morris also described it as a "coup." *Id.* at vol. 4, morning session, 107.

<sup>23</sup> *Id.* at vol. 2, 23-24; McCanon, *Classical Musicians Aid One of Their Own*, *Boston Globe*, Mar. 28, 1982, at 81 (trial exhibit 18).

<sup>24</sup> Trial Transcript at vol. 3, 118, 142 (Morris testimony), vol. 2, 29 (Sellars testimony), vol. 11, 155-58 (testimony of Judith Gordon Gassner).

<sup>25</sup> *Id.* at vol. 6, morning session, 27; see *infra* note 54 and accompanying text.

especially Jewish women, to a new ground of understanding.<sup>26</sup>

Despite these precedents, by Monday, March 29, the BSO's sangfroid had begun to melt. Orchestra management knew that the local branch of the Anti-Defamation League would be meeting to discuss whether to censure the BSO.<sup>27</sup> Irving Rabb, a Symphony trustee influential in Jewish philanthropic affairs, called General Manager Morris on Monday morning to ask him to get out of the contract.<sup>28</sup> By mid-morning Morris was extremely worried, and the staff was, according to Sellars, "slightly moving into crisis mode."<sup>29</sup>

Sellars explained to the jury that the BSO administration was acutely sensitive to criticism from the Jewish community. Tom Morris told the others that

historically at the symphony there had been some . . . problem of anti-Semitism, and that they were extremely proud of the fact that progress had been made in this area and that there were now Jewish people on the board of the symphony and actively participating . . . and that this decision could have serious consequences to that and there could be a backlash that would damage the advance that had been made in relations with the Jewish community.<sup>30</sup>

The idea of substituting narrators first came up during the March 29 conversations. Sellars testified that Morris asked him if he could stage the production without Redgrave.<sup>31</sup> The controversy provoked by her engagement was more than they had anticipated; Morris worried that Redgrave "might be the thing that would sink the whole ship, and it might be best to throw her overboard." The public might regard her appearance with the Symphony as an en-

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<sup>26</sup> Letter from CBS Broadcast Group (Sept. 1979) (trial exhibit 38).

<sup>27</sup> Trial Transcript at vol. 2, 27 (Sellars testimony).

<sup>28</sup> *Id.* at vol. 3, 68, 74 (deposition of Irving Rabb, as read into evidence). Morris disputed Rabb's testimony on this point, denying that Rabb had asked him to get out of the contract. *Id.* at vol. 3, 120, 124 (Morris testimony). Morris's recollection was that Rabb told him Redgrave was "at best . . . a very controversial piece of casting," and he replied, "we hired her because she is a terrific actress." *Id.* at 118. Rabb testified that he said: "Is there any way you can get out of it? . . . I think you will offend a tremendous number of Jews in the community if she performs." *Id.* at 68, 74.

<sup>29</sup> *Id.* at vol. 2, 28-29 (Sellars testimony), vol. 3, 28-29 (Morris testimony).

<sup>30</sup> *Id.* at vol. 2, 30.

<sup>31</sup> *Id.* at 31-32. Morris's testimony on this point was equivocal: he did not "believe" he advocated changing narrators. *Id.* at vol. 3, 193.



dorsement of her views. By late Monday, said Sellars, "a kind of almost bunker mentality had set in."<sup>32</sup>

Initially, Sellars agreed with Morris. The Stravinsky program "was based on very subtle musical and dramatic issues" that could be lost in "a storm over . . . who supported the PLO and who supported Israel."<sup>33</sup> But by the next day, March 30, Sellars had thought further. He now saw ominous implications in firing Redgrave: "I felt it was a hideous idea . . . . On no moral grounds was the act of removing Ms. Redgrave acceptable. It was fully the equivalent of in 1933, because of a certain political climate, saying at the Vienna State Opera, let's not have a Jewish person sing the role of Siegfried . . . . It was a form of blacklisting." Sellars argued that in Russia people are denied work because of their politics, not in the United States. He reminded Morris of an incident during the First World War when the BSO had fired a conductor, Karl Muck, because of anti-German hysteria.<sup>34</sup>

By Tuesday, March 30, the conversation focused on possible disruption of the concerts. The BSO at this point had not received any "explicit threats of disruption,"<sup>35</sup> but Morris and the public relations staff began to imagine possible catastrophes: boos, stink bombs, even a shooting. In such a "volatile situation," it would be

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<sup>32</sup> *Id.* at vol. 2, 33. Morris testified he did not "believe" he used the nautical metaphor, but "there seemed to be a general sentiment" by late Monday "that it would be difficult to go ahead." *Id.* at vol. 4, afternoon session, 9. The vitriol of the phone calls had so alarmed the staff that at a 5 P.M. meeting, "the general conclusion" was "that we could not go forward." *Id.* at vol. 3, 190, 192.

<sup>33</sup> *Id.* at vol. 2, 34.

<sup>34</sup> *Id.* at 37.

<sup>35</sup> Morris memorandum, *supra* note 5, at 2. The question of whether, and when, the BSO received any actual threat of performance disruption was much in dispute at trial. There was testimony about a telephone call from one Arthur Bernstein, a former officer of the by-then defunct Jewish Defense League of Massachusetts. Judith Gassner, in 1982 a member of the BSO's public relations staff, testified that Bernstein had threatened "bloodshed and violence" if Redgrave appeared at Symphony Hall. Trial Transcript at vol. 11, 160. Bernstein testified that he had merely promised a picket line on the sidewalk such as the JDL had mounted some twelve years earlier when Ukrainian dancers performed at Symphony Hall. *Id.* at vol. 9, afternoon session, 45-47, 53-54. Whatever the actual substance of the conversation, Morris testified that he did not learn of this call until about noon on Thursday, April 1, after the decision to cancel the concerts had been made and indeed after publication of the press release announcing the cancellation. *Id.* at vol. 5, 8. Bernstein also testified he had called on Thursday, and the BSO's press office notes reflect this. *Id.* at vol. 12, morning session, 32-33. Gassner insisted that Bernstein called on Wednesday, as did Bernell. *Id.* at vol. 11, 118. Sellars remembered hearing about a call from the JDL regarding disruption on Wednesday, but with no reference to "bloodshed and violence." *Id.* at vol. 2, 99.

"impossible to predict what type of public disturbance might ensue."<sup>36</sup>

Morris's fears were aggravated at a Tuesday afternoon meeting with Boston Police Commissioner Joseph Jordan. According to Morris's Tuesday memo to Abe Collier, President of the Board of Trustees, Jordan warned him that, should the JDL get involved, the police would not be able to avert an interruption of the performance.<sup>37</sup> Morris noted in his memo that Redgrave traveled with a bodyguard, that she had not performed in the United States in four or five years, and that "the basic political problem here is the use of Miss Redgrave's art to express her political beliefs. She is strong-minded and unpredictable and is likely to turn the BSO situation, in whatever way possible, to her advantage."<sup>38</sup> Morris's memo concluded:

Given all the information, there is no question that proceeding with the engagement might probably lead to disruption of the concerts, at best . . . . At this point I cannot recommend a course of security which would reasonably guarantee no disruptions, nor do I have such guarantee from Carnegie Hall. The question then becomes how to disengage, should Redgrave not choose to withdraw herself, without compromising the clear, artistic ideals of the BSO and our need to preserve the freedom of artistic choice in the future.<sup>39</sup>

Peter Sellars vehemently disagreed. Late Monday evening he had reminded Morris that "as of yet, no threats had been received, and there was no reason to suppose that such a situation was even probable . . . . I felt that such an extreme reaction was completely premature."<sup>40</sup> Morris was not convinced. He pressed Sellars to agree

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<sup>36</sup> *Id.* at vol. 2, 47-48 (Sellars testimony).

<sup>37</sup> Morris memorandum, *supra* note 5, at 2. Because the performances were sold out, it was not entirely clear how JDL members, in Jordan's scenario, would get into the hall. Trial Transcript at vol. 4, afternoon session, 39. Morris acknowledged that Jordan had promised a sufficient police presence to ensure public safety. *Id.* Jordan testified to the same effect. *Id.* at vol. 12, 136, 140.

<sup>38</sup> Morris memorandum, *supra* note 5, at 2. The basis for Morris's prognostications is not clear. Redgrave testified that she had never interrupted or otherwise used an artistic performance to express her political views. Trial Transcript at vol. 5, 91, vol. 7, afternoon session, 34.

<sup>39</sup> Morris memorandum, *supra* note 5, at 3.

<sup>40</sup> Trial Transcript at vol. 2, 48 (Sellars testimony).

to go forward without Redgrave, saying the decision was his, and "in his opinion . . . it was impossible to proceed" with her.<sup>41</sup> On Tuesday, Morris instructed the press people to remove Redgrave's name from an advertisement scheduled to appear in the Sunday *New York Times*, and the group set to work attempting to draft a press statement, without success.<sup>42</sup>

Sellars refused to acquiesce. From Tuesday to Wednesday his conviction strengthened. He came up with new arguments to persuade Morris and the others. Given the level of protests received, he said, picketing was the worst the BSO was likely to face. And the presence of pickets would not harm but in fact would intensify the theatrical experience, making the audience concentrate on the message of Stravinsky's music. The pieces "are about extremely large and profound human issues of an ability to prejudge another human being":

[T]he point of *Oedipus Rex* is that he tells his guards to scour the city of Thebes for the murderer of his father. And the point is after he's done trying to bully everyone else on their political points of view and . . . after the most intense introspection, he realizes the heart of these issues lies within his own self. And Thebes, the city, is destroyed by a plague, and the plague is only lifted when one man, Oedipus Rex, faces the moral imperative. And in Sophocles it's not a choice, it's an imperative. The purification of the individual as the highest exemplification and serious possibility for the moral health and fiber of an entire community is Sophocles' subject. I felt that this would be overwhelmingly and resoundingly demonstrated by the symphony making a courageous stand, and that the courage of the symphony's stand would be felt by and reinforced in the courage of the performance itself . . .<sup>43</sup>

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<sup>41</sup> *Id.* at 48-49.

<sup>42</sup> *Id.* at 55-59.

<sup>43</sup> *Id.* at 91-92. *Oedipus Rex*, scored mostly in minor keys, "is dominated by the search for D major, which is the key of the inner light" into which Oedipus finally emerges. Mellers, *Stravinsky's Oedipus as 20th-Century Hero*, quoted in E.W. WHITE, *supra* note 3, at 335 n.1.

Peter Sellars's career since the BSO episode has been marked by his determination to render works of classical music, particularly opera, relevant to contemporary audiences. He has transported the three Mozart-Da Ponte operas to modern locales: *The Marriage of Figaro* to Trump Tower; *Così fan Tutte* to a seaside diner; and *Don Giovanni* to Spanish Harlem. See, e.g., Porter, *Musical Events*, THE NEW YORKER, Aug. 15, 1988, at 63-64; Rockwell, *A Sellarized "Figaro" in First Performance*, THE NEW YORK TIMES, July 15, 1988, at C3, col. 4. He staged Handel's *Orlando* at Cape Canaveral and his *Giulio Cesare* at a disarmament conference.

Meanwhile, Morris and Bernell were keeping Seiji Ozawa, still in Paris and conducting Beethoven's *Fidelio*, apprised of developments. Ozawa at first suggested that the situation be explained to Redgrave, who, as an artist, would surely understand the BSO's dilemma and withdraw.<sup>44</sup> When she did not, and with only two weeks until rehearsals began, Morris decided the only alternative was cancellation. A transatlantic call with Ozawa was arranged for Thursday April 1; Sellars understood it as "essentially an occasion for good-byes."<sup>45</sup>

But once on the phone with the conductor, Sellars launched into a last attempt at persuasion. He told Ozawa that "there were very large dimensions to the concert as it developed that called upon us to act . . . heroically, in the manner of the music that both of us spend most of our lives with." Ozawa responded that he had to be neutral politically; his "only concern could be music," which would not be served by disruption.<sup>46</sup>

Sellars countered "that there were more important values at stake than whether one has an auditorium of complete silence to play music in." He reminded Ozawa that he was at that time conducting *Fidelio* by Beethoven, which is

the most explicit statement for freedom of speech in the world of art . . . . [T]o abandon these concerts and to abandon Ms. Redgrave's participation in them was cowardly and did dishonor to the works, . . . not only the specific Stravinsky works but works like *Fidelio* which both he and I make our livelihood from and have been entrusted with as important cultural monuments. And I spoke to him of our role as guardians of these.<sup>47</sup>

Ozawa said that the situation was out of his hands.

P. CONRAD, *supra* note 8, at 278, 293. A Sellars production of Wagner's *Tannhäuser* was set in the contemporary world of televangelism; although controversial, the performance was described by one reviewer as "the first truly alive opera I had seen in this country since — well, since Sellars' production of *Figaro*." Porter, *Musical Events*, THE NEW YORKER, Nov. 7, 1988, at 151.

<sup>44</sup> Trial Transcript at vol. 4, morning session, 47–50.

<sup>45</sup> *Id.* at vol. 2, 101.

<sup>46</sup> *Id.* at 96, 101–02.

<sup>47</sup> *Id.* at 102–03. *Fidelio* departed from "the mythology of neoclassical opera" to address the "intractable human realities" of political repression; instead of the heroine following the hero to the underworld, she follows him to "the modern hell of a political prison." P. CONRAD, *supra* note 8, at 127.

"I suppose at that point I wouldn't take no for an answer," testified Sellars.

It was for me . . . a very large act to, at the age of 25, decide to simply throw over a chance to stage one of the greatest pieces that I have ever known with the orchestra and the soloists that can play it better than it could ever be played . . . . It was a very rare occasion and occurring to me at a very important point in my life and so their hope was that I would reconsider . . . . And I could not.<sup>48</sup>

The staff now attempted again to compose a press statement. Morris's draft tried to justify the cancellation. But after much struggle, it was agreed that "there were no statements that were finally adequate or defensible that could be issued";<sup>49</sup> a BSO attorney who was present advised that all reasons be deleted "because none of them would hold up legally if this were brought to court."<sup>50</sup> The final press release simply announced the cancellation of the Stravinsky program, and substitution of the Berlioz *Requiem*, because of "circumstances beyond [the Orchestra's] reasonable control."<sup>51</sup>

Sellars's fundamental disagreement with Ozawa was over the contingencies inherent in the very nature of theater. As he told the jury, absolute silence during a live performance is

hardly *de rigeur*. [A] musical performance, like any theater performance, is a collective experience which frequently takes on dimensions that nobody can foresee . . . . And God knows in the history of concerts, there is a rich history of disruption . . . . [A]t one point when this was a living vital art form, it was very crucial that there was wild audience participation, people screaming patriotic slogans during Verdi; . . . in fact, music has a responsibility to incite.<sup>52</sup>

<sup>48</sup> Trial Transcript at vol. 2, 104 (Sellars testimony).

<sup>49</sup> *Id.* at 106.

<sup>50</sup> *Id.* at 152.

<sup>51</sup> *Id.* at 107; BSO Press Release, April 1, 1982 (trial exhibit 28).

<sup>52</sup> Trial Transcript at vol. 2, 111-13; see also P. CONRAD, *supra* note 8, at 237. Milan's La Scala was a place for political proclamations:

In 1800 a French official hastened there to announce the victory of the Napoleonic army over Melas at Marengo. It's this news which so dismays the monarchist Scarpia in the Rome of *Tosca*; to the newly radicalized public in Milan, it was an occasion for rejoicing. In 1859, a performance of *Norma* at La Scala incited an outcry against the occupying Austrian army. The Milanese in their boxes and the Austrian officers in the orchestra stalls came to a showdown

## II. INTERFERENCE WITH RIGHTS SECURED

Although the Boston Symphony's press statement announcing its cancellation of the centenary concerts cited, in the standard boilerplate of contract, "circumstances beyond its reasonable control," the BSO would probably have compensated Redgrave (as it did the other artists) in the amount of her contract fee. Indeed, it formally tendered an offer of \$31,000 ("plus accrued interest and costs") shortly after suit was filed.<sup>53</sup>

But for Redgrave, simply receiving the contract fee was not the point. The BSO had acquiesced in pressures to punish her for her political beliefs, to blacklist her, in the word that became a subject of heated debate at the subsequent trial. Being fired by a prestigious cultural institution in response to vociferous, emotional disagreement with her politics and amid rumors of possible audience disruption would not exactly enhance her opportunities for other work in the United States. This was the first time — despite previous attempts that had been made to get her fired — that an employer had acquiesced.<sup>54</sup> The BSO's example could be insidious.

Yet blacklisting, in acquiescence to popular antagonism to a performer's politics, had been endemic in the United States in the 1950s, and most of its victims had found little relief in the courts.<sup>55</sup> Part of the question in Redgrave's case was whether the law had changed, whether a legal theory, beyond simple breach of contract,

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during the scene when Norma, striking the gong, goads the Druids to revenge themselves on the imperial Roman invaders. The chorus bayed for blood, and the boxholders joined in its cries of "Guerra! Guerra!" . . . Opera and the cause of Italian unification were literally synonymous.

*Id.*

Sellers might have also told the jury that *Oedipus Rex* was booed during an early Paris performance, with Cocteau narrating. Stravinsky was not upset or surprised. 3 STRAVINSKY: SELECTED CORRESPONDENCE 131 n.40 (R. Craft ed. 1985).

<sup>53</sup> Defendant's Motion to Dismiss at 1-2, *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189 (D. Mass. 1985) (C.A. No. 82-3193-K) (denying liability but tendering offer pursuant to Fed. R. Civ. P. 68).

<sup>54</sup> See *supra* note 25 and accompanying text; Trial Transcript at vol. 6, morning session, 27 (pressure from Jewish Defense League on Twentieth Century Fox, producers of *Julia*, to promise in writing "that they would never employ me again"); *id.* at 38-41 (demands that CBS fire Redgrave from *Playing for Time*); *id.* at vol. 8, 28 (BSO was first to acquiesce in pressures to fire Redgrave); *id.* at 28 (Redgrave told attorneys that her firing "must not be overlooked. The Boston Symphony Orchestra has denied me participation in a purely artistic performance for purely political reasons.").

<sup>55</sup> See *infra* notes 111-17 and accompanying text. Historians of the period often point to radio commentator John Henry Faulk's libel suit against the publishers of a blacklist/scandal sheet as the first successful legal action. See *infra* note 122.

could now be found to hold employers liable for, and deter them from, political blacklisting.

The Massachusetts Civil Rights Act, or MCRA, was enacted in 1979 in response to the horrendous racial violence that accompanied court-ordered school desegregation in Boston's entrenched ethnic neighborhoods. The statute has broad language, however, that goes beyond racial violence and prohibits "any person or persons, whether or not acting under color of law," from interfering or attempting to interfere, "by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth."<sup>56</sup> Redgrave's attorneys made this still largely unconstrued statute the centerpiece of her suit against the BSO in federal district court. She also alleged breach of contract, "tortious repudiation" of contract, and violation of 42 U.S.C. § 1986, a Reconstruction-era civil rights law.<sup>57</sup> Under the state civil rights count, Redgrave's complaint claimed that the Orchestra had interfered with rights secured to her by the first and fourteenth amendments to the U.S. Constitution, and articles 1, 10, 16, and 19 of the Massachusetts Declaration of Rights.<sup>58</sup>

From the filing of Redgrave's complaint in October 1982 until the time of trial in October 1984, Federal District Court Judge

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<sup>56</sup> MASS. GEN. L. ch. 12, §§ 11H, 11I (1986). Section 11H provides for enforcement actions by the attorney general. Section 11I creates a private right of action for "injunctive and other appropriate equitable relief . . . including the award of compensatory money damages," for "[a]ny person whose exercise or enjoyment of rights secured by the constitution or laws of the the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H."

<sup>57</sup> 42 U.S.C. § 1986 (1982). Redgrave also sued "John Doe" and "Richard Roe" defendants for common law conspiracy, intentional infliction of emotional distress, tortious interference with contractual rights, and violation of 42 U.S.C. § 1985 (1982). On February 1, 1983, Federal District Court Judge Robert Keeton granted the Symphony's motion to dismiss the tortious interference and § 1986 claims, as well as Redgrave's demand for specific performance of the contract. 557 F. Supp. 230, 235, 241 (D. Mass. 1983). The court rejected the BSO's motion to dismiss the state civil rights act claim and its argument that Redgrave could not prove any entitlement to consequential damages flowing from the contract breach. *Id.* at 233-34. Redgrave eventually abandoned her claims against the pseudonymous defendants. Notice of Dismissal at 1, *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189 (D. Mass. 1985) (C.A. No. 82-3193-K).

<sup>58</sup> Article 1 is a general assurance of due process and equal protection (with an equal rights amendment added in 1976); article 10 is a specific equal protection guarantee; article 16 assures free speech and press (*see infra* note 133); and article 19 protects the right to assemble and petition for redress of grievances.

Robert Keeton was largely on his own in construing the MCRA. The Massachusetts Supreme Judicial Court did not begin to elucidate the mysteries of the statute until 1985. Faced in 1983 with deciding the BSO's motion to dismiss Redgrave's MCRA count, Judge Keeton rejected the Orchestra's argument that "the factual allegations of the complaint demonstrate that the BSO did not engage in threats, coercion, or intimidation, and that plaintiffs [Redgrave and Vanessa Redgrave Enterprises, Ltd.] should not be allowed to bootstrap a breach of contract claim into a civil rights action."<sup>59</sup> Judge Keeton wrote:

Plaintiffs here have alleged, at the least, deprivations of constitutionally protected speech adequate to suggest that this case has a constitutional dimension that may implicate the state civil rights act. Whether plaintiffs will be able to demonstrate that the BSO, as distinguished from defendants Doe and Roe, coerced Ms. Redgrave, is a matter best left for another time. Though I am troubled by the rather conclusory nature of the allegations of violation of civil rights protected by state law, and by uncertainties of the law defining those rights, I conclude that the motion to dismiss the eighth claim should be denied.<sup>60</sup>

By the time of trial, Judge Keeton's troubles with the state civil rights law had matured into serious doubts about its applicability to Redgrave's case. At sidebar and lobby conferences during trial, he repeatedly questioned whether acquiescence in the threatening and coercive activities of others could violate the MCRA, and opined that the statute's requirement of "threats, intimidation, or coercion" implied a prohibition only of acts done with a "specific intent" to deprive another of secured constitutional or civil rights. As he said to Redgrave's attorney Marvin Wexler, "depriving a person of a contractual right without the intent thereby to coerce and preclude that person from exercising a civil right is not enough."<sup>61</sup>

Wexler and Daniel Kornstein, plaintiff's lead counsel, disputed Judge Keeton's contention that the statute required specific intent. They argued that the case should go to the jury on alternative theories of liability: either specific intent to deprive Redgrave of her constitutional rights, or acquiescence in the retaliatory demands of others. The specific intent theory would be based on trustee Irving

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<sup>59</sup> 557 F. Supp. at 243.

<sup>60</sup> *Id.*

<sup>61</sup> Trial Transcript at vol. 13, noon lobby conference, 23-24.



Rabb's deposition testimony that he deplored Redgrave's political views.<sup>62</sup>

Judge Keeton's resistance to the plaintiff's acquiescence theory had its source in his scholarly grounding in the traditional verities of common law. As the judge, a former Harvard Law professor, told the attorneys:

The usual measure of liability for breach of contract would be the performance fee, unless you show that the additional claim you're making is within the scope of the measure of damages under contract law because it was concerned with consequences within the contemplation of the parties . . . . You are all familiar with the Holmes bad man theory of breach of contract, that there is a right if you will or at least a legal privilege if you want to get involved in Hohfeldian terminology, to buy out the contract, to break it as long as you're willing to pay the damages . . .

Now in order to overcome that argument that that's the limit of the recovery for breach of contract, it seems to me you will have to do either one of two things: offer evidence from which the jury under a correct legal instruction could find that additional consequential damages were within the contemplation of the parties or that you are not limited to that usual measure of damages because this was wrongful conduct in a sense beyond being merely a breach of contract.<sup>63</sup>

Judge Keeton thus viewed the MCRA, at least as interpreted by Redgrave's side, as radically revising common law principles of contract. Resisting such a departure from tradition, he ultimately instructed the jury (which he employed in an advisory capacity for purposes of the MCRA) that to prevail on the civil rights claim, Redgrave had to show that the BSO "threatened, intimidated, or coerced her for the purpose of interfering with, or attempting to interfere with her civil right to free expression of her political views," and that "[c]oercion may include depriving a person of a

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<sup>62</sup> See *supra* notes 28-29 and accompanying text. In his deposition, read at trial, Rabb readily acknowledged that "I am very much opposed to the PLO and . . . I differed very much with [Redgrave] on her opinions." He added that this disagreement was not the reason for his effort to persuade Morris to dump her: "I was interested in the Boston Symphony Orchestra and its relationship with the community and its ability to sustain itself, and that was the thing that motivated me." Trial Transcript at vol. 3, 72. The jury could have chosen to disbelieve this disclaimer and concluded that Rabb's animus toward Redgrave's politics motivated his successful effort to get her fired.

<sup>63</sup> Trial Transcript at vol. 13, 42-49.

contractual right to work in retaliation for the person's political views with the purpose of causing that person to alter those views or to become less outspoken."<sup>64</sup> Consequently, the judge did not permit the plaintiff's acquiescence theory of liability to go to the jury.

Thus, the jury's special verdict form began with a series of questions directed specifically at the BSO's "state of mind." First, Judge Keeton asked the jury whether the "only" or "primary" reason for the BSO's cancellation was "that the agents who acted for the BSO in making the decision to cancel disagreed with political views that Redgrave had publicly expressed." Second, he asked whether one or more of the "agents of the BSO" wanted to fire her because of her political views and if so, whether the BSO "would not have cancelled but for the influence" of those agents. Only if one of these two state-of-mind prerequisites were met could the jury even reach the further two questions that the judge also thought material under the MCRA: whether the BSO "threaten[ed], intimidate[d], or coerce[d]" Redgrave "for the purpose of interfering with or attempting to interfere with her civil right to free expression of her political views"; and whether the BSO would not have cancelled *Oedipus Rex* "but for the fact, if you find it to be a fact, that one or more of the BSO's trustees opposed Vanessa Redgrave's political views and wanted to retaliate against and punish her for those views and to coerce and intimidate her into becoming less outspoken."<sup>65</sup> Both of these latter two questions reiterated the evil, retaliatory purpose or specific intent requirement that Judge Keeton thought critical to the MCRA. Only if the jury answered yes to one of the two could Redgrave prevail on her civil rights claim.

Although Irving Rabb's statements provided some evidence, albeit ambiguous, of retaliatory motivation, the overwhelming weight of trial testimony from BSO management suggested that the decisionmakers harbored little or no political animus against Redgrave for her views; indeed, the Orchestra had hired her despite them. The decision to cancel was in acquiescence to vociferous and emotional protests from others, and was based, so they said, on fears that the concerts would be disrupted, even that harm might come to persons or musical instruments.<sup>66</sup>

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<sup>64</sup> *Id.* at vol. 14, 157 (instructions to the jury).

<sup>65</sup> Verdict form, questions 1, 2A and 2B, 6, 7, *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189 (D. Mass. 1985) (C.A. No. 82-3193-K).

<sup>66</sup> Morris acknowledged that the financial consequences of going forward with Redgrave

Given this testimony, the jurors did not find the invidious motivation that Judge Keeton said was a prerequisite to MCRA liability, and reluctantly found for the BSO on the MCRA claim.<sup>67</sup> They expressed disquiet in an unusual post-verdict letter to the judge:

Your Honor:

We are writing to you for clarification as to the verdict, and your charge to us . . . . There was one issue we thought was clearly proved by a preponderance of the evidence that we could find no way to express within the confines of the verdict questions and your explanation to us as to the parameters within which the law required we must decide. We were convinced that there was indeed an abrogation of Ms. Redgrave's civil rights by the BSO. We were convinced that one of the primary reasons that the BSO cancelled the arrangements for Vanessa Redgrave to appear as narrator in the performance of *Oedipus Rex* was that the agent(s) who acted for the BSO in making the decision to cancel were willing to cooperate with members of the broader Symphony community (i.e., season subscribers, ticket holders, and supporters by monetary contributions) in the desire by members of that broader community to fire Ms. Redgrave because, and only because, of the disagreement by that group with political views that Ms. Redgrave had publicly expressed.

That group expressed its demands in terms of politics and money — disagreement with Ms. Redgrave's politics and threats, expressed or implied, to withhold money. The BSO's agent(s) knew this to be so. They knew further, that

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could have been serious. Trial Transcript at vol. 4, afternoon session, 19. He testified that fundraising concerns "did play a role" in the decision making process but that the "issue that we made the decision on was disruption." *Id.* at vol. 5, 48.

<sup>67</sup> They did award Redgrave consequential damages for breach of contract in the amount of \$100,000 (in addition to her \$31,000 fee). The consequential damages were based on Redgrave's testimony that her job offers after the BSO cancellation diminished in both quantity and quality, and that her income consequently fell. One producer, Theodore Mann, testified that he dropped plans to feature Redgrave in an off-Broadway performance of Shaw's *Heartbreak House* in response to news of the BSO cancellation of *Oedipus Rex* by "one of the premier arts organizations" in the United States. *Id.* at vol. 9, afternoon session, 20–25. Mann told Redgrave's agent that the BSO cancellation "would have a devastating effect on Vanessa's career." *Id.* at 39. Director Sidney Lumet also described the likely career-deadening effect of an incident like the BSO cancellation. *Id.* at vol. 9, afternoon session, 7–9. A deposition by Redgrave's secretary, Silvana Sammassimo, indicated that viable lucrative offers fell off after the cancellation. *Id.* at vol. 10, 43.

to accede to these demands was to violate Ms. Redgrave's civil rights . . . .<sup>68</sup>

This letter became a prime illustration of Redgrave's two major arguments on appeal. First, no specific intent or retaliatory motive need be proved under the MCRA; acquiescence in the retaliatory or discriminatory demands of others is enough. Second (after the first point was finally won), the BSO's argument that it had a first amendment right to cancel the concerts — because it feared that audience disruption would interfere with the artistic integrity of the performances — had no basis in the jury's factfindings.

The interrelated issues of acquiescence and specific intent were the focus of Redgrave's appeal to the U.S. Court of Appeals for the First Circuit, and the appeal attracted *amicus* interest from the Screen Actors Guild, the Civil Liberties Union of Massachusetts, and the Lawyers Committee for Civil Rights Under Law of the Boston Bar Association. If acquiescence were accepted as a legitimate defense under the MCRA, these groups argued, then employers could engage in discrimination on grounds of customer (or co-employee) prejudice; and realtors or landlords could refuse to show, sell, or rent to individuals based on their skin color, religion, and so forth, in acquiescence to the animus of neighbors. Such results would be intolerable; in fact, considerable precedent from constitutional and civil rights law rejected just such an acquiescence defense to civil rights liability.<sup>69</sup> Likewise, 42 U.S.C. § 1983, a major model for the MCRA, required no specially retaliatory state of mind. Both statutes had criminal counterparts that explicitly *did* contain such a specific intent standard.<sup>70</sup>

A second issue on appeal arose out of Judge Keeton's post-trial decision to strip Redgrave of \$100,000 that the jury had awarded her in consequential contract damages. Keeton's novel theory had been that the BSO could only have caused such damages through

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<sup>68</sup> Jury's post-verdict letter to The Honorable Robert E. Keeton I, *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189 (D. Mass. 1985) (C.A. No. 82-3193-K).

<sup>69</sup> *E.g.*, *Palmore v. Sidoti*, 466 U.S. 429 (1984) (race discrimination in child custody decision — perceived societal burdens); *Buchanan v. Warley*, 245 U.S. 60 (1917) (race discrimination in housing — private prejudices); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (sex discrimination in employment — customer preference), *cert. denied*, 404 U.S. 950 (1971); *Sarni Original Dry Cleaners v. Cooke*, 388 Mass. 611, 447 N.E.2d 1228 (1983) (race discrimination in employment — neighborhood hostility).

<sup>70</sup> See 18 U.S.C. § 242 (1982), the criminal counterpart to § 1983, and MASS. GEN. L. ch. 265, § 37 (1986), the criminal analog to §§ 11H and 11I.

an implied communication in its April 1, 1982 press release, that Redgrave could not be prudently hired to perform in the United States. This implied statement of opinion, Judge Keeton had said, was first amendment-protected, by analogy to defamation law, unless Redgrave proved that it was made with actual malice or reckless disregard for its falsity or truth.<sup>71</sup>

The United States Court of Appeals for the First Circuit later had little trouble disposing of Judge Keeton's defamation law analogy. The court held that acts such as contract breaches are not transmuted into words (or symbolic acts) protected by the first amendment simply because of the meanings that others may read into them.<sup>72</sup> But on the MCRA issue that had so plagued judge, parties, and jury below, the Court of Appeals was uneasy. Recognizing the persuasiveness of the precedents involving acquiescence, the appellate judges were nevertheless troubled by the prospect of transplanting this law, developed partly in the context of constitutional and civil rights violations by governments, into a statute that reached private conduct.<sup>73</sup> Accordingly, they invoked the certification procedure,<sup>74</sup> and asked the Massachusetts Supreme Judicial Court to answer two questions of state law:

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<sup>71</sup> He relied primarily on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189, 1197-1203 (D. Mass. 1985), *rev'd*, 855 F.2d 888, 894-95 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 869 (1989). The cancellation announcement itself scrupulously avoided any explicit statement about Redgrave.

<sup>72</sup> 855 F.2d at 894-95. This was the First Circuit's decision on rehearing, but on the consequential damages point, it was unchanged from an earlier panel opinion in October 1987. See *infra* notes 138-41 and accompanying text. The Court of Appeals did, however, reduce the amount of Redgrave's consequential damages from \$100,000 to \$12,000, ruling that the remainder entailed undue speculation by the jury. 855 F.2d at 896-900.

<sup>73</sup> The Massachusetts Supreme Judicial Court had ruled in 1985, shortly after the completion of post-trial proceedings in *Redgrave*, and well before the record was assembled for appeal, that the MCRA indeed meant what it said, that it applied to conduct "whether or not . . . under color of law." *Bell v. Mazza*, 394 Mass. 176, 181-82, 474 N.E.2d 1111, 1114-15 (1985). The court resolved the conundrum of how a private defendant could interfere with rights that the state or federal constitutions, at least, articulated only as limitations on governmental conduct, by adopting Justice Brennan's interpretation of "rights secured" in his concurrence in *United States v. Guest*, 383 U.S. 745, 778-79 (1966) (Brennan, J., concurring) (right is secured by the Constitution if it "emanates from [or] . . . finds its source in the Constitution").

<sup>74</sup> Mass. S.J.C. Rule 1:03. See generally 17 C.A. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4248 (1978) (certification as a more convenient and less harsh alternative to so-called *Pullman* abstention where a federal court faces an uncertain or complex question of state law). The Supreme Court expressed its delight in the virtues of certification in *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). See *infra* notes 158-89 and accompanying text for discussion of the ultimately dispositive role of certification in Redgrave's case.

- (1) Under the Massachusetts Civil Rights Act, . . . may a defendant be held liable for interfering with the rights of another person, by "threats, intimidation, or coercion," if the defendant had no personal desire to interfere with the rights of that person but acquiesced to pressure from third parties who did wish to interfere with such rights?
- (2) If a defendant can be held liable under the Massachusetts Civil Rights Act for acquiescence to third party pressure, is it a defense for the defendant to show that its actions were independently motivated by additional concerns, such as the threat of extensive economic loss, physical safety, or particular concerns affecting the defendant's course of business?<sup>75</sup>

In his certification order accompanying these questions, First Circuit Presiding Judge Frank Coffin explained his unease. The Massachusetts Supreme Judicial Court had recently ruled that the MCRA was "coextensive with 42 U.S.C. § 1983, except that the Federal statute requires State action whereas its State counterpart does not."<sup>76</sup> Under section 1983, it was well established that no specific intent is required. But Judge Coffin said,

it is precisely because the Massachusetts Civil Rights Act extends to private actors that we are unsure as to whether the Legislature intended the statute's coverage to extend to private economic entities faced with external pressures . . . . Given the potential differences between what may be allowed state actors and private actors, we are unsure whether in its statement regarding the coextensiveness of § 11H with § 1983, the Supreme Judicial Court intended to adopt *in toto* all case law concerning § 1983 liability stemming from acquiescence to third party pressure or whether the Supreme Judicial Court would find the need to fashion a different approach because of the private actor coverage of § 11H.<sup>77</sup>

These hesitations, as sketched by Judge Coffin in December 1985, were the proverbial handwriting on the wall.

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<sup>75</sup> Certification, *Redgrave v. Boston Symphony Orchestra, Inc.*, No. 85-1305 (1st Cir. Dec. 9, 1985), reproduced in the First Circuit's en banc decision, 855 F.2d 888, 902 (1988) [hereinafter Certification].

<sup>76</sup> *Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 823, 473 N.E.2d 1128, 1131 (1985).

<sup>77</sup> Certification at 5.

## III. OZAWA'S STORY

Seiji Ozawa, BSO music director for a decade at the time of the Redgrave debacle, wanted a fully staged version of *Oedipus Rex* for the BSO's centennial. He envisioned costumes, movement, something beyond the Orchestra's usual line and befitting a 100th anniversary celebration.<sup>78</sup>

Ozawa first met Peter Sellars at Tanglewood in the summer of 1981; General Manager Morris and Artistic Administrator Bernell had suggested him as stage director for the Stravinsky program. The conductor was impressed with Sellars's stage sketch, particularly his "brilliant idea" for Jessye Norman, as Jocasta, to be perched on an industrial elevator that would rise and descend during portions of her performance. Even more important for Ozawa was that Sellars "knew music quite well."<sup>79</sup>

At their meeting seven months later in Paris, Ozawa again found himself agreeing wholeheartedly with Sellars's approach to Stravinsky's stately work. "He said" (Ozawa testified), "please, Seiji, watch out to do exactly what Stravinsky wrote.' And that absolutely I agreed . . . In other words, music is so important for this piece and Stravinsky wrote everything so precisely."<sup>80</sup>

Ozawa left the choice of narrator to Sellars, Morris, and Bernell. "I am terrible for no music thing, like theater people . . . I don't remember names of movie actors."<sup>81</sup> He had not heard of Vanessa Redgrave, and so called his wife, who was in Japan at the time, to consult her. "She said it's a fantastic choice."<sup>82</sup> Ozawa was not able to test that opinion until after the BSO had cancelled the Stravinsky concerts. Redgrave came to Boston to protest and Ozawa saw her on TV. He thought, "this is the perfect voice. But already at that time . . . everything was gone."<sup>83</sup>

Ozawa first heard about the crisis in Boston from Bernell and Morris. Though his testimony was hazy, the impression he received in long distance telephone calls from Tuesday through early Thursday morning, March 30 through April 1, was that the *Oedipus Rex* performances would certainly be disrupted on account of Red-

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<sup>78</sup> Trial Transcript at vol. 4, morning session, 8.

<sup>79</sup> *Id.* at 11-12.

<sup>80</sup> *Id.* at 15.

<sup>81</sup> *Id.* at 16.

<sup>82</sup> *Id.* at 16-17.

<sup>83</sup> *Id.* at 17.

grave's appearance, and police would be lining the aisles of Symphony Hall.<sup>84</sup> He recalled Bernell and Morris speculating about bomb threats, or at least stink bombs. Moreover, his managers told him, some of the musicians had protested Redgrave's hiring and were threatening not to perform.<sup>85</sup> Bernell said that Redgrave had made a political speech when she received her Academy Award for *Julia*; Ozawa's impression was that she could well do so again in response to a hostile audience.<sup>86</sup>

Daniel Kornstein cross-examined Ozawa on this point:

Q. Now, in which conversation did Mr. Bernell say that Vanessa Redgrave would talk back to the audience from the stage?

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<sup>84</sup> *Id.* at 38–60. For Ozawa, the calls blurred together; he could not remember “which is first, which is second.” *Id.* at 44.

The telephone protests had become increasingly abrasive as the week wore on. Judith Gassner, then assistant director of promotion, found them “upsetting, unsettling.” One caller told her: “You will mourn for this. You will be sorry.” *Id.* at vol. 11, 163–64. Another protester said that his parents had died at Auschwitz and that the PLO was committed “to the destruction of the state of Israel and the Jewish people.” *Id.* at vol. 12, 61 (testimony of Promotion Director Caroline Smedvig). Still another: “This will haunt you. You will mourn. There will be trouble. There is trouble wherever this woman goes.” *Id.* at 63. Smedvig was “very shaken up,” she was “frantic trying to keep my own staff calm and functioning.” *Id.* at 62, 77.

<sup>85</sup> Trial Transcript at vol. 4, morning session, 52–53, 55–56. Redgrave's counsel disputed the notion that there was any reasonable basis to anticipate disruption. Producer Ismail Merchant testified that during the filming of *The Bostonians* on location in Boston in the fall of 1983, there were no disruptions despite heavy publicity and consistently large crowds of observers. “Christopher Reeve [Redgrave's co-star] was rather shy and Miss Redgrave would take the autograph books and get Christopher Reeve to autograph them.” *Id.* at vol. 8, 139–42.

<sup>86</sup> *Id.* at vol. 4, morning session, 36, 38–40, 44, 50, 55. Redgrave explained to the jury the circumstances of her Academy Award acceptance speech. Julia, the character she had played, was a socialist and a member of the underground resistance to the Nazis, an individual with whom both Redgrave and her co-star, Jane Fonda, could obviously identify. *Id.* at vol. 6, morning session, 21. The JDL's burning of Redgrave's effigy outside the auditorium on award night stirred her to explain in her acceptance speech “that the work had meant a very great deal to me and Jane Fonda and that we have believed profoundly in the principles for which Julia died . . . [We believed] that you must fight against anti-Semitism and Fascism.” *Id.* at 27–30. She referred in her speech to the JDL as “Zionist hoodlums,” urged the industry not to succumb to the League's updated demands for a blacklist and “a return to McCarthyism,” and “promised . . . that I would continue to fight for the the principles that Julia had.” *Id.* at 30–31.

Sidney Lumet, who had been at the award ceremony, told the jury that initially some in the audience thought Redgrave's speech anti-Semitic because of the reference to “Zionist hoodlums,” but that by the end she was cheered because “she went on . . . with great passion thanking the Academy membership for not being influenced by . . . her politically controversial position. And at the end of the speech, I remember an enormous, enormous burst of applause, and it may have even been a standing ovation.” *Id.* at vol. 9, morning session, 44.



A. I don't remember.

. . . I think that moment he told me first time that she made a speech at Academy.

. . . And I thought that's not place to make speech.

Q. And it was told to you that Ms. Redgrave would do just that, speak from the stage as narrator?

A. Ask her.

Q. Maestro, I'm just asking, were you told that by Mr. Bernell?

A. I think it was a possibility.

Q. Based on what?

A. Maybe that Academy thing, maybe. Or she maybe — she maybe said it to Bill by telephone.

Q. Are you just guessing now?

A. Yes . . . . I mean, not guessing. Just something in my mind remember she talked to him, and he got the impression this may have some reaction from audience . . . . And in that conversation could be that then she doesn't mind that, you know . . . she is expecting that; and she could talk back to them, don't worry, that kind of thing. Could be that conversation.<sup>87</sup>

The situation saddened Ozawa, but he told Morris and Bernell that he was sure Redgrave would understand the problem and offer to withdraw.<sup>88</sup> He was surprised to learn after a telephone call late Wednesday night that she would not.<sup>89</sup> It was finally, Ozawa said,

<sup>87</sup> *Id.* at vol. 4, morning session, 67–71. Bernell and Morris denied specifically telling Ozawa that Redgrave would talk back to the audience during the performance. *Id.* at vol. 11, 101 (Bernell testimony), vol. 5, 41 (Morris testimony). But Bernell did say "that I could not assure him that she would not speak from the stage of Symphony Hall other than the words she was assigned to speak as an actress." Although he had no basis in Redgrave's past performances to make the suggestion, he explained, "I was thinking of the Academy Awards event." *Id.* at vol. 11, 101. *See also id.* at 123 (Bernell never had impression Redgrave would make a political statement during the performances). Bernell testified that he told Ozawa the problems "seemed to be insurmountable." *Id.* at 73.

Morris told Ozawa about his Tuesday meeting with Police Commissioner Jordan (*see supra* note 37 and accompanying text), his conversations with managers of Carnegie Hall in New York City, and his conclusion that disruption, at least in the form of yelling, was likely during the concert. *Id.* at vol. 4, afternoon session, 52, vol. 5, 41.

<sup>88</sup> Trial Transcript at vol. 4, afternoon session, 53 (Morris testimony).

<sup>89</sup> *Id.* at vol. 4, morning session 47–50 (Ozawa testimony). Bernell testified that he reached Redgrave on Thursday early morning London time. He told her the protest calls were "heated" and "very troublesome." She took the news "dispassionately" and urged him not to be alarmed. "[S]he seemed genuinely to believe" that the protests would subside, told him that in Australia recently there had been a bomb scare before a showing of her film, *Occupied Palestine*, but that the performance had gone forward. "How do you think you would feel if

his decision to cancel the entire Stravinsky program and proceed instead with Berlioz' *Requiem*, a piece that the Tanglewood chorus already knew well.<sup>90</sup> There ensued his remarkable telephone debate with Sellars on April 1, just before the cancellation was announced.

In this conversation, said the conductor, Sellars acknowledged that the Orchestra was "expecting some noise, . . . even some police," but still wanted to proceed. "I said that's crazy . . . . [M]usic goes to your ear and then go directly to your feeling . . . . To do that, we have to have silence," particularly for the *Symphony of Psalms*, "which is one of the most pure music and most quiet music . . . ."<sup>91</sup>

Sellars pressed on. He said, according to Ozawa, that the opera would become more lively and interesting

when we have noise from audience or police is around the theater; he thought that is excitement. And that really absolutely crazy. I think he was very hot that day . . . . I was amazed that he changed from purely music[al] point of view . . . . I do not want somebody to use Symphony Hall for political issue. I feel everybody should have freedom to have political wish, but they should not be involved with a great piece of art . . . . Peter had a different idea . . . . Peter thought politic[s] and music must be together, live together. I'm absolutely against it.<sup>92</sup>

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you were shot dead on the stage of Symphony Hall?" Bernell said he asked her. "And her response was, 'I am sure that the Boston police will apprehend my killer.' . . . She said, 'Let's get on with it.' And I just did not seem to be able to awaken her to what I perceived as a very real danger to her, to our audiences, to everybody in the building." *Id.* at vol. 11, 83-87.

Redgrave for her part believed that Bernell was exaggerating the danger. She testified that she reminded him that CBS had not caved in to similar pressures over her role in *Playing for Time*. Despite the emotional temperature of those protests, there had been no violence, but only peaceful picketing. Even when she had shown *Occupied Palestine* in Australia and Sydney Town Hall had received a bomb threat, the show went forward after the police checked the hall. *Id.* at vol. 6, morning session, 103-05. Redgrave told Bernell that she had never had a performance disrupted, and did not believe "that there are barbarians who would start screaming and shouting in Symphony Hall during *Oedipus Rex*." *Id.* at vol. 7, afternoon session, 30-34.

<sup>90</sup> *Id.* at vol. 4, morning session, 24 (Ozawa testimony).

<sup>91</sup> *Id.* at 20-21.

<sup>92</sup> *Id.* at 23-25. Bernell testified to a similar debate with Sellars. When the management realized there would probably "be boos and catcalls and hissing and stamping of feet . . . police in the hall . . . [and the] possibility that somebody could get hurt," Sellars suggested shifting the concept of the production because *Oedipus Rex* is, after all, a political play. "Peter, don't be an opportunist," Bernell said he responded. Lining Symphony Hall with police "is not what we set out to do. It's not what we discussed with Jessye Norman and Seiji Ozawa." *Id.* at vol. 11, 63-64. See *supra* note 43 and accompanying text for a discussion of Sellars's interest in rendering classic art relevant to contemporary reality.

Ozawa told Sellars that he would not mix music "with political issue . . . [A]rt and music is fragile." Sellars replied, "Decision is of course, Seiji, yours. But I am asking you to keep going."<sup>93</sup>

Kornstein cross-examined Ozawa extensively on this point. Ozawa had been conducting *Fidelio* in Paris at the time of the crisis.

Q. Would you tell us in a minute what the theme of *Fidelio* is?

A. The theme of the *Fidelio* is, how you call — that's a political kind of a game —

Q. It's about liberation of prisoners, political prisoners.

A. Yes, it is. Prisoner the very brave woman, put men's, how you call — to become like man, young man, to save her lover or, I think, husband, I don't remember, to save from jail. At end, the good man comes, clear everything, so everybody become free, that kind of a story.

Q. And you mentioned that *Fidelio* is a political —

A. Yes.

Q. — opera?

A. *Fidelio* is, you know, against bad king who — bad man —

Q. — who is oppressing his people.

A. That's right.

Q. And it's about the struggle against the oppressor.

A. Yes.

Q. And eventual freedom and liberation.

A. That's right. Bad story, though.

Q. But beautiful music?

A. Ah, yes. The story is stupid, really . . . . Beethoven was a great composer, but he did not choose . . . he could do better if he was to choose a better libretto . . . . When I conduct, I felt that too. And many people agreed with me.

<sup>93</sup> Trial Transcript at vol. 4, morning session, 21. The rebuttal testimony of Thelma Holt, a British producer, provided a contrast to the attitude of Ozawa and the BSO management on the issue of disruption threats. When the Rustavelli Company, the USSR's leading Shakespearean troupe, came to London in 1981, just after the Soviet Union invaded Afghanistan, "[w]e had bomb threats for the first ten days every night." Once she had to clear the theater while the police scoured it. "It was extremely costly to the British taxpayer, and it was a bore for all of us." But cancellation would have been unthinkable:

I mean, if every time some loony-bean rings you up and says he is going to drop a bomb on you — it is an occupational hazard when you run a public service. . . . But we could never have taken the dangerous course of canceling a performance; because if we did that, we would have no hotels open, we would have no theaters open. I mean, we'd have nothing.

*Id.* at vol. 13, afternoon session, 10–13.

Q. Now, while the story may not have been exactly as good as you would have liked, Maestro, do you think the theme is noble?

A. Yes. I mean, . . . at the end, prisoner become free, and everybody very happy, you know.

Q. So in your conducting of *Fidelio*, there was a blending of music and politics?

A. Ah, now. No, no. I think you approach — I know what you want to say. I think that's . . . very stupid you are. But don't waste time talking about *Fidelio*, because . . . nothing to do with this case . . . .

Q. Maestro, didn't you say that you do not like to mix politics and music?

A. Yes, of course.

Q. And do you agree that *Fidelio* has a political theme?

A. Yes.

Q. Have you ever conducted *Tosca*?

A. Yes.

Q. Does *Tosca* have a political theme?

A. Yes.

Q. Have you ever conducted any other operas that have a political theme?

A. I'm sure.

Q. Which ones?

A. Because in all this has a political theme, it's same as *Oedipus Rex*, you know.

Q. Yes.

A. *Oedipus Rex* is very political because people say at the end, my dear Oedipus Rex — he is, you know, he lost his eyes . . . cut his own eyes, became blind. And then he is going — I think he's going to die, but, you know, disappearing, chorus says, "Adieu, adieu, By-bye, Oedipus. We loved you." That was the last, how you say, narrator's word . . . . And then soft down, soft down, soft down. And that is, you know, political.

I told you, [in] our life politics is always connecting and music, of course, goes in. But what I'm saying is performing art of music to directly use is very cheap way to me. What I say is very dangerous to use that . . . Beethoven wanted to have free — those times was very difficult time, I'm sure; so he had this idea, that political. And what we are facing this political is not the same thing . . .

Q. Don't we live in difficult times now?

A. Yes, but it is not right to solve this way. People need music. Because of difficulty, people need music. [P]art of

music is to . . . direct to people's feeling . . . when life becomes so noisy, life becomes so busy, life becomes hating many people each other, when that time we need music.

Q. Music can be a healing, unifying force?

A. Right, yes.

Q. Should *Fidelio* not be played if there are some people in the audience who disagree with its theme? . . . And who might boo?

A. Yes. I got boo.

Q. You did get booed?

A. Oh, sure.

Q. When was that?

A. In Paris, but it's not because of theme. Because of some singers performing was not good. Boo is always very popular . . . .

Q. Booing is a common occurrence in opera.

A. Yes, sure.

Q. And the performance continued?

A. No. Boo comes usually at the end of a performance, I hope.

. . . [I]t doesn't happen often in Symphony Hall here, but that happen quite often in Europe; in opera house, for instance.

Q. Now, Mr. Ozawa, my question was: Should *Fidelio* not be played if there are people in the audience who disagree with its theme?

A. It will not happen, I assure you.

Q. That everybody will agree with the political theme of *Fidelio*?

A. Because the story is so stupid. It's not serious, you know.

Q. Well, for example, suppose during the Nazi era the German symphony wanted to put on *Fidelio*.

A. Mm-hm.

Q. And suppose some people hired by the government were going to protest —

A. Which government?

Q. The Nazi government at the time.

A. Why?

Q. It occurs to me that they might not like the theme of *Fidelio*.

A. Why you think so? Seriously . . . . Why German government don't like *Fidelio* story? Tell me. It doesn't just happen.

Q. Just assume. Indulge me.

A. That assume is very poor.

Q. Assume that there are some people in an audience who do not like the theme of *Tosca*.

A. That's very unlikely, and you shouldn't assume — you should not waste time with everybody here. You are approaching very wrong, you know. You can ask me anything, but don't waste time, because we are facing, you know, very particular problem.<sup>94</sup>

Whoever was thought to have prevailed in this extended dialogue on the complex intersection between art and politics, ultimately the cross-examination did not serve Redgrave's cause. For whatever the merits of Ozawa's artistic philosophy, a number of appellate judges found in his testimony a demonstration of his unimpeachable constitutional right, as musical director of a symphony orchestra, to decide the aesthetic terms on which it would perform.

#### IV. BLACKLISTING

On the tenth day of trial, plaintiff's counsel attempted to introduce in evidence an affidavit by the recently-deceased playwright, Lillian Hellman. In 1952, Hellman had agreed to testify before the House Committee on Un-American Activities about her own past left-wing political activities but had refused to talk about her friends. Her most famous line — "I cannot and will not cut my conscience to fit this year's fashions" — signaled a dramatic point of resistance in the years when political blacklisting, fostered and inspired by HUAC and other inquisitorial committees, dominated arts and entertainment in the United States.<sup>95</sup>

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<sup>94</sup> *Id.* at vol. 4, morning session, 27-34.

<sup>95</sup> There is extensive literature on the era in post-World War II American history when rampant and often hysterical anti-communist attitudes led to purges and loyalty oaths in virtually all areas of employment. On witchhunting and blacklisting in the arts and entertainment specifically, see, e.g., C. BELFRAGE, *THE AMERICAN INQUISITION* (1973); E. BENTLEY, *THIRTY YEARS OF TREASON* (1971); A. BESSIE, *INQUISITION IN EDEN* (1967); D. CAUTE, *THE GREAT FEAR* (1979); L. CEPLAIR & S. ENGLAND, *THE INQUISITION IN HOLLYWOOD* (1979); J. COGLEY, *REPORT ON BLACKLISTING* (1956); F. COOK, *THE NIGHTMARE DECADE* (1971); J.H. FAULK, *FEAR ON TRIAL* (1964); G. KAHN, *HOLLYWOOD ON TRIAL* (1948); S. KANFER, *A JOURNAL OF THE PLAGUE YEARS* (1973); V. NAVASKY, *NAMING NAMES* (1981); M. SCHUMACH, *THE FACE ON THE CUTTING ROOM FLOOR* (1964); D. TRUMBO, *THE TIME OF THE TOAD* (1972); L. HELLMAN, *SCOUNDREL TIME 90* (quoting her letter to HUAC) (1977).

The law review literature is less extensive. See, e.g., Horowitz, *Legal Aspects of "Political Black Listing" in the Entertainment Industry*, 29 S. CAL. L. REV. 263 (1956); Note, *Political Blacklisting in the Motion Picture Industry: A Sherman Act Violation*, 74 YALE L.J. 567 (1965);

Hellman's affidavit was first entered in the *Redgrave* record in the spring of 1984, in opposition to the BSO's motion for summary judgment. Daniel Kornstein has described his November 1983 visit to Hellman to discuss the case. She was recovering from a stroke, but nevertheless was mentally alert:

She already understood the essentials of Redgrave's suit, and was full of ideas and suggestions. With biting and uninhibited language, Hellman compared her own plight during the McCarthy era to Redgrave's situation. She talked of her own suffering at the hands of the blacklists, and I felt as if I were taking part in an oral history project.<sup>96</sup>

In her affidavit, Hellman asserted that she considered herself "an expert witness on blacklists." She recounted how, as a result of her 1952 appearance before HUAC, in which she refused to testify about other people's political activities, she was unable to work at screenwriting and suffered a decline in income from \$140,000 to, eventually, \$10,000 a year. The blacklist operated secretly, yet was very effective. "In my experience," she concluded, "and particularly in light of the fact that the BSO is a leading artistic institution in this country, there is a cause and effect relationship between the BSO cancellation and what happened to Ms. Redgrave's career."<sup>97</sup>

Judge Keeton did not allow the affidavit into evidence at trial, primarily because of relevance, not hearsay, problems.<sup>98</sup> As he said,

The burden of the affidavit is blacklisting. There is no conceivable way that what occurred here would constitute blacklisting. Blacklisting involves concerted action. There is no charge, there is no evidence, that the BSO has engaged in concerted action with anybody else . . . . So insofar as there is evidence in this affidavit regarding

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Note, *Loyalty and Private Employment: The Right of Employers to Discharge Suspected Subversives*, 62 *YALE L.J.* 954 (1953).

<sup>96</sup> Kornstein, *Lillian Hellman and the Law*, *NEW YORK LAW JOURNAL*, Dec. 29, 1986, at 2. See also Kornstein, *The Case Against Lillian Hellman: A Literacy/Legal Defense*, 57 *FORD L. REV.* 683, 721-23 (1989).

<sup>97</sup> Affidavit of Lillian Hellman, *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189 (D. Mass. 1985) (C.A. No. 82-3193-K).

<sup>98</sup> F.R.E. 804(a)(5) permits the admission of hearsay from dead or otherwise unavailable witnesses where the statement has "circumstantial guarantees of trustworthiness," is "evidence of a material fact," and is "more probative on the point . . . than any other evidence which the proponent can procure through reasonable efforts."

blacklisting, it's totally irrelevant to this trial and would be highly prejudicial.<sup>99</sup>

Despite Judge Keeton's view on this point, testimony in addition to Peter Sellars's indicated that blacklisting was much on the minds of the BSO decisionmakers during the frantic last days of March 1982. Kornstein had Judith Gordon Gassner, the Orchestra's Assistant Director of Promotion in 1982, read from her deposition regarding a conversation among herself, Sellars, Bernell, and Promotion Director Caroline Smedvig: they had agreed that "we would really be blacklisting her and that it was just bad; we really shouldn't do it . . . And that we shouldn't bow to any kind of pressure from the community."<sup>100</sup>

Movie director Sidney Lumet also testified about blacklisting: the mid- to late-1970s controversy over Redgrave's pro-PLO activity was easing at the time that the BSO fueled its renewal by acquiescing in the pressures to fire her.

The memory of the event that actually created a problem tends to fade, except, of course, this was not true during the McCarthy time . . . a period lasting all through the '50s in which the blacklisting of actors, directors and writers was official — a list actually existed in movies and television and those people could not find any work.<sup>101</sup>

Similarly, Kornstein argued in his summation that the "early fifties . . . period is still a shame to our national conscience; . . . [W]e don't want to start down that path again."<sup>102</sup>

Despite Judge Keeton's view, the issue of political blacklisting emerged full-blown on appeal. Redgrave and the *amici* who sup-

<sup>99</sup> Trial Transcript at vol. 10, morning session, 60. Judge Keeton's definition of blacklisting was arguably too narrow. See *Legal Aspects of 'Political Black Listing'*, *supra* note 95, at 263 ("[b]lack listing is not a term of settled factual or legal meaning, and is used here, for want of a better term, to describe in the aggregate various practices of employers in the entertainment industry in utilizing what might be called 'political' tests for employment, and various activities of extra-industry private individuals or groups with respect to the employment of particular individuals in the industry").

<sup>100</sup> Trial Transcript at vol. 12, morning session, 15. Morris testified that blacklisting "may have" been discussed, but he did not see how concerns about the Orchestra's ability to mount the concerts was blacklisting. *Id.* at vol. 5, 43. Bernell concurred. When Sellars argued that firing Redgrave would amount to blacklisting, Bernell testified, "I was furious . . . I said, 'Peter, this is not a blacklisting issue . . . If we wanted to blacklist Vanessa Redgrave, we wouldn't have engaged Vanessa Redgrave.'" *Id.* at vol. 11, 65. Sellars testified that Bernell had raised the specter of blacklisting at a late evening meeting on Monday, March 29. *Id.* at vol. 2, 44.

<sup>101</sup> *Id.* at vol. 9, afternoon session, 7-9.

<sup>102</sup> *Id.* at vol. 14, 71.



ported her pressed the historical analogy. The Civil Liberties Union/Lawyers Committee for Civil Rights brief contended that blacklisting did not require concerted action: its essence was "acquiescence to third party pressure," exactly the situation in the *Redgrave* case and exactly the activity that the trial court had erroneously ruled was not a basis for MCRA liability.<sup>103</sup> As these *amici* wrote:

From 1947 to the early 1960's, major employers acquiesced in the threats and demands of others such as Congressional committees and private pressure groups . . . . The blacklist was economically motivated: employers feared picket lines, bad publicity, advertisers' and lobbyists' pressures, or other "controversy" that might diminish box office receipts . . . .

As one observer of the blacklist years said, "I think if at the very beginning the heads of the studios had stood up to the Committee, none of this would have happened, or it would have happened on a very reduced scale."<sup>104</sup>

<sup>103</sup> *Amici Curiae* Brief of the Lawyers Committee for Civil Rights Under Law of the Boston Bar Association and the Civil Liberties Union of Massachusetts, *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888 (No. 85-1305). See *supra* note 69 and accompanying text.

<sup>104</sup> *Id.* at 20 n.17 (quoting D. CAUTE and V. NAVASKY, and citing J. COGLEY, D. CAUTE, and S. KANFER, *supra* note 95). In an addendum, the *amici* brief quoted from the infamous "Waldorf Declaration" of 1947, in which the major movie producers announced that not only would they discharge the Hollywood Ten, directors and screenwriters who in October 1947 had refused to answer HUAC's questions, but that "[w]e will not knowingly employ a Communist or a member of any party or group which advocates the overthrow of the Government of the United States by force, or by any illegal or unconstitutional method." Less than a month earlier, the president of the Motion Picture Association of America had assured the writers and actors who had been subpoenaed by HUAC that "[a]s long as I live I will never be a party to anything as un-American as a blacklist." W. GOODMAN, THE COMMITTEE 217-18 (1969); S. KANFER, *supra* note 95 at 41-42; G. KAHN, *supra* note 95 at 6. *Amici* argued that the industry's quick reversal illustrated that the producers had acquiesced in the "politically-motivated punitive purposes" of others. *Amici curiae* brief, *supra* note 103, addendum 2. See also *Young v. Motion Picture Assoc. of Am., Inc.*, 299 F.2d 119, 120 (D.C. Cir. 1962) (suggesting that "protests by members of Congress and the public, . . . posing a threat to the economic well-being" of a film company, would justify refusal to deal with politically suspect writers and actors); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 851, 853 (9th Cir. 1954) (holding that public reaction to screenwriter's refusal to testify before HUAC regarding his political associations justified terminating his contract under the contract's "morals" clause), *cert. denied*, 348 U.S. 944 (1955); *Loew's, Inc. v. Cole*, 185 F.2d 641, 649, 658 (9th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951) (same); *United Electrical Radio and Machine Workers v. General Electric Co.*, 127 F. Supp. 934, 939 (D.D.C. 1954) (holding that criticism from stockholders and customers, as well as "unrest among fellow employees," justified GE in firing for "obvious cause" workers who had relied upon the fifth amendment during interrogation by congressional committees).

Similarly, Kornstein and Wexler's brief to the First Circuit disputed the trial court's ruling that political criteria were permissible in employment decisions. Judge Keeton had written in his post-trial decision rejecting Redgrave's MCRA claim:

The law does not forbid an entity . . . from taking account of recognized differences among its members and patrons regarding controversial political issues . . . . [I]t is not illegal for a private entity to make a choice not to contract with an artist for a performance if its agents believe that the artist's appearance under their sponsorship would be interpreted by others as in some degree a political statement.<sup>105</sup>

Kornstein and Wexler argued that political tests for employment, of the type apparently sanctioned by Judge Keeton in this passage, were legal in Poland and other totalitarian countries, and in Nazi Germany where artistic organizations "proved their political 'purity' by firing and refusing to re-employ those opposed to fascist ideology."<sup>106</sup> The same mentality prevailed in the U.S. during the "scoundrel time" of the blacklist: the brief cited Hellman and other authors<sup>107</sup> to illustrate that blacklisting resulted from acquiescence to the demands of red-baiters.<sup>108</sup>

This Court should make it clear that the law has made great strides since the early 1950's and that meaningful legal redress for such political coercion now exists. The trial court's dangerous rulings of law should be reversed, and its open invitation to return to the McCarthy era should be turned aside.<sup>109</sup>

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<sup>105</sup> Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1194 (D. Mass. 1985). Because the judge had used the jury in an advisory capacity for the purpose of the MCRA claim, it was up to him to render the actual decision.

<sup>106</sup> Brief of Plaintiffs-Appellants Vanessa Redgrave and Vanessa Redgrave Enterprises, Ltd., 5, Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888 (1st Cir. 1985) (No. 85-1305).

<sup>107</sup> See *supra* note 95.

<sup>108</sup> Brief of Plaintiffs-Appellants, *supra* note 106, at 6 (quoting K. FOLEY, THE POLITICAL BLACKLIST IN THE BROADCAST INDUSTRY 422 (1979)). See also *Cole v. Loew's, Inc.*, 8 F.R.D. 508, 523 (S.D. Cal. 1948) ("agents or investigators" of HUAC "insisted that certain writers . . . should be discharged"), *rev'd*, 185 F.2d 641 (9th Cir. 1950). Redgrave repeated her historical arguments to the Massachusetts Supreme Judicial Court after the First Circuit certified to it two questions of law under the state civil rights act. See *supra* notes 74-77 and accompanying text.

<sup>109</sup> Brief of Plaintiffs-Appellants, *supra* note 106, at 6.

Consistent with this position, Kornstein responded to a question during the first oral argument in the First Circuit on Redgrave's appeal by asserting that for purposes of the actress's free speech rights, it made no difference that the case involved a contract cancellation rather than a refusal to hire. That is, refusing to hire an artist because of her political beliefs is as unacceptable as firing her for the same reason. One practical difference, of course, is that in refusal-to-hire situations the victim often does not know that he or she was even being considered. Under the Massachusetts Civil Rights Act,<sup>110</sup> it is difficult to imagine an individual being threatened, intimidated, or coerced — i.e., punished for the past exercise of political freedoms, or chilled in their future exercise — if he or she does not even know that an employer has made a politically-motivated decision. But, from the perspective of freedom of speech, a refusal to hire is as destructive of first amendment values as is a discharge from employment in response to political pressures.

As Redgrave's brief suggested, legal efforts to challenge black-listing in the 1950s were not notably successful. The Hollywood Ten, directors and screenwriters who had resisted HUAC's political inquisition, lost their first amendment-based appeals from their convictions for contempt of Congress,<sup>111</sup> and their suits against their employers for breach of contract fared no better.

The film studios justified firing the Ten under contractual "morals" clauses that typically obligated those in the studios' employ to avoid conduct that (in the words of the Loew's contract) would

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<sup>110</sup> See *supra* note 56 and accompanying text. Whether *in fact* cancellation in these circumstances amounted to coercion, as Judge Keeton had originally ruled that it might (*see supra* notes 59–60 and accompanying text) was not an issue on appeal but crept into the appellate interchange between state and federal courts, and ultimately did affect the outcome. See *infra* notes 183–87 and accompanying text.

<sup>111</sup> *Lawson v. United States* and *Trumbo v. United States*, 176 F.2d 49 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950). The Court of Appeals determined that HUAC's questions were justified, despite their intrusion into the freedom of political association, because

No one can doubt in these chaotic times that the destiny of all nations hangs in balance in the current ideological struggle between communistic-thinking and democratic-thinking peoples of the world . . . . It is equally beyond dispute that the motion picture industry plays a critically prominent role in the molding of public opinion and that motion pictures are, or are capable of being, a potent medium of propaganda dissemination which may influence the minds of millions of American people. This being so, it is absurd to argue, as these appellants do, that questions asked men who, by their authorship of the scripts, vitally influence the ultimate production of motion pictures seen by millions, which questions require disclosure of whether or not they are or ever have been Communists, are not pertinent questions.

176 F.2d at 53. Justices Black and Douglas dissented from the denial of certiorari.

"tend to degrade [them] in society or bring [them] into public hatred, contempt, scorn or ridicule, or . . . tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general."<sup>112</sup> In three cases arising from contract cancellations under these morals clauses — *Loews, Inc. v. Cole*, *Scott v. RKO Radio Pictures, Inc.*, and *Twentieth Century-Fox Film Corp. v. Lardner* — juries found for the plaintiffs. But the Ninth Circuit reversed the *Cole* and *Lardner* judgments, on grounds that ranged from trivial to picayune, and in *Scott* the trial judge ruled that the verdict was against the weight of the evidence.

In *Cole*, the appellate court found fault in four aspects of the trial court's charge to the jury and one ruling excluding evidence. It also reversed a factual finding that Loew's had waived reliance on the morals clause by employing Cole for more than a month after his HUAC testimony.<sup>113</sup> The court remanded for a new trial but, in rejecting Cole's claim that he deserved a judgment in his favor as a matter of law, made clear its view that a jury might easily infer from Cole's refusal to answer HUAC's questions that he had been a Communist, and that "because, even in 1947, a large segment of the public did look upon Communism and Communists as things of evil, we think it cannot be said, as a matter of law, that in acting as he did Cole did not breach his agreement . . . ."<sup>114</sup>

In *Lardner*, four years later, the Court of Appeals left open even less possibility of a plaintiff's judgment on retrial. In reversing the jury verdict on grounds of perceived evidentiary errors, the

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<sup>112</sup> *Loew's, Inc. v. Cole*, 185 F.2d 641, 645 (9th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951); *see also Young v. Motion Picture Ass'n of America, Inc.*, 299 F.2d 119 (D.C. Cir. 1962) (affirming denial of preliminary injunction under antitrust laws to restrain blacklisting), *cert. denied*, 370 U.S. 922 (1962); *Independent Productions Corp. v. Loew's, Inc.*, 283 F.2d 730 (2nd Cir. 1960) (reversing dismissal of antitrust suit by blacklisted producers of *Salt of the Earth* alleging industry-wide boycott of the film); *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87 (9th Cir. 1956) (breach of contract), *cert. denied*, 353 U.S. 939 (1957); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954) (same), *cert. denied*, 348 U.S. 944 (1955); *Wilson v. Loew's, Inc.*, 142 Cal. App. 2d 183, 298 P.2d 152 (1956) (affirming dismissal of suit by 23 blacklisted artists for malicious interference with employment), *cert. dismissed*, 355 U.S. 597 (1958); *RKO Radio Pictures, Inc. v. Jarrico*, 128 Cal. App. 2d 172, 274 P.2d 928 (1954) (declaratory judgment action by employer seeking to deprive writer of screen credit), *cert. denied*, 349 U.S. 928 (1955). A 1965 student note reports that none of these suits generated helpful precedents, though some cases settled out of court. Note, *Political Blacklisting*, *supra* note 95, at 569 n.8.

<sup>113</sup> *Loew's, Inc. v. Cole*, 185 F.2d 641, 658-62 (9th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951).

<sup>114</sup> *Id.* at 649. The Ninth Circuit's speculation was ironic in view of the jury's specific finding that Cole's conduct did not violate the "morals" clause in his contract.

court essentially ruled as a matter of law that the company was within its rights under the morals clause in cancelling the contract after Lardner had refused to answer HUAC's questions.<sup>115</sup>

In *Scott*, a jury again found for the plaintiff but the trial court, having apparently received the Ninth Circuit's message in *Cole* and *Lardner*, granted a new trial on the ground that the verdict was against the weight of the evidence.<sup>116</sup> The judge then ruled for the company, and the Court of Appeals affirmed without analysis on the authority of *Lardner*, noting however that Scott's "frontal attack on our previous two cases, particularly Lardner's . . . is done with some persuasiveness."<sup>117</sup>

In *Redgrave* some thirty years later, the BSO's reliance on language in its contract permitting it to cancel because of "circumstances beyond its reasonable control"<sup>118</sup> was reminiscent of the morals clause defenses of blacklist-era cases like *Cole*, *Scott*, and *Lardner*. Like the juries in those earlier suits, the *Redgrave* jury rejected the defense,<sup>119</sup> and the BSO did not press this point on

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<sup>115</sup> *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9th Cir. 1954), *cert. denied*, 348 U.S. 944 (1955). The judgment for Lardner was reversed because the appellate court reasoned that: (1) Lardner's testimony that Fox manager Darryl Zannuck had said "he was not interested in a man's politics" was improperly admitted; (2) evidence of Lardner's conviction for contempt of Congress was improperly excluded; and (3) the trial court's instruction on "moral turpitude" was too narrow. *Id.* at 849, 850, 852.

<sup>116</sup> *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 88 (9th Cir. 1956), *cert. denied*, 353 U.S. 939 (1957).

<sup>117</sup> *Id.* at 91. See also *RKO Radio Pictures, Inc. v. Jarrico*, 128 Cal. App. 2d at 174-75, 274 P.2d at 929-30 (affirming judgment that writer "had become an object of public disgrace and ill will"; rejecting argument that "[t]he assertion of a constitutional right cannot be in violation of public conventions and morals"). On the cases of this era generally, see Note, *Political Black Listing*, *supra* note 95, at 270-71, 272, 275; Note, *Loyalty and Private Employment*, *supra* note 95 at 958-82.

Even a California statute specifically forbidding employers from "[c]ontrolling or directing or tending to control or direct the political activities or affiliations of employees," did not help: the California Supreme Court ruled in 1946 that the law did not address discharges where the employee's "loyalty to the United States has not been established to the satisfaction of the employer." *Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 485, 171 P.2d 21, 24 (1946). Although the *Lockheed* holding rejected the company's constitutional attack on the statute in the context of a suit by former employees, this dicta, by bestowing on employers broad permission to discharge based on subjective suspicions of "disloyalty," essentially eliminated the statute as a protection for blacklisted workers. See *Wilson v. Loew's, Inc.* 142 Cal. App. 2d at 189, 298 P.2d at 157 (citing *Lockheed* for proposition that "political" activity implies "orderly conduct of government, not revolution"). Numerous other state and federal laws, including the National Labor Relations Act, provided potential sources of legal protection for victims of blacklisting, but, although occasionally helpful in the pre-McCarthy period, were by the early 1950's rendered virtually useless by the courts. See Note, *Loyalty and Private Employment*, *supra* note 95, at 975-79.

<sup>118</sup> See *supra* note 51 and accompanying text.

<sup>119</sup> The jury did so by answering "no" to a special question on this point. Verdict form, *supra* note 65, at question 3.

appeal. One might thus argue that *Redgrave* demonstrates progress in the law of breach of contract, and an advance over the ideological result-orientation of the blacklist era contract decisions. But the appellate courts' eventual affection for the BSO's artistic integrity defense<sup>120</sup> arguably resurrected the morals clause as a matter of constitutional law. That is, in both situations courts seemed willing to defer to managerial judgments that artists were unacceptable because their political views tended "to shock, insult or offend the community."

This is not to say that purveyors of blacklists or boycotts should never have a defense to liability: the Supreme Court has created first amendment breathing space for those who advocate boycotts as a political weapon.<sup>121</sup> In the *Redgrave* case, ironically, it was precisely because the BSO disclaimed any political motivation that the first amendment rights of those who advocate blacklisting should not have had to be balanced against the actress's own constitutional liberties.<sup>122</sup>

The BSO nevertheless invoked the first amendment to its advantage. Without responding to the specific charge of blacklisting, the BSO's brief to the First Circuit asserted its own constitutional right of "artistic choice and expression."<sup>123</sup>

Just as a theater is protected in choosing to stage certain productions, it has the same protection when choosing not

<sup>120</sup> See *infra* notes 123–25, 131–36, 191–229 and accompanying text.

<sup>121</sup> See *NAACP v. Claiborne Hardware, Inc.*, 458 U.S. 886, 927 (1982); *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 906 (1st Cir. 1988), *cert. denied* 109 S.Ct. 869 (1989); cf. *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (construing antitrust law to exclude petitioning for legislation, in light of first amendment implications).

The American Jewish Congress argued in *amicus* briefs to both the First Circuit and the Massachusetts Supreme Judicial Court that the first amendment protects even coercive and intimidating advocacy of economic boycotts for political purposes, "so long as the means are peaceful." Brief *Amicus Curiae* of American Jewish Congress, *Redgrave v. Boston Symphony Orchestra, Inc.*, No. SJC-4089, at 3–6 (undated); No. 85–1305, 85–1341 (the BSO's cross-appeal on the issue of consequential contract damages) at 3–6 (1st Cir. April 22, 1985). Of course, direct threats or blacklist advocacy were not in controversy on the *Redgrave* appeal; her "John Doe" and "Richard Roe" claims had been dismissed before trial. See *supra* note 57 and accompanying text.

<sup>122</sup> But see *infra* notes 192–207 and accompanying text, discussing the First Circuit's contrary intimation. In a defamation case often said to have broken the blacklist, the defendants unsuccessfully raised a first amendment defense. *Faulk v. Aware, Inc.*, 14 N.Y.2d 899, 252 N.Y.S.2d 95, 200 N.E.2d 778 (1964) (reducing \$3.5 million verdict to \$550,000), *cert. denied*, 380 U.S. 916 (1965). For Faulk's account of the case, see J.H. FAULK, *supra* note 95; for his attorney's, see L. NIZER, *THE JURY RETURNS* 225–438 (1966).

<sup>123</sup> Brief of Appellee Boston Symphony Orchestra at 16, *Redgrave v. Boston Symphony Orchestra, Inc.*, Nos. 85–1305, 85–1341, at 16 (1st Cir. July 30, 1985).

to stage a production . . . . [T]he District Court and jury found that when the Symphony cancelled the *Oedipus Rex* concerts it did so for artistic, not political, reasons . . . . [T]his critical factual finding . . . not only defeats plaintiffs' state civil rights act claim, but . . . defeats their claim for consequential damages as well.<sup>124</sup>

This contention had not figured at trial. Judge Keeton gave no instructions to the jury on the first amendment "right not to speak" as a defense to MCRA liability.<sup>125</sup> But the argument caught the appellate imagination, and in the end was pivotal to the BSO's success. The appellate courts, in general, were more responsive to the BSO's "right not to speak" than to the cautionary history and economic devastation of political blacklisting.

## V. THE RIGHT NOT TO SPEAK

The seven justices of the Massachusetts Supreme Judicial Court shared First Circuit Judge Coffin's disquiet over the implications of applying the Massachusetts Civil Rights Act to the Boston Symphony Orchestra's cancellation of the *Oedipus Rex* concerts.<sup>126</sup> But they could not agree on a rationale, and five of them opposed either reading a specific intent requirement into the Act, or relieving a defendant of liability where he or she had acquiesced in discriminatory pressures from others.<sup>127</sup>

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<sup>124</sup> *Id.* at 18 (citing *Wooley v. Maynard*, 430 U.S. 705, 762 (1977) (first amendment right to refrain from speaking)). Actually, the jury stated in its post-verdict letter that it believed the BSO fired Redgrave for political, not artistic reasons. See *supra* note 68 and accompanying text. Its responses to the special verdict questions merely indicated that it did not find that the BSO shared the politically retaliatory motivation of the third parties who exerted pressure. See *supra* notes 65-67 and accompanying text.

<sup>125</sup> The BSO made passing mention of such a defense in its motions to dismiss and for summary judgment. In denying the motion to dismiss the MCRA count (see *supra* notes 59-60 and accompanying text), the judge did not address this point; and in denying the summary judgment, he simply noted: "The extent to which a broad interpretation of the statute could interfere with the BSO's First Amendment rights to make artistic judgments may depend on whether the factfinder decides that the cancellation of the concerts was at least in part for artistic reasons." Memorandum and order at 9 (Aug. 28, 1984), *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189 (D. Mass. 1985) (C.A. No. 82-3193-K).

<sup>126</sup> See *supra* notes 73-77 (Judge Coffin's certification order); 61-66 (discussion of trial court rulings that the MCRA did not apply if the BSO was simply acquiescing in the politically retaliatory demands of outsiders) and accompanying text.

<sup>127</sup> Two justices, Neil Lynch and Francis O'Connor, would have imposed these heightened state-of-mind requirements and thus answered the first certified question "no" and the second, "yes." *Redgrave v. Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 106, 502 N.E.2d 1375, 1382 (1987) (dissenting opinion).

The result was a certification nightmare. Instead of unequivocal and unanimous answers to the questions that were plaguing the federal court of appeals, the SJC produced three separate, idiosyncratic opinions.

Strictly answering the certified questions, five justices (three in a plurality opinion, and two concurring) agreed that the MCRA does prohibit interference with the secured right of another even if, in the words of certified question 1, "the defendant had no personal desire to interfere with the rights of that person but acquiesced to pressure from third parties who did wish to interfere with such rights."<sup>128</sup> As Chief Justice Edward Hennessey wrote for the plurality of three,

[m]aking an exemption for civil rights deprivations resulting from third-party pressure "would reward and encourage" the very conduct which the substantive statutes prohibit. . . . Whether the issue is phrased in terms of the existence of a specific intent requirement . . . or a third-party pressure exemption . . . , recognizing such an exemption would tend to eviscerate the statute and defeat the legislative policies behind [it]. . . . Thus, to be effective, the provisions of §§ 11H and 11I must apply to any threatening, intimidating, or coercive behavior regardless of whether the defendant specifically intended to interfere with a right to which the plaintiff is entitled.<sup>129</sup>

Similarly, the plurality ruled that "[a]n abstract proposition, fear of business disruption, fear for economic loss, or fear for physical safety are not justifications under §§ 11H and 11I . . . . Fear that the prejudice of third-party actors may lead to a breach of the peace has . . . been rejected as a justification for deprivations of civil rights."<sup>130</sup> The SJC thus answered the second question "no."

Before announcing these conclusions, however, the plurality engaged in an unusually convoluted hypothetical discussion. From the premise that the BSO had a right to perform or not, the Chief Justice wrote:

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<sup>128</sup> See *supra* note 75 and accompanying text for text of the two questions certified by the First Circuit to the SJC.

<sup>129</sup> 399 Mass. at 100, 502 N.E.2d at 1379 (quoting *Sarni Original Dry Cleaners, Inc. v. Cooke*, 388 Mass. 611, 618 n.7, 447 N.E.2d 1228, 1233 n.7 (1983)). *Sarni* involved the unlawful firing of a black truckdriver, allegedly in acquiescence to neighborhood hostility.

<sup>130</sup> *Id.* at 101, 502 N.E.2d at 1379-80, (citing *Sarni*, 388 Mass 611, 447 N.E.2d 1228 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Buchanan v. Warley*, 245 U.S. 60, 81 (1917)).



[I]t can be argued that the BSO's secured rights were interfered with [by the protesters], and that it was not within the legislative intent that anyone should be punished under c. 12 for exercising the constitutional right not to speak (i.e. perform). It can also be argued that when a private person decides not to speak and has no duty to do so, it would be unconstitutional to require that person to speak or, contractual obligations aside, to punish him civilly for not speaking.

The foregoing arguments can be focused on both of the certified questions. It can be offered that a person exercising constitutional rights who interferes with another's constitutional rights is not (Question 1) "interfering with the rights of another person by 'threats, intimidation, or coercion,'" within the meaning of G.L. c. 12, §§ 11H and 11I. It can be further offered by way of defense to an action under §§ 11H and 11I (Question 2) that the defendant was motivated by the "additional concern" of the artistic integrity of its production; this motivation is within the defendant's free speech rights; and that this independent motivation, if established, is a complete defense to the action. . . .

We have not considered any of the above arguments or issues in answering the two certified questions. We treat the questions as addressed to a typical action under the Massachusetts Civil Rights Act, which does not concern a defendant who is exercising a free speech or other constitutional right in interfering with the secured rights of another. In short, we answer the two questions as they are worded.<sup>131</sup>

This was an unusual way for a state court to communicate its dissatisfaction with the wording of certified questions or its views on other questions, not asked but related to the disposition of the case. The three-justice plurality clearly did not like the theory that Judge Keeton had chosen to foreclose MCRA liability. Its devastating effect in civil rights litigation involving customer preference or other forms of acquiescence was obvious. But the judges need not have been coy: state courts following certification procedures sometimes squarely express views beyond those encompassed by the certified questions, and federal courts usually welcome the added

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<sup>131</sup> 399 Mass. at 97, 502 N.E.2d at 1377.

advice.<sup>132</sup> That the three-judge plurality couched its thoughts in such speculative syntax may have been a function of the federal (first amendment) basis of the defense to which it seemed hospitable. That is, the judges assumed that the First Circuit could and would deal with the federal constitutional issue on its own.

Two other SJC justices, however, explicitly addressed the BSO's free speech defense. Although agreeing with the plurality's interpretation of the MCRA generally in acquiescence situations, Justices Herbert Wilkins and Ruth Abrams announced that in their view article 16<sup>133</sup> of the state constitution absolved the BSO of liability. Justice Wilkins wrote:

I have been unable to think of any theory under which, in the circumstances, statutory liability may properly be imposed on the BSO in the face of its State constitutional right to determine what artistic performances it will or will not perform. Redgrave's constitutional rights are no greater than those of the BSO, and there was no way in which the interests of each could be accommodated.<sup>134</sup>

Justices Wilkins and Abrams here seemed to be assuming a fact that was much in dispute at trial: that the BSO cancelled because it reasonably feared disruption would change the quality of its performances. It was true the the aesthetic dispute between Seiji Ozawa and Peter Sellars had proceeded on the assumption that some form of disruption was sufficiently likely that police would have to be lining the aisles of Symphony Hall. But the jury believed that the BSO cancelled simply in response to political pressure and fear of

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<sup>132</sup> See, e.g., *St. Paul Fire & Marine Ins. Co. v. Caguas Fed. Sav. & Loan Ass'n*, 825 F.2d 536, 537 (1st Cir. 1986) (certifying questions and "welcom[ing] the advice of the [Puerto Rico Supreme C]ourt on any other question of Puerto Rican law material to this case on which it would like to comment"); *Tarr v. Manchester Ins. Co.*, 544 F.2d 14 (1st Cir. 1976) (state court's answer to question not certified proved dispositive); *Martinez v. Rodriguez*, 394 F.2d 156, 159 n.6 (5th Cir. 1968) (state court may restate issues in answering certified questions); *Corr & Robbins, Interjurisdictional Certification and Choice of Law*, 41 *VAND. L. REV.* 411, 426-27 (1988) ("the answering court must have the power to reformulate the questions posed . . . . Indeed, the ability of the answering court to reshape or add to the issues is necessary to further the goals of certification."). See generally 17 *C.A. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE* § 4248, at 531-32 (1978).

<sup>133</sup> Article 16 of the Massachusetts Constitution, Declaration of Rights, reads in pertinent part: "The right of free speech shall not be abridged."

<sup>134</sup> 399 *Mass.* at 102, 502 *N.E.2d* at 1380. The dissenters asserted in dicta that the case presented "serious constitutional questions stemming from the BSO's constitutional right not to speak," questions that would disappear if the statute were construed in the manner they advocated. *Id.* at 106, 502 *N.E.2d* at 1382.

lost income.<sup>135</sup> And the only actual threat of disruption — from a former member of the Jewish Defense League — was probably received after the management had made and publicly announced its decision.<sup>136</sup> On these facts, it was not clear why the BSO's conduct was an exercise of its right not to speak, rather than simply a politically-inspired contract cancellation. *Oedipus Rex* arguably was not cancelled because the BSO changed its artistic mind but because the management wanted to fire Redgrave, and Peter Sellars would not go forward without her.

The case returned to the First Circuit. The issue of a first amendment "right not to speak" was now squarely presented — and vigorously argued. Redgrave's counsel asserted that it would turn both the MCRA and the first amendment upside down to discern a constitutional right in the Orchestra's decision to cave in to third party pressure to fire Redgrave. It was the *actress's* political expression, after all, that caused the controversy. The BSO had, to be sure, exercised its free speech rights in deciding to stage *Oedipus Rex* and *Symphony of Psalms*. Its cancellation of that choice was no more constitutionally protected for purposes of the MCRA than it was for purposes of the plaintiff's breach of contract claim. And no one was arguing that the first amendment, or article 16, relieved the BSO of contract liability.<sup>137</sup>

The First Circuit panel announced its decision on October 14, 1987, three years after the *Redgrave* trial. The court agreed that the SJC, in answering the certified questions of state law, had rejected the trial court's imposition of heightened state-of-mind requirements under the MCRA. But the three federal judges — Frank Coffin, Hugh Bownes and Bruce Selya — disagreed on the BSO's first amendment defense.

Judge Bownes, writing the majority decision on this issue for himself and Judge Selya, rejected the "right not to speak" argument. "If the state or local government were attempting to dictate to the BSO how *Oedipus Rex* should be performed, there might well be a

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<sup>135</sup> See *supra* note 68 and accompanying text (jury's post-verdict letter to Judge Keeton).

<sup>136</sup> See *supra* note 35 for a discussion of the timing and substance of this call.

<sup>137</sup> By contrast, film studios and others during the McCarthy Era frequently did escape contract liability on the basis of explicit or implied "morals" clauses, or judicial inferences that purging the workplace of "subversives" was a "reasonable" condition of employment. See *supra* notes 112–18 and accompanying text; Horowitz, *Political Black Listing*, *supra* note 95, at 263–78. Similarly, the BSO argued that language in the contract entitled it to cancel because of "circumstances beyond its reasonable control." See *supra* notes 51, 118 and accompanying text.

first amendment violation," he wrote. "But that is not the case before us."<sup>138</sup> Judge Bownes continued:

No precedent has been cited by the BSO for extending first amendment protection to artistic integrity in this context, and we have been unable to find any. Although we can understand why the BSO would want its performance to be free from audience interruption, we hold as a matter of law that the first amendment is not implicated . . . .

The Supreme Judicial Court has held unequivocally that acquiescence to outside pressure is one of the harms that the MCRA was designed to prevent. . . . Allowing the defense of artistic integrity would withdraw the protection of the MCRA from artists, such as Redgrave, who openly espouse unpopular political views. The effect would be to give free rein to those seeking to intimidate artists engaging in political activity.<sup>139</sup>

Judge Coffin dissented ardently from the panel majority's reasoning. For him, penalizing the BSO for a decision not to perform *was* the equivalent of a government order *to* perform *Oedipus Rex* in a particular way, the way that Sellars had advocated and Ozawa had rejected:

The BSO does not claim a "right" against the audience that would require it to be silent; nor does it claim a right against the state to require that the audience be kept silent. The BSO's claim is, rather, that the state *is* "attempting to dictate how *Oedipus Rex* should be performed." It is that, in a dispute between private parties, the state is putting not only a thumb, but a fist, on the scales.<sup>140</sup>

This was a powerful argument, but Judge Coffin did not explain how it was consistent with the BSO's clear liability for breach of contract and, as the panel also unanimously held, for consequential contract damages.<sup>141</sup> Nor did Judge Coffin say whether a court that imposed MCRA damages liability where an organization cancelled a performance, or fired a performer, in response to racist or

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<sup>138</sup> *Redgrave v. Boston Symphony Orchestra, Inc.*, Nos. 85-1305, 85-1341 (1st Cir. Oct. 14, 1987) slip op. at 39 (panel decision), *withdrawn and superseded by* 855 F.2d 888 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 869 (1989).

<sup>139</sup> *Id.* at 40, 42.

<sup>140</sup> *Id.* at 48 (Coffin, J., dissenting) (emphasis in original).

<sup>141</sup> *Id.* at 12-17. The First Circuit on rehearing adhered to the panel's conclusion on this point. 855 F.2d at 894-96 (rejecting Judge Keeton's theory that the first amendment barred consequential contract damages). See *supra* note 71 and accompanying text.

anti-Semitic pressures, would also be "attempting to dictate" how a work should be performed.

Arguably, the common law has dealt with this dilemma by imposing a general rule against specific performance as a remedy in personal service contract cases.<sup>142</sup> A direct judicial order to perform *Oedipus Rex* or anything else is, obviously, constitutionally discomfiting as well as pragmatically awkward. But a contract, once breached, triggers a legal obligation to compensate the injured party. It does not seem such a long jump to require compensation for the injury to civil rights as well.<sup>143</sup> In any event, this was the debate that occupied the Boston legal community as the First Circuit entertained, and then granted, the BSO's petition for rehearing en banc.

The debate was without much legal precedent to inform it. The cases relied upon by the BSO, by Judge Coffin's dissent, and by the Boston Ballet and a number of universities that filed *amicus* briefs at the rehearing stage, all had to do with governmental efforts to force individuals or private corporations to articulate a message with which they disagreed, or to penalize them for refusing to do so.<sup>144</sup> It was bit of a stretch to apply this precedent to the issue of

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<sup>142</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981); *Loeb v. Textron*, 600 F.2d 1003, 1023 n.34 (1st Cir. 1979); MASS. GEN. L. ch. 214, § 1A (1986). Judge Keeton, following this rule, had granted the BSO's motion to dismiss Redgrave's claim for specific performance back in 1983. *Redgrave v. Boston Symphony Orchestra, Inc.*, 557 F. Supp. 230, 234-35 (D. Mass. 1983).

<sup>143</sup> Unquestionably, different remedies for a violation of law may raise different constitutional problems. In *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), for example, the justices differed over which remedies were most appropriate, and least constitutionally problematic, for Snepp's breach of a contract permitting the CIA to review and censor any writing he might wish to publish. The majority saw no constitutional problem with a constructive trust remedy for Snepp's violation of a fiduciary duty. *Id.* at 514-17. The dissenters disagreed on the constitutional point and thought punitive tort damages "the preferable remedy." *Id.* at 520-22, 523, 526 (Stevens, J., dissenting).

In *Redgrave*, no such problematic remedies were in dispute; by the time the case reached trial, the plaintiff sought only money damages. The battle over MCRA liability was thus largely one of principle, for it was unclear what, if any, damages Redgrave could collect for interference with her constitutional rights beyond what the jury had already given her for breach of contract. Of course, the MCRA does entitle a prevailing party to an award of attorney's fees, no small matter given the duration of the case and the high-powered legal talent involved. MASS. GEN. L. ch. 12, § 111 (1988).

<sup>144</sup> This line of cases starts with the landmark *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (school board cannot constitutionally force children who object on religious grounds to pledge allegiance to the flag), and continues through *Wooley v. Maynard*, 430 U.S. 705 (1977) (applying essentially the same analysis to statute punishing individuals who covered the phrase "Live Free or Die" on their license plates because they objected to the political message). See also *Pacific Gas & Electric Co. v. Public Utilities Comm'n*,

possible disruption or police presence during *Oedipus Rex*. Such possibilities were arguably collateral or incidental to the message of the music as the BSO intended to express it.

Thus, as the Supreme Court had held in *Abood v. Detroit Board of Education*,<sup>145</sup> a union could not use mandatory fees to subsidize its ideological speech but could, consistently with the first amendment, use the fees for speech incidental to its collective bargaining role.<sup>146</sup> In *Pacific Gas & Electric Company v. Public Utilities Commission*,<sup>147</sup> the Court distinguished impermissible state coercion to spread a particular message (in the form of inserts in utility bill envelopes) from constitutional conduct that might incidentally affect speech, such as requirements that businesses publish certain legal notices.<sup>148</sup> In *Wooley v. Maynard*,<sup>149</sup> where the Court struck down New Hampshire's requirement that its automobile-owning residents sport the "Live Free or Die" slogan on their license plates, it nevertheless acknowledged that citizens may be required to carry documents bearing state seals or mottos; these intrusions were simply too minor to amount to forced speech.<sup>150</sup> And in *Prune Yard Shopping Center v. Robins*,<sup>151</sup> the Court rejected an argument by mall owners that California's rule requiring them to permit leafletting on their premises violated the first amendment. Observers, said the Court, were not likely to confuse the leafletters' messages with owners', and the owners were not being compelled to affirm their belief in "any governmentally-prescribed position or view."<sup>152</sup>

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475 U.S. 1 (1986) (plurality opinion) (state may not force corporation to include a message with which it disagrees in its billing envelopes); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (union may not use mandatory dues for political expression with which some members may disagree); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (government cannot force private newspaper to publish opposing views).

<sup>145</sup> 431 U.S. 209 (1977).

<sup>146</sup> *Id.* at 222.

<sup>147</sup> 475 U.S. 1 (1986).

<sup>148</sup> *Id.* at 15-16 n.12 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)). In *Zauderer*, the Court upheld a state bar requirement that attorneys' advertisements disclose client responsibility for costs in the event a suit fails. The Court distinguished *Barnette* and its progeny on the ground that "the interests at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio has not attempted to 'prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.'" *Id.* (quoting *Barnette*, 319 U.S. at 642).

<sup>149</sup> 430 U.S. 705 (1977).

<sup>150</sup> *Id.* at 715 n.11.

<sup>151</sup> 447 U.S. 74 (1980).

<sup>152</sup> *Id.* at 87-88. To the extent there was an issue in *Redgrave* of the public's interpreting the actress' appearance as an endorsement by the BSO of her views, presumably a disclaimer by the Orchestra could have set the record straight.

At best then, the BSO's first amendment defense was attenuated in comparison to the forced speech claims that the Supreme Court had recognized.<sup>153</sup>

Moreover, the "right not to speak" argument raised numerous questions that the record in *Redgrave* did not fully answer. For one thing, how was a court to determine what facts were necessary to trigger a forced-speech defense? Would the defendant have to show an objectively reasonable fear of disruption, or would any speculative, or subjectively good-faith fear, be enough?<sup>154</sup> How serious or "core" to the style or message of the cancelled performance would the threatened disruption have to be before the defense came into play? Should there be a balancing test, as is common throughout constitutional law, where free speech rights exist on both sides of the equation, or where, perhaps, a plaintiff claims race discrimination and the first amendment defense is a reasonable fear of performance disruption by racists? Courts have performed such

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<sup>153</sup> Interestingly, no party or court in *Redgrave* cited the factually similar case of *Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983). *Muir* arose after political and financial pressures persuaded a number of public television stations to cancel scheduled showings of the controversial "Death of a Princess" program. Plaintiffs, members of the viewing public, sought injunctions requiring that the program be shown. The Fifth Circuit, over seven dissents, held that cancellation did not violate the plaintiffs' first amendment rights, and that although the government-managed stations did not have first amendment rights of their own, they did have a statutory right to exercise editorial judgment commensurate with the rights of private broadcasters. *Id.* at 1038-41, 1041-48. Because the court found the plaintiffs had no constitutional claim, it did not reach the issue of conflicting free speech rights perceived in *Redgrave*. But its approach suggested that the broadcasters' rights in such a situation might well outweigh the plaintiffs'. *Id.*; cf. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 572-74 (1975) (Rehnquist, J., dissenting) (contesting majority's conclusion that municipal theater was a public forum and that, therefore, municipality could not discriminate on the basis of productions' content; that "element of it which is 'theater' ought to be accorded some constitutional recognition along with that element of it which is 'municipal.'").

<sup>154</sup> The evidence suggested that the BSO had received no actual threats of disruption when the management determined to "throw [Redgrave] overboard" or when, after she declined to withdraw and Sellars would not continue without her, it decided to cancel the entire Stravinsky program. See *supra* note 35 and accompanying text.

The SJC did not have the full record before it on certification in *Redgrave*, but it did have five hefty volumes of Record Appendix. The SJC opinions do not reveal whether anyone on the state court side culled this material; the First Circuit order contained a brief and equivocal fact summary simply stating: "BSO agents testified that the performances were cancelled because it was felt that potential disruptions, which BSO agents perceived as quite possible given the community reaction, would implicate the physical safety of the audience and players and would jeopardize the artistic integrity of the production." Certification, *supra* note 75, at 2 (emphasis added). Compare Uniform Certification of Questions of Law Act, § 3, 12 U.L.A. 53 (1967)("[a] certification order shall set forth: . . . (2) a statement of all facts relevant to the questions certified . . .").

balancing in numerous cases involving civil rights enforcement where defendants claim exemption based on free speech, free association, or free exercise of religion.<sup>155</sup> Given these precedents, it was hardly a foregone conclusion that a private actor accused of interfering with civil rights would prevail under a constitutional balancing test.

In February 1988, four months after the First Circuit panel ruled for Redgrave, *The New York Times* reported that the Pepsico Summerfare festival had cancelled a British National Theater production of a Soviet play in which Vanessa Redgrave was to appear. Christopher Hunt, director of Summerfare, had said that budget considerations, not Redgrave's participation, accounted for his decision, though he acknowledged expressing "concerns" about Redgrave shortly before cancelling the show.<sup>156</sup>

It turned out that Hunt had raised the issue of Redgrave's appearance with none other than Peter Sellars, who was to stage his innovative production of *The Marriage of Figaro* during the same summer festival. "Obviously, Chris knows how I feel," the *Times* quoted Sellars. "He knows I testified in the Boston Symphony trial and that I think this is a totally unacceptable thing to do." Hunt rejoined that he had cancelled because of "budget constraints, lack of a suitable site, questions about security, and a threat to block the production from a source he refused to identify."<sup>157</sup>

A skeptic might have viewed Mr. Hunt's articulation of apparently legitimate reasons for his cancellation of the Russian play as a prudent response to the U.S. Court of Appeals' October 1987 decision in Redgrave's favor on her civil rights claim. If cancelling

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<sup>155</sup> E.g., *New York State Club Ass'n v. City of New York*, 487 U.S. —, 108 S. Ct. 2225, 2233-34 (1988) (sex discrimination by private clubs — freedom of association defense rejected); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 544-49 (1987) (sex discrimination by private clubs — free speech and association defense rejected); *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 617, 628 (1986) (state agency investigation of sex discrimination and retaliation complaints — freedom of religion defense held not sufficient to bar investigation); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 639-53 (1985) (regulation of certain forms of attorney advertising — free speech defense rejected in some particulars and upheld in others); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (sex discrimination by private business organization — free speech and association defense rejected); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (sex discrimination in partnership decision — free association defense rejected); *Runyon v. McCrary*, 427 U.S. 160, 175-79 (1976) (race discrimination by private school — free association and parental rights defenses rejected).

<sup>156</sup> Gerard, *Summerfare Drops Play with Redgrave*, *The New York Times*, Feb. 25, 1988, at C23, col. 1.

<sup>157</sup> *Id.*



a performance because an artist's politics are perceived to be unpalatable is illegal in Massachusetts, perhaps it is best to be circumspect about one's motives even in New York. If so, Hunt's prudence was unnecessary, for the First Circuit reversed itself ten months later.

## VI. "COMITY RUN AMOK"

Contrary to expectations, the First Circuit's en banc decision, released on August 31, 1988, did not turn on the BSO's first amendment defense. Instead, despite lengthy dicta sympathetically discussing the "right not to speak," the three-judge majority<sup>158</sup> affirmed the district court's ruling against Redgrave on a theory of comity and federalism.

After scrupulously reviewing the three separate opinions of the Massachusetts Supreme Judicial Court in response to the two certified questions of law under the MCRA,<sup>159</sup> Judge Coffin, writing for the majority, drew the obvious conclusion: "[t]here are at least four votes on the SJC denying liability on state law grounds."<sup>160</sup> Those votes consisted of the two dissenting justices, who would have answered the certified questions favorably to the BSO, and the two concurring justices, whose answers to the certified questions favored Redgrave, but who argued that article 16, the free speech provision of the Massachusetts Constitution, afforded the Symphony a complete defense.<sup>161</sup> Following principles of comity, the First Circuit majority then concluded that because it had to defer to the state high court's views on state law, and because a majority of that court had ruled, albeit on different rationales, that, "as a matter of Massachusetts law, the BSO may not in these circumstances be held liable under the MCRA,"<sup>162</sup> it must rule for the BSO as well.

If the First Circuit majority had stopped here, its reasoning would have had considerable surface plausibility, for indeed the SJC opinions suggested that four and possibly all seven justices were

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<sup>158</sup> Judge Frank Coffin, who had dissented from the panel decision of October 1987, wrote the majority opinion. He was joined by Judges Juan Torruella and Stephen Breyer. Hugh Bownes and Bruce Selya dissented. Chief Judge Levin Campbell did not participate.

<sup>159</sup> See *supra* note 75 and accompanying text.

<sup>160</sup> *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 909 (1st Cir. 1988), cert. denied, 109 S. Ct. 869 (1989).

<sup>161</sup> See *supra* notes 133-34 and accompanying text; *Redgrave v. Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 101, 502 N.E.2d 1375, 1380 (1987) (Wilkins and Abrams, JJ, concurring); *id.* at 105, 502 N.E.2d at 1382 (Lynch and O'Connor, JJ, dissenting).

<sup>162</sup> *Redgrave*, 855 F.2d at 903.

hostile to Redgrave's MCRA claim. But on reflection, it is not true that a federal court, following a certification procedure, must or even should adopt the result in a particular case that a majority of the state court apparently would have reached, had the case been litigated in the state system. Certification is not *Pullman* abstention;<sup>163</sup> and as Judge Bownes, now dissenting from the en banc decision in *Redgrave* pointed out,

It is true . . . [that] had this exact case arisen in the Massachusetts state courts and proceeded in its present form to the SJC the BSO would not have been subjected to liability, by virtue of the somewhat unusual combined effect of *two* minority positions. But that possibility is simply irrelevant to the issues here, because this case did not arise in the state courts, it arose in the federal courts. As a federal court sitting in a diversity case, our task is to apply the substantive law of Massachusetts on any given state law question, not to predict what quirky result might obtain in the state courts because a particular case contains multiple state law issues . . . .

In its eagerness to "defer" to the SJC, the majority of this court has confused the procedure of certifying questions of state law to a state court with the procedure of certifying entire cases to state courts. Federal courts do not certify cases to state courts. They certify questions of law and then apply the answers to those questions to reach a result which represents the combined effect of majority, not minority, positions.<sup>164</sup>

Perhaps prodded by these dissenting remarks, Judge Coffin, writing for the majority, went on to press a second, much more complicated, and ultimately less persuasive, comity-based ground for decision. Proceeding from the simple and superficially persua-

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<sup>163</sup> This is the venerable if dubious doctrine deriving from Justice Frankfurter's opinion in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and generally obliging federal courts to stay or dismiss constitutional cases that involve complex and undecided questions of state law whose resolution may obviate the need for reaching a federal constitutional issue. In instances of *Pullman* abstention, a new lawsuit must be filed in state court and the state court's resolution of any issues not explicitly reserved for later decision on the federal side are ordinarily binding. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). Certification, developed in part to ease the rigors and avoid the delays of *Pullman* abstention, is quite a different animal procedurally. The federal court does not dismiss the case, and only stays proceedings until the state court responds. See generally 17 C.A. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 4248 (1978). The case remains, and judgment enters, in the federal court on all claims.

<sup>164</sup> 855 F.2d at 914 (Bownes and Selya, JJ, concurring in part and dissenting in part).

sive fact that at least four SJC justices would have ruled, for differing reasons, against Redgrave on the MCRA count, Judge Coffin now embarked on an investigation of the SJC justices' views on the "forced speech" defense. He concluded that here too, a majority and indeed probably all of the state high court would have embraced the defense as a matter of state constitutional law.<sup>165</sup> On its face, as well as in operation, this proposition was difficult to establish, for only two of the seven SJC justices had said anything about article 16 of the Massachusetts Declaration of Rights, the state analog to the first amendment.<sup>166</sup> The three SJC justices in the plurality engaged in tentative speculations (not properly even dicta) about the BSO's "right not to speak (i.e., perform)";<sup>167</sup> and the dissenters, in passing, mentioned only "serious constitutional questions stemming from the BSO's constitutional right not to speak . . ."<sup>168</sup>

In forging these disparate comments by the SJC into a firm conclusion about the state court's view of a possible state constitutional defense, Judge Coffin began by acknowledging that the comments were dicta. But he said,

they are so deliberate, so unanimously expressed, and involve such a basic proposition, that we feel constrained to listen carefully . . . We think it pointless to turn a deaf ear to all but the direct responses to formal questions where, as here, other important issues clearly are implicated. To do so would be to elevate form over substance, to ignore a helpful opportunity to interpret state law correctly, and to demean the principles of comity and federalism.<sup>169</sup>

Judge Bownes, in dissent, vehemently attacked this reasoning. Its effect, in his view, was that "the majority allows a state court to bar Redgrave from recovering on essentially first amendment grounds without any independent review by a federal court."<sup>170</sup> This was so, Judge Bownes contended, for two reasons. First, and

<sup>165</sup> 855 F.2d at 909. If the state justices had embraced the defense as a matter of federal (first amendment) law, of course the First Circuit could not have deferred to their view but would have had to reach its own conclusion. Cf. *Harris v. Reed*, 109 S. Ct. 1038 (1989); *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983).

<sup>166</sup> *Redgrave v. BSO*, 399 Mass. at 102, 502 N.E.2d at 1380.

<sup>167</sup> *Id.* at 97, 502 N.E.2d at 1377.

<sup>168</sup> *Id.* at 106, 502 N.E.2d at 1382.

<sup>169</sup> 855 F.2d at 903.

<sup>170</sup> *Id.* at 912.

more obviously, only two SJC justices, Wilkins and Abrams, had articulated an article 16 defense. The five other SJC justices' allusions to the right not to speak did not specify article 16 as its source.<sup>171</sup> It was plain that the state judges had debated this point, and only one, Abrams, agreed with Justice Wilkins' view that, whatever the first amendment might mean, article 16 gave the BSO a complete defense.<sup>172</sup> Because only two justices embraced the article 16 position, while five rather pointedly declined to, Judge Bownes argued that it was improper for the federal court to speculate as to what those other five would say if forced to reach the issue, and even more untenable for the First Circuit to avoid the first amendment question on this basis.

Second, urged Judge Bownes, because there was no difference in coverage or interpretation between article 16 and the first amendment,<sup>173</sup> the federal court was in any event free, and obliged, to

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<sup>171</sup> The three-judge plurality and the O'Connor/Lynch dissent simply refer to a constitutional right not to speak or perform. 399 Mass. at 97, 106, 502 N.E.2d at 1377, 1382.

<sup>172</sup> The refusal of five of the SJC justices to join Justice Wilkins on this point may have flowed from their uncertainty whether article 16 in fact protected free speech in broader terms than the first amendment. See *infra* note 173.

In a case that in some ways represents a mirror image of *Redgrave*, a state court refused to answer certified questions because the judges believed they could not do so without addressing first amendment academic freedom issues embedded within them. *Cuesnongle v. Ramos*, 835 F.2d 1486, 1491 (1st Cir. 1987). The case involved a constitutional challenge to the Puerto Rico Department of Consumer Affairs' exercise of jurisdiction over a contract dispute involving the Universidad Central de Bayamon. A majority of the Puerto Rico Supreme Court viewed Puerto Rico's constitutional free speech guarantees as "analogous to those enshrined in the First Amendment." Because the federal court would ultimately decide the free speech issues, the majority reasoned that its answers to the certified questions would be "purely advisory." *Id.* at 1490-91.

The SJC in *Redgrave* obviously did not harbor these hesitations, but the pointed refusal of five of its justices to reach the article 16 issue may likewise have derived from their sense that article 16 and the first amendment were parallel, so that the First Circuit would in any event have the last word on this point. As the First Circuit (speaking through Judge Coffin) noted in *Cuesnongle*, the Supreme Court "has ruled that abstention [and 'by analogy' certification] should not be used to determine the content of a state constitutional provision which parallels the federal constitution." 835 F.2d at 1491 n.6.

<sup>173</sup> This was a matter debated at length by Judges Coffin and Bownes. Coffin, for the majority of three, argued that two SJC decisions concerning nude and semi-nude dancing indicated a broader protection for free expression under article 16. *Redgrave v. BSO*, 855 F.2d at 910-11 (citing *Commonwealth v. Sees*, 374 Mass. 532, 536-38, 373 N.E.2d 1151, 1155-56 (1978) and *Cabaret Enterprises, Inc. v. Alcoholic Beverages Control Comm'n*, 393 Mass. 13, 16-17, 168 N.E.2d 612, 614 (1984)). He also relied on Justice Wilkins's seminal 1980 article which discussed "the future prospects for construing article 16 as divergent from the First Amendment." 855 F.2d at 910 (citing Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U.L.REV. 887, 897-906 (1980)). Judge Bownes pointed out that the Wilkins article, as Judge Coffin acknowledged, only ruminated on "future prospects" for article 16/first amendment

reach the first amendment issue.<sup>174</sup> Under the Supreme Court's 1983 holding in *Michigan v. Long*,<sup>175</sup> when it is unclear whether a state court ruling relies wholly on state constitutional law or on a mixture of state and federal law, the Supreme Court will not presume that an "adequate and independent state ground" supports the decision. The state court must *explicitly* anchor its holding in state law if it wishes to avoid Supreme Court (or by analogy, in this case, federal appellate court) review.<sup>176</sup>

Because Judge Bownes viewed article 16 as functionally equivalent to the first amendment, and because the BSO's asserted right not to speak was grounded in first amendment precedent, there was not in this case an adequate and independent ruling on state law, which under principles of comity would bind the federal court.<sup>177</sup>

[T]he majority has read between the lines of the SJC's three opinions, ferreted out a constitutional ruling where none was intended, and then blindly deferred to that

divergence, 855 F.2d at 917; he cited SJC cases stating that "the criteria which have been established by the United States Supreme Court for judging claims arising under the First Amendment . . . are equally appropriate to claims brought under the cognate provisions of the Massachusetts Constitution," *id.* (quoting Opinions of the Justices to the House of Representatives, 387 Mass. 1201, 1202, 440 N.E.2d 1159, 1160 (1982)); and he argued that the topless dancing cases "do not constitute breaks from the Supreme Court's interpretation of the first amendment" because both constitutions protect nude dancing as expression, and "[f]ederal and state law regarding nude dancing varies only in that under the *twenty-first amendment* to the United States Constitution, federal courts must allow states 'broad powers . . . to regulate the sale of liquor, [including the right to] ban [nude] dancing as part of [their] liquor license program.'" *Id.* at 917-18 n.4 (emphasis in original) (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975)).

<sup>174</sup> 855 F.2d at 917-20.

<sup>175</sup> 463 U.S. 1032 (1983).

<sup>176</sup> *Id.* at 1040-42. See also *Harris v. Reed*, 109 S. Ct. 1038, 1042-44 (1989) (reiterating strictness of *Long* and applying the principle to federal habeas corpus cases).

<sup>177</sup> Redgrave, 855 F.2d at 917-20. The majority disputed Judge Bownes on this point (see *supra* note 173), as well as on the application of *Michigan v. Long*: "[t]he 'plain statement' rule in *Michigan*, quoted at length by the dissent, makes it clear that federal review of such a decision [relying on adequate and independent state grounds] would be inappropriate. . . . This prerequisite is not met here. . . . There is . . . no appearance at all here that the concurrence or either of the other opinions from the SJC was referring to federal law when speaking about the BSO's constitutional right not to perform, and the concurrence explicitly makes reference to *state* constitutional law as the adequate and independent ground for denying liability." *Id.* at 911.

Judge Coffin was on shaky ground here, for *Long* requires the federal court to *presume* that the state court has ruled on federal grounds unless the state court explicitly states the contrary. Judge Bownes' argument faltered also, however, when he insisted that *Cabaret* and *Sees* (see *supra* note 173) did not embrace a broader view of free speech under article 16 than under the first amendment.

ruling in the complete absence of any plain statement of adequate and independent state grounds. This flouts the compelling logic and binding precedent of *Long*.

The ultimate irony in this manipulative reading of the SJC's opinion lies in its purported justification: faithfulness to "principles of comity and federalism." . . . [W]here, as here, a state court delivers a definitive answer to a question of state law which has been put to it, in the interest of comity that answer is normally conclusive in federal court . . . . Not only does the majority of this court ignore the direct answers supplied by the SJC to the questions we certified, it finds controlling a question of law that was never even reached by a majority of the SJC . . . .<sup>178</sup>

In the dissent's pithiest line, Judge Bownes quipped: "Not only has the majority ignored the dictates of *Michigan v. Long*, . . . it has rewritten Massachusetts law. This is comity run amok."<sup>179</sup>

Judge Coffin had an answer to this complaint, though it was buried in his majority opinion. Emphasizing principles of comity, Judge Coffin quoted two First Circuit cases for the proposition that, in the absence of controlling state law, "a federal court may consider 'analogous decisions, considered scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.'"<sup>180</sup>

The interesting thing about the cases cited by Judge Coffin here is that neither involved certification; both were straightforward diversity suits in which, under the *Erie* doctrine, the federal court was obliged to divine current state law.<sup>181</sup> In the certification process, by contrast, the federal court avoids the uncertainties of divination by directly asking the state court what it thinks. The state court may, of course, go beyond the questions certified,<sup>182</sup> and where it

<sup>178</sup> 855 F.2d at 919.

<sup>179</sup> *Id.* at 912. Judge Bownes insisted that in the face of the SJC's three opinions and the highly speculative nature of the en banc majority's hunches and predictions, the proper course at the very least would have been to admit the inadequacy of the previously certified questions and send new queries to the state court instead of "compound[ing] our mistake by entering into a guessing game about what the SJC 'would' have done if we *had* certified sufficiently broad questions." *Id.* at 919 (emphasis in original).

<sup>180</sup> *Id.* at 903, (quoting *Michelin Tires (Canada), Ltd. v. First Nat'l Bank of Boston*, 666 F.2d 673, 682 (1st Cir. 1981), in turn quoting *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 663 (3d Cir. 1980)).

<sup>181</sup> *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *Michelin Tire* involved Massachusetts commercial law; *McKenna*, Ohio torts. See *supra* note 180 and accompanying text.

<sup>182</sup> See, e.g., *Corr & Robbins*, *supra* note 132, at 426-47, and cases cited.

does so, the federal court, under *Erie*, is bound by the state's answers. By contrast, in *Redgrave*, a majority of the state high court, after obvious due consideration, explicitly declined to rule on state law questions not certified. In this situation, it seems a misapplication of the *Erie* doctrine for the federal court itself to dig into the recesses of state policy and precedent, including "considered scholarly works," to root out and pronounce a principle of state constitutional law that a majority of the state court deliberately declined to pass upon, all in order to avoid adjudicating the parallel issue under the federal constitution.

The en banc majority articulated still a third comity-based reason for declining to decide the BSO's first amendment defense. This one was, if anything, more speculative than the pastiche of SJC views regarding article 16. As an alternative ground for their dissent, SJC Justices O'Connor and Lynch had opined that even assuming, as the majority held, that no specific intent was required under the MCRA — and that acquiescence was not a defense — cancellation of an artistic performance did not amount to "threats, intimidation, or coercion," as required by the statute.<sup>183</sup> "This statutory construction," said Judge Coffin for the First Circuit majority, "was not addressed by any of the other justices, and there is no indication that any of them would have disputed the conclusion that liability could not attach in this case."<sup>184</sup> Thus, because the five other SJC justices did not disagree with the O'Connor/Lynch view as expressed in the last paragraph of their dissent, the First Circuit majority leapt to the "confident" conclusion "that the *entire* SJC would, if explicitly asked to decide the issue, concur with the finding of no liability on both state law grounds" (no threats, intimidation, or coercion, and article 16).<sup>185</sup>

This was quite a leap. As Judge Bownes pointed out, whether the BSO's cancellation amounted to "threats, intimidation, or coercion" was not an issue on appeal and indeed, had not been an issue in the case ever since the trial court had found this element of the statute satisfied for purposes of the BSO's motion to dismiss.<sup>186</sup> Thus, it was not surprising that the SJC's plurality and concurring justices did not take pains specifically to dispute the dissent's alternative theory. Moreover, said Judge Bownes, "the majority's facile

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<sup>183</sup> *Redgrave*, 399 Mass. at 110, 502 N.E.2d at 1385 (O'Connor, J., dissenting).

<sup>184</sup> *Redgrave*, 855 F.2d at 908.

<sup>185</sup> *Id.* at 909 (emphasis in original).

<sup>186</sup> See *Redgrave*, 557 F.Supp. at 243.

interpretation of the statute is absolutely untenable as applied to the facts of this case." The BSO cancellation "substantially undermined Redgrave's ability to obtain other work," and must be characterized as coercive within the meaning of the MCRA.<sup>187</sup>

The pains to which the en banc majority went in order to avoid the first amendment issue in *Redgrave* may not have amounted, in Judge Bownes' unforgettable phrase, to "comity run amok," but the decision was certainly unique in the annals of certification caselaw. The majority combined, in one ruling, two very different doctrines: first, that when state courts go beyond the questions certified, the certifying federal courts must listen,<sup>188</sup> and second, that in the absence of certification, federal courts must divine state law from a variety of sources, including state court dicta and scholarly works.<sup>189</sup> It is unclear why the majority acted in this unprecedented way and engaged in such intellectual contortions; one commentator suggests that the court may have avoided reaching the first amendment issue in order to insulate what would have been a dubious federal constitutional ruling from Supreme Court review.<sup>190</sup>

Just five months after its en banc decision in *Redgrave*, the First Circuit took a considerably less contorted approach to certification. Having received answers to certified questions of Puerto Rico law, the federal court did not simply enter judgment for the party favored by the state court's responses. Instead, it remanded to the trial court for further factual development on a question of causation because the state court had not "specifically address[ed] this particular issue" and "it is not clear to what extent the parties directed the district court's attention to it."<sup>191</sup>

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<sup>187</sup> 855 F.2d at 916 (Bownes and Selya, JJ, concurring in part and dissenting in part). Some five months later, the Supreme Judicial Court vindicated Judge Bownes on this point. In *Bally v. Northeastern University*, 403 Mass. 713, 532 N.E.2d 49 (1989), the SJC ruled that a private university's program of mandatory without-cause drug testing of student athletes did not constitute coercion within the meaning of the MCRA, and distinguished a series of earlier cases in which coercion had been found. *Id.* at 719, 532 N.E.2d at 52-53. *Redgrave* was on the list: the unanimous Court (per Chief Justice Hennessey) said that in *Redgrave*, "we stated that the Boston Symphony Orchestra violated the Act because its cancellation of its contract with Redgrave had the effect, intended or otherwise, desired or not, of coercing Redgrave not to exercise her First Amendment rights." *Id.* at 719, 532 N.E.2d at 53.

<sup>188</sup> See *supra* note 132 and accompanying text.

<sup>189</sup> See *supra* notes 180-81 and accompanying text.

<sup>190</sup> Gerwatowski, *Of Comity and Common Sense: The Need to Certify Questions of Unsettled State Constitutional Law* (forthcoming in 75 MASS.L.REV. —[1990]).

<sup>191</sup> *St. Paul Fire & Marine Ins. Co. v. Caguas Fed. Savings & Loan Ass'n.*, 867 F.2d 707, 708 (1st Cir. 1989).



In *Redgrave*, there were likewise significant unresolved issues of fact upon which the BSO's forced speech defense depended. Were the management's fears of disruption reasonable? And if so, did the claimed right not to perform for fear of disruption outweigh *Redgrave's* free speech interests under the Massachusetts Civil Rights Act? Neither the SJC nor Judge Keeton in the district court addressed these questions of fact. At the very least the First Circuit should have remanded for their resolution in *Redgrave* as it did in the case from Puerto Rico.

### VII. THE FUTURE OF THE REDGRAVE DEFENSE

Convoluting debates about comity, federalism, and certification determined the outcome in *Redgrave*, but the procedural circumstances were so unique that the actual holding may be of interest primarily to federal courts scholars compiling footnotes on odd miscarriages in certification procedure. The more pressing and universal interest of the First Circuit's en banc decision is the debate between majority and dissent over application of the first amendment "right not to speak." Here, the en banc majority, speaking in dicta, seemed to suggest principles of law that would limit the potential civil rights liability not only of the BSO but of other arts and media organizations, of universities, and perhaps of private defendants generally. Some of the footnotes in the majority's first amendment discussion were startling in their scope; together with dicta in the various SJC opinions, they have given rise to a new "*Redgrave* defense."

Judge Coffin began this section of the First Circuit's en banc opinion by framing the constitutional issue:

The MCRA is an unusual statute, a civil rights law that abolishes the state action requirement for constitutional claims of deprivation of rights. This is not difficult to understand in the context of racial discrimination, the prohibition of which was the statute's primary object . . . . There, it makes sense to treat private individuals similarly to the state, just as Title VII is designed as a "private" analogue to the non-discrimination provisions of the Constitution. But where the issue is the plaintiff's "right" to free speech, the analogy is strained. Such a right traditionally has content only in relation to state action — the state must be neutral as to all expression . . . . The right is to be free of state regulation, so that all private speech is formally on equal footing as a legal matter. In the tra-

ditional context, this means that various private actors can, without state interference, battle it out in the marketplace of ideas.<sup>192</sup>

Initially, one might ask two questions about Judge Coffin's premise. First, why does he assume that Title VII legitimately dispenses with state action with respect to race discrimination,<sup>193</sup> whereas the Massachusetts Civil Rights Act cannot abandon the state action limitation in the sphere of free speech rights? Judge Coffin's answer is "tradition": free speech (apparently unlike racial equality) "traditionally has content only in relation to state action . . ." <sup>194</sup> This "tradition," in turn, seems to derive from the Holmesian marketplace of ideas in which "various private actors, can, without state interference, battle it out."<sup>195</sup> Judge Bownes commented in dissent on this point that his colleagues were "so wedded to 'traditional' thinking that they simply refuse to accept the basis for Massachusetts' innovative antidiscrimination law."<sup>196</sup>

<sup>192</sup> *Redgrave v. BSO*, 855 F.2d at 904 (citations omitted) (referring to Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (1982)).

<sup>193</sup> The state action limitation has been as sacrosanct, if analytically questionable, in the field of discrimination as in first amendment law. See, e.g., Black, *The Supreme Court, 1966 Term — Forward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L.REV. 69, 100-02 (1967); Heins, *The Marketplace and the World of Ideas: A Substitute for State Action as a Limiting Principle Under the Massachusetts Equal Rights Amendment*, 18 SUFFOLK U.L. REV. 347, 352-60 (1984); Nerkin, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of The Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977).

State action doctrine is generally thought to have its origin in the much-criticized Civil Rights Cases, 109 U.S. 3 (1883), striking down as beyond Congress' fourteenth amendment power a statute prohibiting race discrimination in privately-owned "public accommodations." See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 208-10 (1970) (Brennan, J., concurring and dissenting) (*Civil Rights Cases* were essentially overruled in *United States v. Guest*, 383 U.S. 745 (1966) and *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

<sup>194</sup> 855 F.2d at 904.

<sup>195</sup> *Id.* Holmes coined the phrase in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas — . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market").

<sup>196</sup> 855 F.2d at 921 (Bownes, J., concurring in part and dissenting in part). Judge Bownes might have added that state and federal anti-discrimination laws, including Title VII, contain free speech protections in their "opposition" clauses, which prohibit employers from retaliating against employees who oppose discriminatory practices. 42 U.S.C. § 2000e-3(a) (1982); MASS. GEN. L. ch. 151B, § 4(4) (1986). Thus, the very statutes to which the majority pointed to distinguish racial equality from free speech dispense with the state action limitation for both sets of rights, at least to the extent that an employee's speech takes the form of opposition to perceived discrimination in the workplace. See *infra* note 225 and accompanying text for a discussion of the judicial balancing test in opposition clause cases.

A second question about Judge Coffin's premise is what relation it has to the facts in the *Redgrave* case. Unquestionably, the government could not constitutionally force a private artistic (or political) organization to sponsor a speech or performance inimical to its own convictions, or penalize it through an award of money damages for refusing to do so. The "marketplace of ideas" entitles Vanessa Redgrave to make political speeches at Workers Revolutionary Party platforms, not at Symphony Hall. But Redgrave was not proposing to use Symphony Hall as a pulpit to propound her ideas: she had been hired as narrator of *Oedipus Rex*, with every intention of following Sellars's and Ozawa's directions in her performance.

At best, the marketplace of ideas analogy might apply here if Redgrave's suit against blacklist *advocates* had gone forward,<sup>197</sup> or if Peter Sellars had sued Seiji Ozawa and the BSO over the differing artistic visions of *Oedipus Rex* that emerged once fears of disruption began to color the debate. Sellars had no free speech right to stage *Oedipus Rex* at Symphony Hall in contravention of the BSO's wishes; thus, he could not have sued in these circumstances under the MCRA even though, if Ozawa had later had second thoughts about the initial conception for which Sellars had contracted, and on that basis had fired Sellars, the director would presumably be entitled to contract damages.

Redgrave, on the other hand, arguably had an MCRA as well as a contract claim because the free expression for which the BSO was penalizing her had taken place, and would (if not unduly chilled) presumably continue to take place outside the BSO's bailiwick. Her speech, in contrast to Sellars's theories about staging *Oedipus Rex*, was neither competing with the BSO's in the marketplace of ideas, nor interfering with the Orchestra's expression of any views it may have held about Palestine.

The First Circuit en banc majority came close to articulating this point. In discussing the marketplace of ideas, the court observed that, as Redgrave's counsel had conceded at oral argument, individuals picketing a performance would have a first amendment defense to MCRA liability despite the potentially, indeed intentionally, coercive nature of their activities.<sup>198</sup> "We see no reason," the court said,

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<sup>197</sup> See *supra* notes 57-58 and accompanying text for a discussion of Redgrave's original complaint. The first amendment unquestionably protects, to some extent, advocacy of politically motivated boycotts. See *supra* notes 121-23 and accompanying text for a discussion of *Claiborne Hardware* and other precedents; *Redgrave v. BSO*, 855 F.2d at 906.

<sup>198</sup> 855 F.2d at 906.

"why *less* protection should be provided where the artist refuses to perform."<sup>199</sup>

But there is a reason. The BSO, in contrast to the protesters, was not corporately exercising its right to disagree with or protest against Redgrave, was *not sending a message* (as the First Circuit easily discerned with respect to the contract claim).<sup>200</sup> As the history of blacklisting in the 1950's and early 1960's shows,<sup>201</sup> the most pervasive economic damage is done by employers who do not necessarily disagree with an employee's politics but who, largely for economic reasons, acquiesce in the demands of others. This is not to say that an employer who does fire a worker on account of sincere opposition to the worker's political activity would necessarily be absolved of liability. But the employer in such a situation may at least have stated a factual basis for a constitutional defense, and the consequent application of a balancing test. The BSO, by contrast, did not even make this threshold showing for a constitutional defense, precisely because it was not expressing its own viewpoint but was acquiescing in the politically retaliatory desires of others.

The First Circuit majority, having explained the "common sense" limits it perceived on Redgrave's free speech rights *vis à vis* private defendants, next inquired whether the Supreme Court's teaching in the "right not to speak" cases, beginning with *West Virginia State Board of Education v. Barnette*,<sup>202</sup> applied to the BSO's decision to cancel *Oedipus Rex*. Judge Coffin believed emphatically that it did. Starting from the unquestionable premise that "expression in the performing arts enjoys substantial constitutional protection,"<sup>203</sup> the majority cited the Supreme Court's line of "forced speech" decisions,<sup>204</sup> and concluded: "We have been unable to find any case, involving the arts or otherwise, in which a state has been

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<sup>199</sup> *Id.* (emphasis in original).

<sup>200</sup> See *supra* notes 71-72 and accompanying text; 855 F.2d at 895.

<sup>201</sup> See *supra* notes 95-117 and accompanying text.

<sup>202</sup> 319 U.S. 624 (1943). See *supra* notes 144-53 and accompanying text for a discussion of these cases and their ramifications.

<sup>203</sup> 855 F.2d at 905 (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981)).

<sup>204</sup> *Id.* at 905-06 (citing *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. —, 108 S. Ct. 2667, 2676-80 (1988) (requiring charitable solicitors to disclose percentage of contributions actually turned over to charity); *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986) (plurality opinion) (requiring utility to send consumer message in billing envelopes); *Wooley v. Maynard*, 430 U.S. 705 (1976) (requiring display of "Live Free or Die" license plate motto); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (forcing newspapers to print replies to editorials); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compulsory flag salute)).

allowed to compel expression. The outcome urged by our dissenting colleagues would, to our knowledge, be completely unprecedented."<sup>205</sup>

The leap between the first and second of the two sentences quoted above perhaps contains the key to the conceptual dispute in *Redgrave*. For no one at the appellate stage, including the dissenters, seriously urged that the BSO should have been "compelled" to perform *Oedipus Rex*.<sup>206</sup> This is different from the question of damages, however, whether for breach of contract or for interference with free speech by acquiescence in a campaign of blacklisting. The BSO did not argue that the first amendment relieved it of contract liability, and no appellate judge who accepted the Orchestra's free speech defense satisfactorily explained why the first amendment permitted contract but not MCRA damages — even though *any* damages award arguably penalized the Orchestra's decision "not to speak." The point is that while first amendment artistic integrity, as well as common law rules of contract, probably protect the BSO from a court order to perform, the constitution does not necessarily relieve the Orchestra of damages liability for cancelling a performance or firing a performer because audience conditions may be "less than optimal."<sup>207</sup>

The en banc majority concluded its discussion of the right not to speak with an equivocation:

We raise these points not to resolve the constitutional questions, but to point out how difficult those questions are to resolve, to indicate that expression-related interests appear on all sides, and to suggest that the dissent's resolution, while motivated by values we share, too easily reduces a very complex clash of rights to a simple equation that neglects the serious weight of the BSO's interests.<sup>208</sup>

Here Judge Coffin introduced but did not pursue the analytical crux of any case involving a clash of rights: balancing. The dissent, notwithstanding the majority's accusation that it oversimplified, did engage in such a balancing act, and concluded that even if the BSO's decision to cancel was constitutionally protected, the state's

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<sup>205</sup> 855 F.2d at 906.

<sup>206</sup> See *supra* notes 142–43 and accompanying text.

<sup>207</sup> *Redgrave*, 855 F.2d at 920 (Bownes and Selya, JJ., concurring in part and dissenting in part). On the different constitutional problems implicated by different remedies, see *supra* note 143 and accompanying text.

<sup>208</sup> 855 F.2d at 906.

compelling interest in protecting political dissenters from retaliation,<sup>209</sup> as codified in the MCRA, ought to prevail:

Neither the majority of this court nor the BSO seriously has suggested that Massachusetts does not have a compelling state interest in enacting legislation to protect the free speech rights of citizens in the Commonwealth. Nor has anyone argued that the MCRA does not represent the least restrictive means of achieving that purpose. Rather, the BSO asserts an absolute right against *any* infringement of its artistic expression. Under established Supreme Court precedent, it is clear that this argument must be rejected.<sup>210</sup>

Indeed, Judge Bownes went on, to accept such a defense "would flout the very values that the first amendment and the MCRA protect . . . 'Artistic integrity' under this view would be a license for the heckler's veto in the arena of artistic expression."<sup>211</sup>

Thus, the First Circuit majority and dissenters reached a standoff on the applicability of the *Redgrave* defense to the facts of the *Redgrave* case. Perhaps more important for the future are two expansive footnotes in the majority opinion that address other scenarios in which first amendment defenses might be asserted.

Footnote 17 discusses the right not to speak in the context of possible discrimination claims. A powerful argument for *Redgrave* was that the BSO's defense must be wrong because, if correct, it would justify acquiescence in threats of disruption based on a performer's nationality, religion, or skin color as well as her political views. No meaningful distinction could be drawn between the two scenarios in terms of the forced speech defense. Yet surely a first

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<sup>209</sup> *Id.* at 920-22 (citing Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984); Bob Jones University v. United States, 461 U.S. 574 (1983); and, later in the dissent, the most recent of the "private club" discrimination cases, New York State Club Ass'n v. City of New York, 487 U.S. \_\_\_, 108 S. Ct. 2225 (1988)). In these cases the Supreme Court rejected first amendment defenses to liability for race or sex discrimination. Judge Bownes thus challenged the reliability of the en banc majority's citation of dicta in two of these cases to support its contention that a discrimination claim could be defeated "to preserve expressive integrity." 855 F.2d at 921 n.7 (responding to *id.* at 904 n.17).

<sup>210</sup> 855 F.2d at 923 (Bownes, J., concurring in part and dissenting in part) (citing Kovacs v. Cooper, 336 U.S. 77, 88 (1949) ("[t]o enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself")).

<sup>211</sup> *Id.* at 924. See also *infra* notes 223-239 and accompanying text (discussing balancing of private employer prerogatives or first amendment-based defenses against statutory anti-discrimination or free speech protections for employees).

amendment right to cancel a performance for fear of disruption would not trump an artist's right to be free of invidious racial discrimination. Indeed, the BSO had conceded as much.<sup>212</sup> But the en banc majority was not so sure. Judge Coffin wrote:

Of course, a defendant's freedom of expression interests can also be implicated in a traditional race or sex discrimination case under the MCRA. We do not think it at all obvious, as do our dissenting brethren, that liability should attach if a performing group replaces a black performer with a white performer (or vice versa) in order to further its expressive interests. Unlike the case in *Palmore v. Sidoti*, . . . there would in this case be a *conflict* of protected interests. This presents serious constitutional and statutory questions that we do not pretend to survey here. We do note, however, that the Supreme Court recently has reaffirmed the principle that discrimination might in certain circumstances be justified in order to preserve expressive integrity.<sup>213</sup>

Judge Coffin concluded:

[E]ven if an artistic organization could not *discriminate* in favor of a white (or black, or male) performer, presumably it would have a much more compelling interest in cancelling the performance rather than acceding to the casting requirements imposed by the state, even if the reason for cancellation is fear of community reaction.<sup>214</sup>

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<sup>212</sup> See *id.* at 925 (Bownes and Selya, JJ., concurring in part and dissenting in part); Reply Brief of Boston Symphony Orchestra, at 4 (SJC No. 4089). The BSO tried to distinguish race discrimination simply as more despicable than interference with free speech; the American Jewish Congress, as *amicus curiae*, advanced a convoluted version of the same theme. Brief of American Jewish Congress to First Circuit at 13-19 (theorizing that racial equality is "broader" right than free speech).

<sup>213</sup> 855 F.2d at 904 n.17 (emphasis in original) (citing dicta in *New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. \_\_\_, 108 S. Ct. 2225, 2234 (1988) ("conceivable" that organization could show its expressive purposes would be impeded if it could not discriminate); *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984) ("arguable" that admitting women would change the organization's message "because of the gender-based assumptions of the audience")). As noted *supra* note 209 and accompanying text, Judge Bownes objected to this use of dicta from private club cases in which the Supreme Court had rejected first amendment defenses. *Redgrave*, 855 F.2d at 921 n.7. *Palmore v. Sidoti*, 466 U.S. 429 (1984), relied upon by Judge Bownes and distinguished here by Judge Coffin, rejected an argument that a state court could essentially acquiesce in racial bigotry by removing a white child from its mother's custody after she married a black man because community attitudes might make the child's life harder.

<sup>214</sup> 855 F.2d at 905 n.17 (emphasis in original).

Read literally, perhaps footnote 17 is not surprising. A theater does have an artistic right to make casting decisions based on a performer's appearance, presumably including her race. But this is a far cry from any issue raised by the facts of *Redgrave*. And when, in the passage quoted above, the court refers to the actual *Redgrave* situation (acquiescence in community pressure), it loads the dice by characterizing legal liability for employment discrimination as "casting requirements imposed by the state." This characterization is hardly fair when, in the hypothetical, the defendant organization has made or desires to make its own casting decision, but ultimately changes that decision and acquiesces in the bigotry of others. Yet footnote 17 seems to imply that imposing liability on a performance organization for acquiescence to racism would amount to "casting requirements imposed by the state," and thus violate the first amendment.

The majority's second loaded footnote addressed applications of the *Redgrave* defense beyond the performance context. "[U]nder the dissent's theory of the MCRA," wrote Judge Coffin,

a private university would be liable for denying tenure to a professor whose views it found politically reprehensible, or to a scholar who might cause turmoil on campus. A newspaper could not, without running afoul of the statute, cancel an opinion writer's column in response to outrage in the community, even if it meant that the newspaper's reputation was impugned or that great numbers of people stopped reading the paper. While we may commend those institutions and artists that resist such public pressure, no court has, to our knowledge, ever held legally accountable those private groups or artists that do succumb to public taste.<sup>215</sup>

Though few might quarrel with the newspaper hypothetical in this footnote,<sup>216</sup> a university does seem a different matter. Academic

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<sup>215</sup> *Id.* at 906 n.21.

<sup>216</sup> But note that the majority here elides the distinction between a columnist's work for the newspaper (clearly subject to the boss' editorial control) and her outside political activity or expression of views (the *Redgrave* situation). See *Schneider v. Indian River Community College Fdtn., Inc.*, 684 F. Supp. 283, 286-87 (S.D. Fla. 1987) (no first amendment violation where college radio station fired reporters who disobeyed orders not to broadcast particular stories). It is not so clear that the media, whether privately or publicly owned, may without liability fire an employee for political views that are unrelated to her job performance. Moreover, a distinction might be made between firings motivated by the publisher's own disapproval of the reporter's views, and firings motivated by fear of financial loss. See *Loyalty and Private Employment*, *supra* note 95 at 977-78 (describing arbitrators' decision approving



freedom adheres as much, if not more, to the individual scholar as to her corporate employer,<sup>217</sup> and though the state generally has no business telling a private university what to teach, it is not clear that a university that fires a teacher for expressing herself on matters of public concern has a first amendment right to do so that outweighs whatever statutory rights the teacher could invoke.

For one thing, the university itself, whether public or private, is a "marketplace of ideas."<sup>218</sup> In our society, its very function is to nourish diversity; it does not speak with a single voice.<sup>219</sup> For another, a university is in little danger that the public will perceive obnoxious voices on its faculty as speaking for the institution;<sup>220</sup> thus, it is difficult to see how its toleration of dissidents, even if coerced by courts, interferes with its "right not to speak." Indeed, in "retaliation" cases brought under federal or state employment discrimination or labor laws,<sup>221</sup> all covered employers, including

newspaper's retaliation against two editors who refused to testify before HUAC; the paper's management had acquiesced to community pressure).

<sup>217</sup> See Getman & Mintz, *Foreward: Academic Freedom in a Changing Society*, 66 TEX. L. REV. 1247, 1247 (1988) (defining "the core of academic freedom" as "the right of faculty members to seek, teach, and write the truth as they see fit"); Metzger, *Professions and the Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1274-75 (1988) (academic freedom includes protection for speech outside the classroom); and cases cited *infra* notes 218-19.

<sup>218</sup> See *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'").

<sup>219</sup> See *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (academic freedom is "of transcendent value to all of us and not merely to the teachers concerned. . . . [T]he First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues [rather] than through any kind of authoritative selection'") (quoting in part *United States v. Associated Press*, 52 F. Supp. 365, 372 (S.D.N.Y. 1943)); *Sweezy v. New Hampshire*, 354 U.S. 234, 262-63 (1957) (Frankfurter, J., concurring) (university's freedom to determine who may teach and what may be taught is for purpose of providing atmosphere "most conducive to speculation, experiment, and creation"); *Wieman v. Updegraff*, 344 U.S. 183, 195-96 (1952) (Frankfurter, J., concurring) (noting "that free play of the spirit which all teachers ought especially to cultivate and practice," and describing teachers "as the priests of our democracy"). See also *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-14 (1978) (opinion of Powell, J.) (quoting *Sweezy* and *Keyishian* and recognizing that achieving diversity of student body is a compelling state interest). Justice Powell's opinion for the Court in *Bakke* also cites *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) ("[f]ew [law] students . . . would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned"). The fact that all these academic freedom cases involved teaching, studying, or politically associating at state institutions underscores the location of the constitutional right primarily in individuals and not their university employers.

<sup>220</sup> Cf. *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 87-88 (1980); *supra* notes 144-53 and accompanying text.

<sup>221</sup> *E.g.*, 42 U.S.C. § 2000e-3a (1982) (unlawful to discriminate against employee who

academic ones, may be liable if they penalize employees who speak out in opposition to practices they reasonably believe to be unlawful.<sup>222</sup>

In academia, as elsewhere in the private employment sector, civil rights laws sometimes conflict with management prerogatives, whether or not constitutionally-based. The examples are legion: freedom of association defenses to public accommodation or other civil rights suits;<sup>223</sup> religious freedom claims to immunity from laws prohibiting discrimination because of race or sex, including pregnancy;<sup>224</sup> challenges to interpretation of the opposition clauses of antidiscrimination laws that conflict with the perceived needs of management;<sup>225</sup> recent "academic freedom" objections to the pro-

"has opposed any practice made an unlawful employment practice by this subchapter"); MASS. GEN. L. ch. 151B, § 4(4) (1986) ("unlawful to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter . . .").

<sup>222</sup> 42 U.S.C. § 2000e-5(g) (1982); MASS. GEN. L. ch. 151B, § 5 (1986). Remedies may include back pay, damages, and job reinstatement.

<sup>223</sup> *E.g.*, *supra* note 213 and cases cited therein; *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Concord Rod & Gun Club v. MCAD*, 402 Mass. 716, 721, 524 N.E.2d 1364, 1367 (1988).

<sup>224</sup> *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986) (refusing to enjoin, on first amendment grounds, state agency investigation of sex discrimination and retaliation claims); *Bob Jones University v. United States*, 461 U.S. 574, 602-04 (1983) (rejecting religious freedom defense to rescission of tax exemption because of race discrimination); *Rayburn v. Gen. Conference of Seventh Day Adventists*, 772 F.2d 1164, 1167-71 (4th Cir. 1985) (employment discrimination claim barred by first amendment), *cert. denied*, 478 U.S. 1020 (1986); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1277-82 (9th Cir. 1982) (first amendment no bar to discrimination claim involving church-affiliated publishing house); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 284-87 (5th Cir. 1981) (holding, after close factual analysis, that seminary's relations with employees who function in ministerial capacity are not governed by Title VII, but that first amendment does not bar EEOC regulation of relations with nonministerial staff), *cert. denied*, 456 U.S. 905 (1982); *EEOC v. Mississippi College*, 626 F.2d 477, 486-89 (5th Cir. 1980) (rejecting first amendment defense to investigation of race and sex discrimination charges involving secular teachers at religious college), *cert. denied*, 453 U.S. 912 (1981); *Madsen v. Irwin*, 395 Mass. 715, 481 N.E.2d 1160 (1985) (first amendment exemption for religiously-motivated firing of lesbian employee, but not for invasion of privacy and other torts).

<sup>225</sup> *See supra* note 221 and accompanying text; *Jones v. Flagship Int'l*, 793 F.2d 714, 727-29 (5th Cir. 1986) (applying balancing test, court concludes that Title VII did not protect the company's equal opportunity manager from retaliation where she solicited others to file EEOC complaints and sought to lead class action suit), *cert. denied*, 107 S. Ct. 952 (1987); *Mozece v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984) (opposition under Title VII may not be "excessively disloyal or hostile or disruptive and damaging to the employer's business"); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1142-46, *reh. denied*, 660 F.2d 497 (5th Cir. 1981) (whether opposition is protected depends on form it takes; court must balance to determine if conduct was "unjustifiably detrimental to the employer's interests") (emphasis in original), *cert. denied*, 445 U.S. 1000 (1982); *Rosser v. Laborers' Int'l Union, Local 438*, 616 F.2d 221, 223 (5th Cir. 1980) (where "employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it

duction of confidential tenure review files in discrimination suits.<sup>226</sup> These defenses are sometimes rejected; sometimes they prevail. In any event, courts examine the facts and balance the interests on each side.<sup>227</sup> In *Redgrave*, the en banc majority suggested a broad addition to the arsenal: a right-not-to-speak defense that conceivably could shield not only universities and private schools, but all employers who fire controversial staff, whether or not in acquiescence to community pressure.

What is ominous about footnote 21 of the First Circuit's majority opinion in *Redgrave* is its resemblance to the attitude so prevalent in the blacklist era, and documented by Professor Ellen Schrecker in her recent book *No Ivory Tower: McCarthyism and the Universities*.<sup>228</sup> As Schrecker shows in painstaking detail, universities in the 1950's almost without exception acquiesced in the dominant political attitude that present or former Marxists or communists were not fit to teach unless, perchance, they publicly renounced their past sins and cooperated with the FBI or investigating committees by "naming names." The result was a purge so massive, a destruction of lives and careers so devastating to the spirit of academic freedom, that it is difficult to believe that the judges of the First Circuit majority would welcome a return to that climate of fear. In this historical sense the final sentence of footnote 21, remarking that "no court has, to our knowledge, ever held legally

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renders him ineffective in the position for which he was employed . . . his conduct, or form of opposition, is not covered" by Title VII), *cert. denied*, 449 U.S. 887 (1980); *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 229-34 (1st Cir. 1976) (illegal or unreasonably hostile or aggressive forms of opposition unprotected); *Mitchell v. Visser*, 529 F. Supp. 1034, 1043 (D. Kan. 1981) (court "must balance Title VII's goal of encouraging reasonably expressed opposition to employer discrimination against management's recognized prerogative to maintain internal discipline and a stable working environment").

<sup>226</sup> See discussion and cases cited in Gray, *Academic Freedom and Nondiscrimination: Enemies or Allies?* 66 *Tex. L. Rev.* 1591, 1606-08 (1988) (describing AAUP view that "judicially compelled disclosure infringes on institutional autonomy rather than on individual academic freedom.").

<sup>227</sup> In private employment free speech cases, the balancing need not be very different from the familiar *Pickering* and *Elrod* tests that govern public employees' first amendment claims. *Pickering v. Board of Education*, 391 U.S. 563, 568-70 (1968) (court must balance employee's interest in speaking on matters of public concern, public's interest in receiving views and information, and government employer's interest in efficiency and managerial control); *Elrod v. Burns*, 427 U.S. 347, 360-63, 367-68 (1976) (in context of patronage dismissals, courts look to nature and sensitivity of job in question, thus balancing plaintiff's interest in free political association against defendant's right to politically *simpatico* staff in policymaking and other sensitive posts); *Branti v. Finkel*, 445 U.S. 507, 515 (1980) (recognizing that in some instances government may have "overriding interest" in requiring employees' beliefs to conform to those of hiring authority).

<sup>228</sup> E. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* (1986).

accountable those private groups or artists that do succumb to public taste," seems undiplomatic at best.

Massachusetts litigators have lost little time in seizing upon the intimations in *Redgrave*, in both the First Circuit majority decision and the various opinions of the SJC, and urging that a first amendment-based academic freedom or corporate right not to speak absolves them of liability under the MCRA or other state laws. In *Korb v. Raytheon Corp.*,<sup>229</sup> for example, a former vice president of Raytheon alleged that he was fired after he participated in a press conference critical of the Reagan defense budget. The company moved to dismiss on the grounds, *inter alia*, that *Redgrave* afforded it a right to fire an employee, at least a high-level one, with whose views (expressed as a private citizen) it disagreed.<sup>230</sup> Korb alleged that angry ideologues in the Defense Department has pressured Raytheon into sacking him.

Similarly, in *Brown v. Trustees of Boston University*, the university appealed from a judgment holding it liable for sex discrimination in a faculty tenure decision. One argument on appeal was that *Redgrave* prohibited the introduction of evidence reflecting BU President John Silber's publicly-expressed views on working mothers.<sup>231</sup> As BU put it,

[T]he admission into evidence of a speech by an academic concerning a debatable topic, purportedly to show an ideological taint, will necessarily discourage university presidents, faculty members, and other university personnel who participate in tenure and promotion decisions from making any statement which in another context —

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<sup>229</sup> 707 F. Supp. 63 (D. Mass. 1989) (order remanding case from federal to state court).

<sup>230</sup> Memorandum in support of Defendant Raytheon Company's Motion to Dismiss, 11-15, *Korb v. Raytheon Corp.*, 707 F. Supp. 63 (D. Mass. 1989) (C.A. No. 87-2992-WD). Raytheon's argument replicated a defense asserted by Lockheed Corporation in a blacklisting-era case, that a statute protecting employees from retaliation for their political activities or associations "deprives an employer of the right of free speech and prevents him from publishing his political beliefs or views among his employees." *Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 486, 171 P.2d 21, 25 (1946). The California court rejected the argument summarily, though construing the statute to denude it of much practical force. See *supra* note 117 and accompanying text.

In *Korb*, by contrast, a federal judge (in an order remanding the case to state court after it had been improperly removed), noted that "a very strong argument can be made" that the *Redgrave* defense "will dispose of the case in a manner favorable to the defendant." *Korb v. Raytheon Co.*, 707 F. Supp. 63, 69, n.5 (D. Mass. 1989). At this writing, the state court has not acted on the motion to dismiss.

<sup>231</sup> Brief for Trustees of Boston University at 48, *Brown v. Trustees of Boston University*, No. 88-1288 (1st Cir. June 1, 1988).

such as that of this case — may be viewed as insufficiently “progressive” or unpopular with a particular audience. Cf. *Redgrave*, . . . (suggesting that exercise of constitutional right of free speech cannot constitute evidence of interference with the rights of another).<sup>232</sup>

*Amici* supporting BU in this case argued that the broad principle of corporate academic freedom embedded in *Redgrave* prohibited a court from ordering a university to tenure a professor found to be the victim of sex discrimination.<sup>233</sup> “A judicially imposed choice of a permanent faculty member,” they said, “constitutes a distinct and serious limitation on the first amendment freedom of a university to determine who will be appointed to its permanent gathering of scholars.”<sup>234</sup>

Perhaps the most imaginative use of *Redgrave* to date was in *Bally v. Northeastern University*, a drug testing case in which a student athlete challenged Northeastern University’s policy of conditioning athletic participation on without-cause urinalysis testing for drugs.<sup>235</sup> Bally invoked both the MCRA and Massachusetts’ right to privacy statute.<sup>236</sup> Northeastern argued that its drug testing was an “educational policy decision,” hence protected by academic freedom, hence immune from legal challenge under *Redgrave*.<sup>237</sup>

Regardless of how new assertions of the *Redgrave* defense are resolved, and whatever factual showing the courts eventually require or balancing tests they impose, the dicta in *Redgrave v. BSO* has, by stretching the forced speech doctrine, handed a new weapon to private corporate defendants in civil rights and employment discrimination cases. Whether this *Redgrave* defense becomes a new *Lochnerism*,<sup>238</sup> in first amendment rather than freedom of contract regalia, depends ultimately on the judiciary’s sensitivity to individual

<sup>232</sup> *Id.*

<sup>233</sup> Brief *Amicus Curiae* of Massachusetts Institute of Technology, President and Trustees of Williams College, Boston College, Tufts University, Suffolk University and Adelphi College, *id.* at 1.

<sup>234</sup> *Id.*

<sup>235</sup> *Bally v. Northeastern University*, 403 Mass. 713, 532 N.E.2d 49 (1989). For *Bally*’s impact on the definition of “coercion” under the MCRA, see *supra* notes 183–87 and accompanying text.

<sup>236</sup> MASS. GEN. L. ch. 214, § 1B (1988).

<sup>237</sup> Brief for Defendant-Appellant at 28–31, *Bally v. Northeastern University*, 403 Mass. 713, 532 N.E.2d 49 (1989) (SJC No. 4822); Reply Brief for Defendant-Appellant Northeastern University at 6–9 (quoting note 21 of *Redgrave* en banc opinion). The SJC reversed the lower court ruling for Bally on statutory grounds and did not comment on Northeastern’s use of the *Redgrave* defense. See *supra* note 187 and accompanying text.

<sup>238</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

rights and liberties in the face of increasingly aggressive assertions of managerial or institutional immunity.

#### EPILOGUE

In September 1988, Redgrave's lawyers filed a petition for rehearing in the First Circuit. They asked the court to certify new questions of law to the SJC to determine the "elements and burdens of proof" in any state constitutional defense to MCRA liability, should a majority of the state judges agree that such a defense existed. Kornstein and Wexler contended that they never had a real opportunity to argue this issue to the SJC, that "no State law defense has been *defined* by any court," and that "no court has ever undertaken a review of the facts of this case to determine whether BSO has *proved* any conceivable State law defense."<sup>239</sup>

The petition for rehearing reiterated a point that seemed to have been lost in the appellate proceedings: that on the facts of the case, there was at least a serious question whether the Symphony was motivated by legitimate fears of performance disruption. "[T]he decision to terminate Redgrave was made days before BSO decided to terminate the performance, and in the absence of any threat of disruption . . . ."<sup>240</sup> Recertification was necessary because the en banc ruling was based on guesswork, and deprived Redgrave "of her most basic right to fair and reasonable treatment by the judicial system."<sup>241</sup> In a flight of litigative imagination, Redgrave's lawyers closed by reminding the court of the Cocteau/Stravinsky text of *Oedipus Rex*:

Besieged by acts and riddles difficult to comprehend,  
Creon says to Oedipus: "Seeing to what a pass we have  
come, 'tis better to learn clearly what should be done"  
(Lines 1443-45). This Court should not be content to have  
justice here rest upon a riddle but instead should say to  
the Supreme Judicial Court, as Oedipus said to Tiresias;  
"Speak again that I may learn it better" (Line 3590).<sup>242</sup>

The petition for rehearing was denied without comment.

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<sup>239</sup> Motion of Plaintiffs-Appellants for Rehearing and for Certification of Issues to the Massachusetts Supreme Judicial Court at 2, *Redgrave v. Boston Symphony Orchestra*, Nos. 85-1305, 85-1341 (1st Cir. Sept. 9, 1988) (emphases in original).

<sup>240</sup> *Id.* at 7.

<sup>241</sup> *Id.* at 12-13.

<sup>242</sup> *Id.* at 13.

A petition for a writ of certiorari followed. It was difficult to fit this procedurally convoluted case, seemingly turning on unique and highly specialized issues of state law and certification practice, into one of the Supreme Court's narrow categories of "certworthiness."<sup>243</sup> As the plaintiff's attorneys were all too well aware, no court in the entire tortured course of the *Redgrave* litigation had actually ruled on application of a first amendment forced speech defense in these circumstances, an issue that might have piqued the Supreme Court justices' interest. The cert. petition was denied on January 23, 1989.<sup>244</sup>

Shortly after the First Circuit released its *en banc* decision, *New York Times* drama critic Frank Rich reviewed a London production of Tennessee Williams' play, *Orpheus Descending*, with Redgrave starring in a performance that Rich described as "indelible" and "redemptive."<sup>245</sup> A month later Rich returned to the theme:

Will homebound Americans ever see it [*Orpheus Descending*]? One can hardly assume so; Miss Redgrave, whose vocal support for the Palestine Liberation Organization is repugnant to many, has been conspicuously absent from our stages since the Boston Symphony Orchestra cancelled her engagement as a narrator for Stravinsky's *Oedipus Rex* in 1982. In the meantime, Americans are missing the creative prime of the greatest actress in the English-speaking theater.<sup>246</sup>

*Redgrave* was a case with implications for both political and cultural freedom. It had to do with art as well as employment, with what Peter Sellars called "cultural monuments" that he, the BSO, and classical actresses like Vanessa Redgrave "have been entrusted with."<sup>247</sup> In this it resembled cases of the blacklist era, in which the courts failed so miserably to prevent or even slow a massive wave of retaliation against artists, teachers, and others who exercised their first amendment rights.<sup>248</sup> As a result, cultural life in the United

<sup>243</sup> See U.S. SUP. CT. R. 17.

<sup>244</sup> 109 S. Ct. 869.

<sup>245</sup> Rich, *In London, Taking Williams Seriously*, *The New York Times*, Dec. 17, 1988. at C15, col.3.

<sup>246</sup> Rich, *West End Risks and Rewards*, *The New York Times*, Jan. 15, 1989, at § 2, l. *Orpheus Descending* (with Redgrave starring) in fact opened without incident in New York on Sept. 24, 1989.

<sup>247</sup> See *supra* note 48 and accompanying text.

<sup>248</sup> See *supra* notes 103-20 and accompanying text.

States was impoverished; hundreds if not thousands of talented writers, directors, teachers, and performers were silenced.<sup>249</sup>

It is not enough to argue, in defense of the courts then or now, that not all social or political evils can be judicially eradicated, or that the legal tools do not exist. In *Redgrave*, as in the blacklist-era cases, statutory and common law theories were available. Indeed, the fact that Redgrave lost under the MCRA even though no court actually adjudicated the BSO's first amendment defense may suggest that the defense, even if accepted as a threshold matter, would not have held up when actually applied to the facts of the case.

Judge Bownes may have come closest to understanding this strange outcome when he said the en banc majority was "so wedded to 'traditional' thinking that they simply refuse to accept the basis for Massachusetts' innovative antidiscrimination law."<sup>250</sup> But whatever the source of the judicial unease, it ended by producing dubious theories of constitutional law, impenetrable ground rules for the certification process, and disquieting notes of encouragement for private corporate interference with individuals' political rights.

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<sup>249</sup> See generally *supra* note 95 and accompanying text.

<sup>250</sup> 855 F.2d at 921. See *supra* note 196 and accompanying text.



# BOSTON COLLEGE LAW REVIEW

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VOLUME XXX

SEPTEMBER 1989

NUMBER 5

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