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Survey of Organizational and Supervisory Liability under 42 U.S.C. Section 1983 and 42 U.S.C. Section 1985(3), A

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COMMENT

A SURVEY OF ORGANIZATIONAL AND SUPERVISORY LIABILITY UNDER 42 U.S.C. SECTION 1983 AND 42 U.S.C. SECTION 1985(3)

I. INTRODUCTION

The Ku Klux Klan (KKK) Act[1] was the third of four major federal civil

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1. Ch. 22, 17 Stat. 13 (1871) [hereinafter cited as KKK Act]. The Act is formally entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," but became known popularly as either the KKK Act or the Civil Rights Act of 1871.

Section 1983 is derived from § 1 of the KKK Act. Although the language of § 1983 and § 1 of the KKK Act are similar, there are two significant differences. First, the KKK Act provided for original jurisdiction for *all* claims arising under § 1 in the federal district and circuit courts. Section 1983's jurisdictional counterpart is located in 28 U.S.C. § 1343(a)(3) (Supp. III 1979). Jurisdiction under § 1343(a)(3) is not coextensive with § 1983. *See* Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) (discussed at text accompanying notes 295-303 *infra*). Second, § 1 of the KKK Act protected only "rights, privileges, or immunities secured by the Constitution of the United States." Section 1983 provides a remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*." (Emphasis added.)

Section 1985(3) derives from § 2 of the KKK Act. Section 2 of the KKK Act differs from § 1985(3) in that it provided not only civil but criminal penalties, as well. Also, § 2 of the KKK Act had its own jurisdictional component for the recovery of damages in the federal district and circuit courts. Section 1985(3)'s jurisdictional counterpart is embodied in 28 U.S.C. § 1343(a)(1) (Supp. III 1979).

The comprehensiveness and coherence of the KKK Act was shattered by the revision of the United States Statutes in 1874 when the provisions of the KKK Act were separated and scattered throughout the Revised Statutes. The civil remedy embodied in § 1 of the KKK Act was modified by adding the words "and laws" and placed in Rev. Stat. § 1979 (1874) (current version at 42 U.S.C. § 1983 (Supp. III 1979)). The provision for jurisdiction in the district courts for a claim under § 1 of the KKK Act was placed in Rev. Stat. § 563(12) (1874). Section 563(12) gave district courts jurisdiction to hear suits to redress the deprivation, under color of state law, of any right secured by the Federal Constitution or by "any law of the United States." The provision for original jurisdiction in the circuit courts for a claim under § 1 of the KKK Act was placed in *id.* § 629(16). Section 629(16) gave circuit courts original jurisdiction to hear suits to redress the deprivation, under color of state law, of any right secured by the Federal Constitution or "any law providing for equal rights." The Judicial Code of 1911 adopted the "any law providing for equal rights" language of Rev. Stat. § 629(16) (1874), rather than the "any law of the United States" language of *id.* § 563(12). Act of March 3, 1911, ch. 231, § 24(14), 36 Stat. 1087 (current version at 28 U.S.C. § 1343(a)(3) (Supp. III 1979)).

Section 2 of the KKK Act also was revised in 1874. The criminal sanction of § 2 was placed in Rev. Stat. § 5519 (1874), and was held to be unconstitutional in Baldwin v. Franks, 120 U.S. 678 (1887), and United States v. Harris, 106 U.S. 629 (1882). *But cf.* 18 U.S.C. § 241 (1976) (criminal analogue to § 1985(3)). The civil remedy in § 2 of the KKK Act was placed in Rev. Stat. § 1980 (1874) (current ver-

rights statutes enacted during the Reconstruction Period.[2] Sections 1 and 2

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sion at 42 U.S.C. § 1985(3) (Supp. III 1979)). The jurisdictional parts of § 2 of the KKK Act were placed in Rev. Stat. § 563(11) (1874) (jurisdiction for the district courts) and *id.* § 629(17) (jurisdiction for the circuit courts) (current version at 42 U.S.C. § 1343(a)(1) (Supp. III 1979)).

2. The first civil rights act of this period was entitled "An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication." Ch. 31, 14 Stat. 27 (1866). It became popularly known as the Civil Rights Act of 1866. The first ancestor of § 1983 is found in § 2 of this Act. It provided only criminal penalties for any person who, under color of state law, statute, ordinance, regulation, or custom, deprived another "of any right secured or protected by this act," which included the right to contract and the right to hold property irrespective of race. *Id.* § 1 (current version at 42 U.S.C. §§ 1981-1982 (1976)).

The second civil rights act of this period was the Enforcement Act of 1870, formally entitled "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes." Ch. 114, 16 Stat. 140. *See also* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (protecting voting rights). The second precursor of § 1983 can be found in § 17 of the Enforcement Act, while an analogue to § 1985(3) can be found in § 6 of this Act. *See* 18 U.S.C. § 241 (1976). Section 18 of the Enforcement Act of 1870 re-enacted the Civil Rights Act of 1866, including § 2 of that Act which was the first ancestor of § 1983. This was done because of concern that the § 2 power under the thirteenth amendment, under which the 1866 Act was enacted, was not broad enough to support the Civil Rights Act of 1866. The re-enactment came after the ratification of the fourteenth amendment. Thus, the § 5 power under that amendment was available to sustain this legislation. J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 183-84 (1951); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1333-34 (1952).

The third civil rights statute of this period was the KKK Act. *See* note 1 *supra*. Although § 1 of the KKK Act, the direct precursor of 42 U.S.C. § 1983 (Supp. III 1979), had been preceded by § 2 of the Civil Rights Act of 1866, which in turn had been re-enacted in the Enforcement Act of 1870, § 1 of the KKK Act was the first § 1983-type legislation to provide a civil remedy. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871) ("The model for enacting . . . [§ 1 of the KKK Act] will be found in the second section of the act of April 9, 1866, known as the 'civil rights act.' That section provides a criminal proceeding in identically the same case as . . . [§ 1 of the KKK Act] provides a civil remedy for . . . .") (remarks of Rep. Shellabarger).

The fourth civil rights act of this period was entitled "An act to protect all citizens in their civil and legal rights." Ch. 114, 18 Stat. 335 (1875). This Act provided "[t]hat all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement." Thus, its coverage was similar to Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1976). The 1875 Act was found to be unconstitutional in the Civil Rights Cases, 109 U.S. 3 (1883).

of that Act are the predecessors of sections 1983[3] and 1985(3),[4] respectively. Because the statutes possess a common origin, the historical

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3. 42 U.S.C. § 1983 (Supp. III 1979). Before obtaining legal or equitable relief under § 1983, the plaintiff must show:

(1) that the defendant
  (a) is a "person"
  (b) who was acting "under color of"
  (c) any State or Territorial "statute, ordinance, regulation, custom, or usage";
(2) that the plaintiff suffered injury to any right, privilege, or immunity "secured" by either
  (a) the Constitution
  (b) "and laws";
(3) that the defendant acted with the requisite mental state; and
(4) that the defendant caused the injury complained of.

The Supreme Court has stated:

> By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Gomez v. Toledo, 100 S. Ct. 1920, 1923 (1980). It may be necessary to plead only two allegations, but the cases show that these are causation problems under § 1983, *see* text accompanying notes 169-89 *infra*, and the cases show that an as yet undefined mental state requirement may exist under § 1983, *see* notes 82-105 and accompanying text *infra*.

4. 42 U.S.C. § 1985(3) (Supp. III 1979). The pertinent elements of § 1985(3) discussed in this Comment that the plaintiff must show can be outlined as follows:

(1) that the defendant is one of
  (a) two or more
  (b) "persons"
  (c) who conspire, or "go in disguise on the highway or on the premises of another";
(2) that the purpose of the conspiracy or the proscribed disguised activity was to deprive
  (a) "any person or class of persons" of the
    (i) equal protection of the laws, or
    (ii) the equal privileges and immunities under the laws;
(3) that the defendant acted with the requisite mental state, which is a "racial, or perhaps otherwise class-based, invidiously discriminatory animus"; and
(4) that the two or more persons conspiring or engaging in the proscribed disguised activity
  (a) did, or caused to be done, "any act in furtherance of the object of such conspiracy"
  (b) whereby "another" is
    (i) injured in his person, or

background, legislative history, and purposes of the two statutes are largely the same. These similarities invite comparison.

The purpose of this Comment is to compare the breadth of liability under section 1983 and section 1985(3) with respect to organizations that are state actors for purposes of the fourteenth amendment, public organizations, and of organizations that are not state actors for purposes of the fourteenth amendment, private organizations. The liability of supervisory officials who are agents of public and private organizations also will be examined.

II. THE ELEMENTS OF SECTION 1983 AND SECTION 1985(3)

A. *Possible Defendants*

1. Possible Defendants under Section 1983

There are two requirements that must be met before an organization or supervisory official can be a defendant under section 1983: (1) the defendant must be a "person" for purposes of the statute and (2) the defendant must be acting "under color of state law." Section 1983 applies on its face to "[e]very person." There are two primary means to avoid "person" status under the statute. The first is by way of definition, *i.e.*, by finding that the particular organization or entity involved was not intended to be included within the meaning of the word "person." Second, an analytically distinct but equally effective method for a defendant to avoid classification as a "person" under section 1983 is for the defendant to be within one of those classes of persons to whom the judiciary has granted an absolute immunity from section 1983 suit.

In the Dictionary Act,[5] enacted two months prior to the KKK Act, it was stated that "the word 'person' *may* extend and be applied to bodies politic and corporate."[6] A public organization (state actor) probably would be a "body politic" under this definition and a private organization (nonstate actor) probably would be a "body corporate." The United States Supreme Court has held however, that the Dictionary Act's definition of "person" "is merely an allowable, not a mandatory, one."[7] The Court has, thus, reserved to itself the power to decide whether private organizations, public organizations, and the state itself are included within the meaning of the word "person."

(ii) property, or
(iii) "deprived of having and exercising any right or privilege of a Citizen of the United States."

See Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

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

6. *Id.* § 2 (emphasis added).

7. Monroe v. Pape, 365 U.S. 167, 191 (1961) (overruled in part in Monell v. Department of Social Servs., 436 U.S. 658 (1978)).

Although it never has been held explicitly, the Supreme Court has indicated that a *private corporation* is a "person" within the meaning of section 1983. In *Adickes v. S.H. Kress & Co.*,[8] the Court did not discuss whether the defendant-private corporation was a "person," but remanded the case leaving open the possibility of private corporate liability under section 1983. In addition, the Court in *Monell v. Department of Social Services* stated that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."[9]

The issue of whether a *public organization* or local governmental unit is a "person" for purposes of section 1983 has had a stormy history. In *Monroe v. Pape*,[10] the Court decided that municipalities were not "persons" under section 1983 for the purpose of recovering damages.[11] This decision was based on the Forty-Second Congress' rejection of the Sherman Amendment to the KKK Act. That Amendment would have held local governmental units liable for certain injuries caused by "persons riotously and tumultuously assembled together."[12] It was reasoned that since Congress had rejected an amendment to the KKK Act that would have made local governmental units liable, the word "person" in section 1 of that Act, which later became section 1983, was not intended to include local governmental units.

In *Monell v. Department of Social Services*,[13] the Court re-evaluated the legislative history of section 1983 and concluded "that Congress *did* in-

8. 398 U.S. 144 (1970).

9. 436 U.S. 658, 687 (1978).

10. 365 U.S. 167 (1961) (overruled in part in *Monell*, 436 U.S. 658 (1978)).

11. *Id.* at 187-92. The Court in City of Kenosha v. Bruno, 412 U.S. 507 (1973), extended the holding of *Monroe* to preclude injunctive relief against municipalities. In Moor v. County of Alameda, 411 U.S. 693 (1973), it was held that counties were not persons under § 1983 for the purpose of recovering damages. In *Moor*, the plaintiff argued unsuccessfully that counties were persons under California law and that under 42 U.S.C. § 1988 (1976), state law is adopted in the construction of § 1983 if state law is necessary to make that statute effective. *See also* Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (reserving the question whether local school boards are "persons" under § 1983); Aldinger v. Howard, 427 U.S. 1 (1976) (reaffirming *Monroe* and *Moor*).

12. CONG. GLOBE, 42d Cong., 1st Sess. 749 (1871). As first proposed the Sherman Amendment made the "inhabitants of the county, city, or parish" liable. *Id.* at 663. Under the first conference substitute for the Sherman Amendment only the "county, city, or parish," not its inhabitants, could be held liable. *Id.* at 749. The second conference substitute for the Sherman Amendment, the version that was finally adopted, became § 6 of the KKK Act. Ch. 22, § 6, 17 Stat. 15 (1871) (current version at 42 U.S.C. § 1986 (1976)). The text of the Sherman Amendment and the two conference substitutes are found in the appendix to *Monell*, 436 U.S. at 702-04.

13. 436 U.S. 658 (1978).

tend municipalities and other local government units to be included among those persons to whom § 1983 applies."[14] The Court reasoned that the Sherman Amendment had been rejected by Congress because that Amendment imposed liability on municipalities and counties for riot damage. This liability in effect placed an obligation on cities and counties to keep the peace. It was argued that Congress had no constitutional authority to impose such an obligation on subdivisions of a state. Thus, the Sherman Amendment was rejected because of its questionable constitutionality, not because it imposed liability on local governmental units.[15] Section 1 of the KKK Act, unlike the Sherman Amendment, created no unconstitutional burden on municipalities. Instead, section 1 was "intended to give a broad remedy for violations of federally protected civil rights."[16] Since municipalities could violate the rights or interests encompassed by section 1 just as other persons could, "there is no reason to suppose that municipal corporations would have been excluded from the sweep of § 1."[17]

Whether the *state* itself, apart from its various subdivisions, comes within the definition of the word "person" in section 1983 is unclear. In *Quern v. Jordan*,[18] it was argued that *Monell*'s holding that a municipality was a "person" would affect the states' eleventh amendment immunity from suit in federal court for retroactive damages.[19] Justice Rehnquist stated that *Monell*'s holding was "limited to local government units which are not considered part of the State for Eleventh Amendment purposes."[20]

Justice Brennan, concurring in result only, argued that the majority opinion impliedly held that a state could not be a "person" under section

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14. *Id.* at 690. Under *Monell* there may be two limitations on municipal liability under § 1983. First, there may be a tenth amendment limitation on municipal liability if the § 1983 claim is based on the violation of a federal statutory right or the violation of a right secured by some part of the Constitution other than the fourteenth amendment. *Id.* at 690 n.54. Second, in dicta, *Monell* stated that the plaintiff may not rely solely on a vicarious liability theory, including respondeat superior, when bringing a § 1983 action against a municipality. *Id.* at 691. Only those agents "whose edicts or acts may fairly be said to represent official policy" may create liability for a municipality. *Id.* at 694. *See* notes 180-89 and accompanying text *infra*.

15. *See* CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871) (remarks of Rep. Poland), *quoted in Monell*, 436 U.S. at 664; Monroe v. Pape, 365 U.S. at 190.

16. 436 U.S. at 685.

17. *Id.* at 685-86. The Court also supported the proposition that municipal corporations were intended to be "persons" by citing the Dictionary Act, and by noting that the doctrine that corporations should be treated for all intents and purposes as persons had been extended to municipal corporations by 1871. *Id.* at 688 (citing Cowles v. Mercer County, 74 U.S. (7 Wall.) 118 (1869)).

18. 440 U.S. 332 (1979).

19. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

20. 440 U.S. at 338 (quoting *Monell*, 436 U.S. at 690 n.54).

1983.[21] Under *Fitzpatrick v. Bitzer*[22] and *Hutto v. Finney*,[23] a state's eleventh amendment immunity from suit in federal court may be abrogated if two requirements are met: (1) Congress enacted a statute pursuant to any power clause in the Constitution that follows the eleventh amendment chronologically[24] and (2) Congress intended that statute to abrogate the state's eleventh amendment immunity.[25] Justice Brennan reasoned that because section 1983 was enacted pursuant to the enforcement power of the fourteenth amendment, the first requirement for abrogation of the eleventh amendment immunity is satisfied.[26] Justice Brennan argued that if a state were a "person" for purposes of section 1983, the requisite intent to abrogate the eleventh amendment immunity would exist, and, thus, the states' eleventh amendment immunity would be abrogated in section 1983 actions.[27] Because the majority in *Quern v. Jordan* held that the state does have an eleventh amendment immunity from suit in federal court under section 1983, Justice Brennan found that it necessarily concluded that a state is not a "person" for purposes of section 1983. If Justice Brennan's reasoning is accepted, the state itself, as distinct from any of its subdivisions, is not a "person" under section 1983.

The second means by which a defendant can avoid being included as a "person" within the meaning of section 1983 is by being in one of those classes of persons which has been granted an absolute immunity. To date there are four such classes: legislators,[28] judges,[29] prosecutors,[30] and

21. *Id.* at 350-51 (Brennan, J., concurring).

22. 427 U.S. 445 (1976).

23. 437 U.S. 678 (1978).

24. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (fourteenth amendment § 5 power clause).

25. In Hutto v. Finney, 437 U.S. 678 (1978), the Court held that The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1976)), was enacted pursuant to the § 5 power of the fourteenth amendment and was intended to abrogate the states' eleventh amendment immunity. This case indicates that the intent to abrogate the eleventh amendment immunity need not be shown on the face of the statute. 437 U.S. at 693-94.

Actions under both § 1983 and § 1985(3) are covered by The Civil Rights Attorney's Fees Awards Act of 1976. This Act allows a prevailing party to recover reasonable attorney's fees at the trial court's discretion.

26. 440 U.S. at 351 n.3 (Brennan, J., concurring).

27. *Id.* at 350-51 (Brennan, J., concurring).

28. Tenney v. Brandhove, 341 U.S. 367, 379 (1951).

29. Pierson v. Ray, 386 U.S. 547, 553-55 (1967). *See also* Stump v. Sparkman, 435 U.S. 349, 364 (1978) (immunity for acts in judicial capacity).

30. Imbler v. Pachtman, 424 U.S. 409, 431 (1976). The absolute quasi-judicial immunity has been extended to other court officials. *See, e.g.*, Slotnick v. Staviskey, 560 F.2d 31, 32 (1st Cir. 1977) (judge's clerk), *cert. denied*, 434 U.S. 1077 (1978); Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno, 547 F.2d 1, 2-3 (1st Cir. 1976) (receiver).

possibly public defenders.[31] There are two basic reasons given for these absolute immunities. First, Congress, by using vague, general language, could not have intended to abrogate the common law absolute immunities that existed at the time of the statute's enactment.[32] Second, there is a policy rationale that by granting this immunity, legislative, judicial, and

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31. The Court has not decided explicitly whether public defenders are entitled to an absolute immunity under § 1983. In Ferri v. Ackerman, 444 U.S. 193 (1979), it was decided that an attorney appointed by a federal court to represent a defendant in a criminal trial was not entitled to an absolute immunity in a subsequent state malpractice suit brought against him by his former client. *Id.* at 205. Although *Ferri* was not a § 1983 case, the United States Court of Appeals for the Eighth Circuit has interpreted *Ferri* to preclude granting an absolute immunity to public defenders, and instead has granted a qualified immunity or good faith affirmative defense to court-appointed counsel. Dodson v. Polk County, 628 F.2d 1104, 1107-08 (8th Cir. 1980); White v. Bloom, 621 F.2d 276, 280 (8th Cir. 1980). *See also* John v. Hurt, 489 F.2d 786, 788 (7th Cir. 1973) (granting court-appointed counsel a qualified immunity from § 1983 suit). For a discussion of the good faith affirmative defense, see text accompanying notes 106-34 *infra*.

Prior to *Ferri* most federal courts of appeals dismissed § 1983 actions against public defenders. Some courts of appeals held that public defenders do not act under color of state law because they act for an individual client just as a privately retained attorney would. *See, e.g.*, Skipper v. Brummer, 598 F.2d 427, 428 (5th Cir. 1979) (per curiam), *vacated*, 444 U.S. 1063 (1980); United States *ex rel.* Simmons v. Zibilich, 542 F.2d 259, 261 (5th Cir. 1976) (per curiam); O'Brien v. Colbath, 465 F.2d 358, 359 (5th Cir. 1972) (per curiam); Brown v. Schiff, 614 F.2d 237, 238-39 (10th Cir.) (per curiam), *cert. denied*, 100 S. Ct. 2164 (1980); Espinoza v. Rogers, 470 F.2d 1174, 1174-75 (10th Cir. 1972) (per curiam). For a discussion of the "under color of state law" requirement of § 1983, see notes 34-46 and accompanying text *infra*. Other courts of appeals have held that public defenders have an absolute quasi-judicial immunity from a § 1983 suit similar to that of prosecutors as established in Imbler v. Pachtman, 424 U.S. 409 (1976). *See* Housand v. Heiman, 594 F.2d 923, 924-25 (2d Cir. 1979) (per curiam) (either the court-appointed attorney does not act under color of state law or has an absolute immunity from suit); Waits v. McGowan, 516 F.2d 203, 205 (3d Cir. 1975) (public defenders immune from § 1983 suit); Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972) (public defender does not act under color of state law, but even if he does, he enjoys immunity from § 1983 suit), *cert. denied*, 412 U.S. 950 (1973); Minns v. Paul, 542 F.2d 899, 900-01 (4th Cir. 1976) (public defenders have an absolute immunity from § 1983 suit, without deciding whether court-appointed attorneys act under color of state law), *cert. denied*, 429 U.S. 1102 (1977); Robinson v. Bergstrom, 579 F.2d 401, 411 (7th Cir. 1978) (per curiam) (public defenders act under color of state law, but have an absolute immunity from § 1983 suit); Miller v. Barilla, 549 F.2d 648, 649 (9th Cir. 1977) (public defenders enjoy absolute quasi-judicial immunity). *See generally* Note, *The Immunity of Public Defenders Under Section 1983*, 27 CLEV. ST. L. REV. 244 (1978); *Liability of Public Defenders Under Section 1983*: Robinson v. Bergstrom, 92 HARV. L. REV. 943 (1979).

32. Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

quasi-judicial freedom of decision is preserved from *any* inhibition that civil liability might create.[33]

The second requirement that must be met before an organization or individual can be a defendant under section 1983 is that the defendant act "under color of any [State or Territorial][34] statute, ordinance, regulation, custom, or usage." The "under color of" requirement of section 1983 "has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."[35] In *Adickes v. S.H. Kress & Co.*,[36] it was stated that "[w]hatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983, . . . we think it essential that he act with the knowledge of and pursuant to that statute."[37] There are at least two problems with this language. First, the "[w]hatever else may be also necessary" language leaves open the possibility of additional requirements.[38] Second, it may be that the requirement that the defendant act pursuant to statute in order to act under color of a state statute is inconsistent with *Monroe v. Pape*.[39] In *Monroe*, the defendant-police officers violated state law as well as plaintiff's fourth and fourteenth amendment rights by searching his home without a warrant, by detaining him for ten hours on open charges, and by subjecting him to a strip search in front of his family. These police officers could hardly be said to be acting pursuant to state law because they were violating state law. Nevertheless, they were said to be acting under "color of state law."[40]

Statutes, ordinances, and regulations of a state or territory seem to be qualitatively different from the customs and usages of a state or territory in that the former are usually written or recorded in some permanent way and are subject to objective verification, while the latter are more dependent on sociological knowledge than legal acumen.[41] Yet in *Adickes v.*

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33. Pierson v. Ray, 386 U.S. 547, 554 (1967).

34. Puerto Rico is considered either a territory or a state under § 1983. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores De Otero, 426 U.S. 572, 579 (1976). The District of Columbia is neither a state nor territory for purposes of § 1983. District of Columbia v. Carter, 409 U.S. 418, 432 (1973).

35. United States v. Price, 383 U.S. 787, 794 n.7 (1966) (holding that the "under color of" requirement of 18 U.S.C. § 242, the criminal counterpart of § 1983, has the same meaning as the "under color of" requirement of 42 U.S.C. § 1983).

36. 398 U.S. 144 (1970).

37. *Id.* at 161 n.23.

38. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978).

39. 365 U.S. 167 (1961) (overruled in part in *Monell*, 436 U.S. 658 (1978)).

40. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id.* at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

41. Adickes v. S.H. Kress & Co., 398 U.S. 144, 181 (1970) (Douglas, J., dissenting in part). Justice Douglas not only argued that "custom or usage" should

S.H. Kress & Co., it was decided that a "'custom, or usage, of [a] State' for purposes of § 1983 must have the force of law by virtue of the persistent practices of state officials."[42] This, in effect, only allows a plaintiff to show that a state official has engaged in a "systematic maladministration" of law.[43] Since a "custom or usage" of a state must have the force of law by virtue of the persistent practices of *state officials*, it is a plausible inference that all persons acting under color of such a custom or usage are state actors for purposes of the fourteenth amendment.

Assuming that the "under color of state law" requirement of section 1983 is the equivalent of the state action requirement of the fourteenth amendment, then only public officials and organizations, which are by definition state actors, can be held liable under section 1983.[44] Interestingly, there is at least one way for a private actor to satisfy the state action requirement of the fourteenth amendment and thus act under color of state or territorial law: a private actor conspires or acts jointly with at least one state actor to deprive another of a constitutional right.[45] One limitation on the conspiracy or joint activity theory of state action used to be that if all the state actors who conspire or act jointly with the private actors have an absolute immunity from section 1983 suit, then all the private actors involved in the conspiracy may have a vicarious immunity from section 1983 suit. This position is no longer viable.[46]

2. Possible Defendants under Section 1985(3)

Section 1985(3) requires that "two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another."[47] Both sections 1983 and 1985(3) use the word "person."

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be defined by the binding forces of the social mechanism, he also contended that the word "of" refers to the "geographical area or political entity in which the 'custom' originates and where it is found." *Id.* at 182 (Douglas, J., dissenting in part). Thus, under Douglas' theory of "custom or usage" in § 1983, if the defendant acted in accordance with an established social practice within the geographical area of the state or territory, then the defendant acted under color of a custom of the state or territory.

42. *Id.* at 167.

43. The term systematic maladministration of law comes from the remarks of Representative Garfield during the debate on the KKK Act.

> But the chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.

CONG. GLOBE, 42d Cong., 1st Sess. app. 153 (1871) (remarks of Rep. Garfield).

44. *See* text accompanying notes 234-36 *infra*.

45. Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970). *See* United States v. Price, 383 U.S. 787, 794 (1966) (interpreting 18 U.S.C. § 242).

46. *See generally* Dennis v. Sparks, 101 S. Ct. 183 (1980).

47. 42 U.S.C. § 1985(3) (Supp. III 1979).

Because of their common origin, the definition of the word "person" under both statutes may be the same.[48] If this proposition is true, then municipalities and private corporations, which are "persons" under section 1983, may be "persons" under section 1985(3).

Section 1985(3), unlike section 1983, has no state action or under color of state law requirement on its face. For this reason, its criminal counterpart[49] was declared unconstitutional in *United States v. Harris*[50] and *Baldwin v. Franks*.[51] In *Collins v. Hardyman*,[52] a predecessor statute of section 1985(3) was interpreted as requiring state action to avoid the constitutional problems encountered in reaching private parties under the fourteenth amendment. In 1971 the state action requirement of *Collins* was overruled in *Griffin v. Breckenridge*.[53] In *Griffin*, a two-step process of analysis was adopted for section 1985(3). First, there is an inquiry to see if the statutory requirements are met. Because there is no state action requirement in the statute, no state action is needed at this point. Second, if the defendants are private actors, a search for a constitutional premise that will reach private action is made, *i.e.*, one is allowed to sift through

48. *See, e.g.*, Flesch v. Eastern Pa. Psychiatric Inst., 434 F. Supp. 963, 975 (E.D. Pa. 1977); Boling v. National Zinc Co., 435 F. Supp. 18, 22 (N.D. Okla. 1976); Veres v. County of Monroe, 364 F. Supp. 1327, 1330 n.5 (E.D. Mich. 1973), *aff'd mem.*, 542 F.2d 1177 (6th Cir. 1976), *cert. denied*, 431 U.S. 969 (1977).

Some courts have extended the definition of "persons" to include federal actors because there is no "under color of" state law requirement under § 1985(3). *See* Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 931 (10th Cir. 1975); Paton v. LaPrade, 471 F. Supp. 166, 170-71 (D.N.J.), *remanded on other grounds*, 524 F.2d 862 (3d Cir. 1979); Peck v. United States, 470 F. Supp. 1003, 1011-12 (S.D.N.Y. 1979); Moriani v. Hunter, 462 F. Supp. 353, 356 (S.D.N.Y. 1978); Founding Church of Scientology v. Director, FBI, 459 F. Supp. 748, 753 (D.D.C. 1978); Stith v. Barnwell, 447 F. Supp. 970, 972-73 (M.D.N.C. 1978); Alvarez v. Wilson, 431 F. Supp. 136, 140-41 (N.D. Ill. 1977); Williams v. Wright, 432 F. Supp. 732, 737-38 (D. Or. 1976); Revis v. Laird, 391 F. Supp. 1133, 1138 (E.D. Cal. 1975), *rev'd mem. sub nom.* Revis v. Rumsfeld, 541 F.2d 286 (9th Cir. 1976). *Contra*, Bethea v. Reid, 445 F.2d 1163, 1164 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); Lofland v. Meyers, 442 F. Supp. 955, 957 (S.D.N.Y. 1977); Morpurgo v. Board of Higher Educ., 423 F. Supp. 704, 714 (S.D.N.Y. 1976); Dickinson v. French, 416 F. Supp. 429, 433 (S.D. Ala. 1976); Moore v. Schlesinger, 384 F. Supp. 163, 165 (D. Colo. 1974) (§ 1985(1)); Williams v. Halperin, 360 F. Supp. 554, 556 (S.D.N.Y. 1973). *See also* Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 437-38 (1979) (arguing that the purpose of the KKK Act was to make state and private actors liable, not federal actors).

49. Rev. Stat. § 5519 (1874).

50. 106 U.S 629 (1882).

51. 120 U.S. 678 (1887).

52. 341 U.S. 651 (1951).

53. 403 U.S. 88 (1971). *See* note 2, *supra*.

the Constitution for a clause that grants Congress the power to reach private parties under the particular facts of the case. In *Griffin*, the defendants stopped a car on a highway and assaulted the black occupants of the car. The plaintiffs' section 1985(3) claim reaching private parties was supported by the section 2 power of the thirteenth amendment, because this act of racial discrimination could be considered a badge or incident of slavery under *Jones v. Alfred H. Mayer Co.*,[54] and the claim also was supported by the unenumerated constitutional right to interstate travel under *United States v. Guest*.[55] Interestingly, in *Griffin* the issue whether private parties may be reached under the fourteenth amendment section 5 power was reserved expressly.[56] Because of the constitutional problems in applying section 1985(3) to private organizations and supervisory officials, its main use, outside of racial discrimination cases, may involve public organizations and supervisory officials, especially after *Monell*.

Section 1985(3) differs from section 1983 in that the former requires that "two or more" persons engage in the proscribed activity before a cause of action exists. A major issue in the area of organizational liability under section 1985(3) is whether a single political or corporate entity can be a "person" separate from its agents when the agents are acting within the scope of their authority while depriving another of an interest encompassed by section 1985(3). If the organization is considered to be a "person" separate from its agents, then the required "two or more persons" exist. On the other hand, if the organization and its agents are a single legal entity by virtue of the agency relationship, there is only one "person" and no liability on the part of either the organization or its agents will exist.

There are three approaches to the corporate conspiracy issue. The *majority rule*, created in *Dombrowski v. Dowling*,[57] is that the plurality requirement of section 1985(3) "is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm."[58] Rather, when an agent acts in his representa-

54. 392 U.S. 409 (1968).

55. 383 U.S. 745 (1966).

56. 403 U.S. at 107. A majority of the Court in United States v. Guest, 383 U.S. 745 (1966), held that Congress did have the power to punish private conspiracies that interfered with fourteenth amendment rights. The conspiracy in *Guest* involved interference with the use of state-owned facilities. The state ownership of these facilities may have provided the necessary state action for the conspiracy to be punishable under the fourteenth amendment. *Id.* at 774-86 (Brennan, J., concurring and dissenting).

57. 459 F.2d 190 (7th Cir. 1972) (Stevens, J.).

58. *Id.* at 196. *Accord*, Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 70-71 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); Bellamy v. Mason's Stores, Inc., 508 F.2d 504, 508 (4th Cir. 1974); Baker v. Stuart Broadcasting Co., 505 F.2d 181, 183 (8th Cir. 1974); Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910, 915 (E.D. Mich. 1977); Cole v. University of Hartford, 391 F. Supp. 888,

tional capacity for a principal, only a single legal entity is involved and the plurality requirement is not met. The *Dombrowski* rule banning intracorporate conspiracies may have at least three exceptions. First, there is the *violent acts exception*. "We do not suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding. Agents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon."[59] Second, there is the *multiple acts exception*. If the organizational agents were engaged in more than one act of discrimination, then the requisite plurality may exist.[60] Third, there is the *outside the scope of authority exception*. If any organizational agent acts outside the scope of his authority, that agent does not act in a representative capacity so the required plurality of persons exists.[61]

The *minority rule* focuses on "the policies undergirding § 1985(c)."[62] This approach views the rule banning intracorporate conspiracies as granting all organizations, private and public, and their agents an absolute immunity from suit under section 1985(3). Finding that creating such an absolute immunity would not serve any public function, this approach would allow intracorporate conspiracies.[63]

890-94 (D. Conn. 1975); Milburn v. Blackfrica Promotions, Inc., 392 F. Supp. 434, 436 (S.D.N.Y. 1974); Fallis v. Dunbar, 386 F. Supp. 1117, 1121 (N.D. Ohio 1974); Cohen v. Illinois Inst. of Tech., 384 F. Supp. 202, 205 (N.D. Ill. 1974), *aff'd on other grounds*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). *Cf.* Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952) (establishing the single-legal entity doctrine under § 1 of the Sherman Act).

59. *Dombrowski*, 459 F.2d at 196. *But see* Cole v. University of Hartford, 391 F. Supp. 888, 893 (D. Conn. 1975).

60. In *Dombrowski*, it was stated that "if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself normally will not constitute the conspiracy contemplated by the statute." 459 F.2d at 196. Some courts have interpreted this language to mean that if there are multiple acts of discrimination, the ban on intracorporate conspiracies does not apply. Jackson v. University of Pittsburgh, 405 F. Supp. 607, 612-13 (W.D. Pa. 1975); Rackin v. University of Pa., 386 F. Supp. 992, 1005-06 (E.D. Pa. 1974).

61. *See* Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 71-72 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); Cole v. University of Hartford, 391 F. Supp. 888, 893 (D. Conn. 1975) ("The plaintiff must . . . allege that . . . [the corporate agents] acted other than in the normal course of their duties.").

62. Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1257 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979).

63. "If, as seems clear under § 1985(c), the agreement of three partners to use their business to harass any blacks who registered to vote constitutes an actionable conspiracy, we perceive no function to be served by immunizing such action once a business is incorporated." *Id. See Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 951-53 (1959) ("Society is

The third approach is an attempt to find a *middle ground*. In *Dupree v. Hertz Corp.*,[64] it was held that whether an organization may be a separate person from its agents depends on a number of factors. These factors include (1) whether the organization involved is large or small, (2) whether there were single or multiple acts of discrimination, and (3) the number of persons, agents, or entities involved in making or executing the organizational decision.[65] Factors that may be added to this list include (4) whether the organization is public or private and (5) the nature of the discriminatory acts or decisions.

This type of factor analysis is unpromising. For example, the significance of the size of the organization is of doubtful validity. If agents in several subdivisions of a large organization engage in discriminatory acts, it may be easier to see "two or more persons" involved because each of the subdivisions of the large organization may be viewed as a separate person. If the discriminatory act is engaged in by agents of a small closely held corporation, however, it may be easier to see through the organization because of the close relationship between those making the corporate decisions and the probable lack of corporate formalities, and to view the act as one of individuals.

Similarly, the significance of the number of agents involved is of doubtful validity. If the number of agents involved is large, then at first glance it seems unreasonable to find that only one "person" is acting.[66] If the discriminatory act is committed by a small number of agents, however, then the act can more easily be characterized as the act of a small conspiratorial band.

The nature of the discriminatory act may be an ambiguous factor. If the discriminatory act complained of is a policy decision arrived at through consensus of those at the top of the organization, it may be easy to find an agreement, a requirement for a conspiracy.[67] If the act complained of is an act of violence perpetrated by agents of the organization, however, then under the case law it may be easier to say that the agent is a person separate from the organizational entity.[68] Thus, two very different kinds of acts both point to satisfaction of the "two or more persons" requirement.

In addition, it may be difficult to determine whether there are single or multiple acts of discrimination involved in a claim. For example, if a group on the board of directors of a savings and loan association agrees to

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benefitted by viewing a corporation as a single legal entity only when its acts for proper ends." *Id.* at 953).

64. 419 F. Supp. 764 (E.D. Pa. 1976).

65. *Id.* at 766.

66. The *Dupree* case indicates the greater the number of agents involved, the more likely that there are two or more "persons" involved. *Id.*

67. *See Developments in the Law—Criminal Conspiracy, supra* note 63, at 925-27.

68. *See Dombrowski*, 459 F.2d at 196; text accompanying note 59 *supra*.

"redline" an economically depressed geographical area, does that decision constitute a single act or multiple acts of discrimination? One can argue that a single decision was made that affected numerous individuals, thus making the decision a single act of discrimination. On the other hand, this situation could be characterized as an organization committing multiple acts of discrimination by failing to consider the loan applications of a large number of individuals.[69] Because it is unclear which way these factors point, the judiciary might be wise to decide the hard question: whether it wants to grant all incorporated organizations and their agents an absolute immunity from suit under section 1985(3).

A generally recognized requirement of conspiracy is that there be an illegitimate agreement.[70] In the case of section 1985(3), the proscribed agreement would be one to deprive another of the equal protection of the laws or the equal privileges and immunities under the law.[71] Assuming for the moment that the agents of a corporate entity can "conspire" within the meaning of section 1985(3),[72] two questions must be answered before liability can be imposed on a private or public organization: (1) can a corporate entity be a party to the illegitimate agreement; and (2) if so, what has to be shown to prove that the agreement exists?

Since public and private organizations are artificial persons that can act only through their agents, one needs a method of imputing the conspiratorial acts of agents to the corporate principal before the private or public organization can be liable under section 1985(3). There are two methods of imputing the corporate agents' acts to the corporate principal: the vicarious liability theory and the identification theory.[73]

Under the *vicarious liability theory*, the agreement of the agents is imputed to the corporation on the basis of the agency relationship.[74] The vicarious liability theory may be unavailable, however, under section 1985(3), especially when the organization involved is a municipality. In *Monell*, it was stated that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some

69. *See* 459 F.2d at 196. In *Dombrowski*, the plaintiff, a white lawyer, was refused office rental space because most of his clients were blacks and Hispanics. The court took the position that this was a single act of discrimination, although it could be argued that the corporate *decision* resulted in multiple acts of discrimination since every member of the class of potential Hispanic and black clients was denied access to legal services in that location.

70. *See Developments in the Law—Criminal Conspiracy, supra* note 63, at 925-27.

71. *See* text accompanying notes 237-75 *infra*.

72. This could occur if the ban on intracorporate conspiracies were abolished or if one of the exceptions to the rule prohibiting intracorporate conspiracies exists. *See* text accompanying notes 57-69 *supra*.

73. Goode, *Corporate Conspiracy: Problems of Mens Rea and the Parties to the Agreement*, 2 DALHOUSIE L. REV. 121, 124-29 (1975).

74. *Developments in the Law—Criminal Conspiracy, supra* note 63, at 951.

nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor."[75] This language in *Monell* concerning section 1983 might be used to limit vicarious liability theories under section 1985(3) since the two statutes have a common origin.

The second theory by which the acts of agents may be imputed to a corporate principal is the *identification method.*[76] Under this theory, the corporate entity is analogized to a human being and the agents are analogized to parts of the body. Some agents are the hands of the corporate entity; they do the work. Other agents represent the directing mind or will of the corporation; because these agents act as the mind of the corporation, their state of mind is that of the corporation.[77] *Monell* accepted implicitly the identification method of imputing the acts of municipal agents to the municipal principal. In dicta, it was stated that a municipality may be held liable under section 1983 only "when execution of a government's policy or custom, whether made by its lawmakers or *by those whose edicts of acts may fairly be said to represent official policy*, inflicts the injury."[78] Thus, the key to municipal liability under section 1983 is being able to identify those agents of the municipality who represent official policy, *i.e.*, agents who act as the organizational mind. If a municipal agent who represents the official policy of the organization "agrees" to engage in conduct that injures interests protected by section 1985(3), under the identification method of imputing liability to an organization, the organization would become a party to the conspiracy.

If the identification method of imputing the conspiratorial acts of agents to their principal is adopted, one may have to establish that a supervisory official who represents official policy was a party to the illegitimate agreement that is the basis of the section 1985(3) conspiracy. If an agent with supervisory power knows in a general way that agents subject to his supervision are planning acts of discrimination prohibited by section 1985(3) and does nothing to prevent the acts of discrimination, does the supervisory agent become a co-conspirator with the lower-level agents?[79] It

75. 436 U.S. at 691.

76. *See* Goode, *supra* note 73, at 124-29.

77. The dichotomy between hand-agents and mind-agents may not stand up under practical application. For example, do policemen who patrol city streets represent the state as policymakers or implementors of policy? Police implement the law, but they also have the discretion to make many low visibility decisions that may have broad policy implications.

78. 436 U.S. at 694 (emphasis added).

79. Under the "closest remaining criminal analogue to § 1985(3), 18 U.S.C. § 241," Griffin v. Breckenridge, 403 U.S. 88, 98 (1971), if "the defendant aided the conspirators knowing in a general way their purpose to break the law the jury may infer that he entered into an express or implied agreement with them." Luteran v. United States, 93 F.2d 395, 399 (8th Cir.), *cert. denied,* 303 U.S. 644 (1937).

has been held under section 1985(3) that "[i]f a party has the potential to stop illegal activity but fails to do so, and sits idly by, then that party may be said to have impliedly conspired in such illegalities."[80] A supervisor may have the ability to prevent or to attempt to prevent illegal conduct by his agents, yet making the supervisory agent a co-conspirator may be an unjustified reading of section 1985(3)'s conspiracy requirement. Under 42 U.S.C. § 1986,[81] a person who knows that wrongs proscribed by section 1985 are about to be committed and who has the power to prevent or aid in preventing the commission of any of those wrongs but fails to do so is liable for all damages caused by the wrongful acts which that person by reasonable diligence could have prevented. If a person with knowledge and the ability to prevent or aid in preventing damage done by the conspiracy were a co-conspirator under section 1985(3), then section 1986 would be redundant. Thus, it would follow that something more than knowledge and ability to prevent or aid in preventing is needed to show that the supervisory agent is a co-conspirator under section 1985(3).

B. *Mental States*

1. The Required Mental State under Section 1983: Proving a Cause of Action and Establishing a Defense

There are two general sets of mental state requirements under section 1983. First, there is the state of mind on which the plaintiff has the burdens of pleading, production, and persuasion. Second, there is the state of mind that the defendant can plead and prove for a section 1983 good faith affirmative defense, sometimes called a qualified immunity.

The mental state requirement on which the plaintiff has the burden of pleading, production, and persuasion is not defined clearly.[82] Although there is no explicit mental state requirement in the language of the statute,[83] section 1983 may impose something other than a strict liability standard.

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80. Dickerson v. United States Steel Corp., 439 F. Supp. 55, 67 (E.D. Pa. 1977).

81. (1976). Section 1986 originated as the second conference substitute for the rejected Sherman Amendment to the KKK Act. CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871). *See* note 12 *supra*.

82. The primary reason for the underdevelopment of doctrine concerning the mental state requirement that the plaintiff must plead and prove is that the judiciary has been generous in handing out good faith affirmative defenses to most public officials subject to § 1983 suit. *See* text accompanying notes 106-34 *infra*.

83. Section 1983 does require that the defendant "subjects, or causes [the plaintiff] to be subjected . . . [to a] deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (Supp. III 1979). It might be argued that one cannot "subject" another to a deprivation of a constitutional or federal statutory right, privilege, or immunity without in some

In *Baker v. McCollan*,[84] the Supreme Court reserved for later decision the issue of what mental state the plaintiff must prove. The Court did state that the "first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'"[85] There cannot be a deprivation of some kinds of constitutional or federal statutory rights, privileges, or immunities unless the plaintiff shows that the defendant was acting with a required mental state. For example, in order to prevail in a fourteenth amendment equal protection claim where the governmental act is not facially discriminatory, one must show that the defendant acted with an "invidiously discriminatory purpose."[86] Similarly, before one may recover damages under the eighth amendment cruel and unusual punishment prohibition as incorporated into the fourteenth amendment, one must show at least that the state actor punishing the plaintiff acted with deliberate indifference to the plaintiff's suffering.[87]

The constitutional or federal statutory substantive right which is the basis of the section 1983 action may be however, the *exclusive* source of a mental state requirement. In *Chapman v. Houston Welfare Rights Organization*,[88] it was decided that section 1983 is a purely remedial statute that does not provide for any substantive rights. This means that section 1983 itself cannot be violated; it only remedies the violation of substantive rights created in the Constitution and in some federal statutes.[89] If section 1983 is a purely remedial conduit, it is difficult to justify the creation of substantive limitations on the statute, such as a mental state requirement.

Nevertheless, in *Monroe v. Pape*,[90] it was suggested that a mental state requirement exists although that substantive limitation does not appear on the face of the statute. The Court, in *Monroe*, distinguished section 1983 from its criminal counterpart, 18 U.S.C. § 242,[91] which has an explicit "wilfully" mental state requirement.[92]

> In the Screws Case we dealt with a statute that imposed criminal penalties for acts "wilfully" done. We construed that

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sense intending to do so. This may be inconsistent with *Monroe*'s holding that specific intent to deprive another of federal rights need not be shown to state a claim under § 1983. 365 U.S. at 187. *See* text accompanying notes 90-96 *infra*.

84. 443 U.S. 137 (1979).

85. *Id.* at 140.

86. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

87. *See* Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

88. 441 U.S. 600 (1979).

89. *See* text accompanying notes 208 & 209 *infra*.

90. 365 U.S. 167 (1961) (overruled in part in *Monell*, 436 U.S. 658 (1978)).

91. (1976).

92. Section 242 derived from § 2 of the Civil Rights Act of 1866. *See* note 2 *supra*.

> word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right." . . . We do not think that gloss should be placed on . . . [section 1983] . . . . The word "wilfully" does not appear in . . . [section 1983]. Moreover, . . . [section 1983] provides a civil remedy, while in the Screws Case we dealt with a criminal law challenged on the ground of vagueness. . . . [Section 1983] *should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.*[93]

Just what the background of tort liability is that makes a man responsible for the natural consequences of his actions remains a mystery. In fact, the phrase is internally inconsistent. The "background of tort liability" language has been used to justify the creation of the good faith affirmative defense,[94] while the "makes a man responsible for the natural consequences of his actions" language has been used to justify a strict liability standard under the statute.[95] *Monroe* does establish, however, two things with regard to any mental state requirement of section 1983. First, intentional conduct, specific intent, or wilfullness need not be shown for *all* section 1983 actions.[96] Second, there is some relationship between tort liability and section 1983 liability.

This amorphous relationship between the "background of tort liability" and section 1983 has led some courts to find the applicable standard of care by analogizing the section 1983 action to the closest common law tort.[97] For example, if a deprivation of a liberty interest without due process under the fourteenth amendment is analogous to a state law false imprisonment action, one might be justified in reading the mental state requirement of the state common law false imprisonment action into a section 1983 action for deprivation of a liberty interest without due process.[98]

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93. 365 U.S. at 187 (emphasis added) (citation omitted).

94. *See* Pierson v. Ray, 386 U.S. 547, 556-57 (1967).

95. "We think it inconsistent to say a man is 'responsible for the natural consequences of his action,' . . . and that he is responsible only if his actions are improperly motivated." Whirl v. Kern, 407 F.2d 781, 795 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969) (overruled in part in Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976)).

96. *See* notes 97 & 98 and accompanying text *infra*.

97. *See, e.g.*, Roberts v. Williams, 456 F.2d 819 (5th Cir. 1972) (negligence action); Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968) (false imprisonment action), *cert. denied*, 396 U.S. 901 (1969) (overruled in part in Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976)). *See generally* Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-Of-Mind Requirement*, 46 U. CIN. L. REV. 45 (1977); Note, *Section 1983 Liability for Negligence*, 58 NEB. L. REV. 271 (1979); Comment, *The Evolution of the State of Mind Requirement of Section 1983*, 47 TUL. L. REV. 870 (1973).

98. There are at least three problems with the tort analogue approach. First, if the tort analogue is an intentional tort, should a specific intent requirement be imposed on the § 1983 action? *Monroe* holds that specific intent to

Monroe's reference to the background of tort liability did not explain what happens when there is no state law tort analogue, *i.e.*, no background of tort liability to the constitutional or federal statutory violation that is the basis of the section 1983 action.[99] It is unclear whether a negligence or a strict liability standard should apply in such a case. The Court has yet to decide the issue.[100]

Support for the simple negligence standard of care in all section 1983 actions can be found in *Monroe*'s "background of tort liability" language. Tort law at the time the KKK Act was enacted probably required persons to be negligent before liability could be imposed.[101] Thus, to read section 1983 with this background in mind, one could conclude that the drafters of the KKK Act adopted a negligence standard of care *sub silentio*. There is a policy consideration supporting this conclusion: one cannot expect public officials to conform their behavior to anything higher than a "reasonable man" standard.[102]

Support for the strict liability standard can be found in the fact that section 1983 has no mental state requirement on its face.[103] Additionally, a

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deprive another of federal rights is not required under § 1983. 365 U.S. at 187. Can this be reconciled with an intent requirement derived from § 1983's "background of tort liability"?

Second, to what law does one look to find § 1983's "background of tort liability"? Is the "background of tort liability" referred to in *Monroe* tort law that existed in 1871 so that the drafter's of the KKK Act could have incorporated it into the statute *sub silentio*, or is tort law as it exists today the background referred to in *Monroe*?

Third, should the general law of torts be consulted to find the tort analogue or should the law of the state where the § 1983 action arose be used to find the analogue? If the individual state law is used, certainty and simplicity might be gained, yet the result would be that the mental state element of § 1983 would vary from state to state. *See* 42 U.S.C. § 1988 (1976). If a general tort law standard is used, uniformity in the federal statutory cause of action is gained, yet there may be little certainty as to what that general tort law standard is.

99. *See, e.g.*, Carey v. Piphus, 435 U.S. 247 (1978) (no tort analogue for deprivation of a constitutionally required hearing).

100. Baker v. McCollan, 443 U.S. 137, 138-40 (1979). *See also* Procunier v. Navarette, 434 U.S. 555, 561 (1978).

101. Professor Prosser has stated that the common law standard of negligence as an independent basis of tort liability began to develop around 1825. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 140 (4th ed. 1971). The KKK Act was enacted in 1871.

102. The policy considerations supporting the § 1983 good faith affirmative defense may justify a negligence standard of care under the statute. *See* text accompanying notes 116-18 *infra*.

103. Two recent cases support the strict liability standard. In Owen v. City of Independence, 100 S. Ct. 1398 (1980), Justice Powell in his dissent argued that the Court had established a strict liability standard of care for municipalities by denying them a good faith affirmative defense under § 1983. *Id.* at 1419 (Powell,

strict liability standard of care may be the most effective means of promoting compensation for an injury cognizable under section 1983 and deterrence from creating the injury, two "background" policies animating tort law. The strict liability standard promotes the compensation policy underlying section 1983 better than a negligence standard because a nonnegligent deprivation of a constitutional or federal statutory right is as injurious to the plaintiff as a deprivation caused by negligence. The deterrence policy is promoted better by a strict liability standard because of the nature of federal constitutional or federal statutory rights, *i.e.*, with a negligence standard of care one may be able to avoid liability by ignorance; the strict liability standard would give public officials an incentive to educate themselves to the constitutional rights of the individuals who are affected by their decisions. On the other hand, a strict liability standard might cause the Court to restrict the rights or interests protected by section 1983 so as not to impose liability in situations where it would be unjust to do so.

A compromise between the negligence and strict liability standards might be found in terms of the remedy sought.[104] In a common law tort action, money damages is generally the sole remedy. Section 1983 explicitly allows a "suit in equity." If an action for money damages is brought, a negligence standard of care might be appropriate because it would avoid the unfair result of imposing money damages on someone who was "just doing his job." If an equitable action is brought, a strict liability standard might be more appropriate since equitable relief often does not impose adverse economic effects on the defendant. On occasion, however, an injunction may impose as much or more economic cost on the defendant as an action for money damages; in this event, an injunction could have as much of an unfair punishing effect on the nonnegligent defendant as an action for money damages. If the economic burden of the injunctive relief will be borne not by the supervisory official but by a public organization, however, a strict liability standard may still be justified because this economic burden will be spread throughout the community.[105]

J., dissenting). Gomez v. Toledo, 100 S. Ct. 1920 (1980), stated that only two allegations need be pleaded for a § 1983 cause of action, neither of which is a mental state requirement. *Id.* at 1923.

104. The Court has sanctioned using the nature of the remedy to determine the mental state required under § 1983. In *Wood v. Strickland*, the Court indicated that the good faith affirmative defense to § 1983 is available only against claims for money damages. 420 U.S. 308, 315 n.6 (1975) ("immunity from damages does not ordinarily bar equitable relief as well").

105. *See* Owen v. City of Independence, 100 S. Ct. 1398, 1417 (1980), where one of the justifications for denying municipalities a good faith affirmative defense was an "equitable loss-spreading principle." *Cf.* Monell v. Department of Social Servs., 436 U.S. 658, 693-94 (1978) (insurance theory was an insufficient justification for the imposition of respondeat superior liability on municipalities).

There is a different set of mental state requirements when the defendant pleads and proves that he is entitled to a qualified immunity from section 1983 suit. The qualified immunity is actually a good faith affirmative defense on which the defendant has the burdens of pleading and production.[106] The Court has held that policemen,[107] governors, presidents of state universities, officers and members of state National Guard units,[108] local school board members,[109] state hospital superintendants,[110] and prison officials[111] have a qualified immunity to section 1983 suits for money damages.[112]

The sources of the good faith affirmative defense are tort law and policy considerations. *Monroe*'s enigmatic command that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"[113] is one of the justifications for the good faith affirmative defense. For example, "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause."[114] Thus, the first inquiry in determining whether an official has a good faith affirmative defense or qualified immunity is determining whether the official had a good faith affirmative defense under tort law.[115]

There are at least three public policy considerations justifying the good faith affirmative defense: (1) imposing personal liability on public officials might deter qualified individuals from holding public office;[116] (2)

106. Gomez v. Toledo, 100 S. Ct. 1920, 1924 (1980).

107. Pierson v. Ray, 386 U.S. 547, 556-57 (1967).

108. Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (survivors of students killed at Kent State brought a § 1983 action against the governor of Ohio, the president of Kent State University, and members of the Ohio State National Guard).

109. Wood v. Strickland, 420 U.S. 308, 322 (1975).

110. O'Connor v. Donaldson, 422 U.S. 563, 576-77 (1975).

111. Procunier v. Navarette, 434 U.S. 555, 561 (1978).

112. The good faith affirmative defense may not be available against a claim for equitable relief. Wood v. Strickland, 420 U.S. 308, 315 n.6 (1975) ("immunity from damages does not ordinarily bar equitable relief as well"). *See, e.g.*, Fowler v. Alexander, 478 F.2d 694, 696 (4th Cir. 1973); Rud v. Dahl, 578 F.2d 674, 676 (7th Cir. 1978); Shipp v. Todd, 568 F.2d 133, 134 (9th Cir. 1978).

113. 365 U.S. at 187.

114. Pierson v. Ray, 386 U.S. at 556-57.

115. In post-*Pierson* cases, the Court seems to have abandoned its search for a common law tort background which would justify creating a good faith affirmative defense to § 1983. *See* Procunier v. Navarette, 434 U.S. 555, 568 n.3 (1978) (Stevens, J., dissenting) (creating a good faith affirmative defense for prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (creating a good faith affirmative defense for mental hospital superintendents). *But see* Owen v. City of Independence, 100 S. Ct. 1398, 1412-15 (1980) (common law tort immunities of municipalities examined).

116. Wood v. Strickland, 420 U.S. at 320.

the threat of money damages liability might interfere with a public official's exercise of an unintimated, unfettered discretion;[117] and (3) there is "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion."[118]

To determine the availability of a good faith affirmative defense, the trial court must decide that the defendant is a public official who possesses discretionary decision-making power and that the act complained of is an exercise of that official's discretionary power.[119] Once the availability of the defense is established, the defendant has the burden of pleading, production, and possibly the burden of persuasion[120] to show (1) that the defendant-official subjectively was "acting sincerely and with a belief that he . . . [was] doing right"[121] and (2) that the defendant-official's belief that he was doing right was objectively reasonable.[122] The plaintiff *may* try to thwart the official's good faith affirmative defense by showing that the defendant-official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the . . . [individuals] affected, or . . . [that the defendant-official] took the action with the malicious intention to cause a deprivation of constitutional rights or other injury."[123]

To date, no organizations have been given a section 1983 good faith affirmative defense. In *Owen v. City of Independence*,[124] the municipality of Independence, Missouri, tried to establish a good faith affirmative defense to a section 1983 claim by its former police chief that he had been discharged without a hearing and notice in violation of the fourteenth amendment. The Court held that the good faith affirmative defense was unavailable to municipalities because neither the common law tradition nor the policy considerations undergirding the section 1983 good faith affirmative defense justified the extension of the defense to municipalities.

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117. Scheuer v. Rhodes, 416 U.S. at 240. But the Court in Owen v. City of Independence, 100 S. Ct. 1398, 1418 (1980), noted that state officials do not have discretion with respect to compliance with applicable federal law.

118. 416 U.S. at 240.

119. *See id.* at 247. *See also* Procunier v. Navarette, 434 U.S. 555 (1978), which indicates that acts of negligence might be negated by the good faith affirmative defense, even though one of the elements of the defense is that the defendant show that his conduct was objectively reasonable. This notion seems peculiar since acts of negligence are by definition unreasonable.

120. *See* Gomez v. Toledo, 100 S. Ct. 1920 (1980). Justice Rehnquist reads this case to require only the burdens of pleading and production to be borne by the defendant. *Id.* at 1924 (Rehnquist, J., concurring).

121. Wood v. Strickland, 420 U.S. at 321.

122. *See* Gomez v. Toledo, 100 S. Ct. at 1924; Wood v. Strickland, 420 U.S. at 320-22.

123. 420 U.S. at 322.

124. 100 S. Ct. 1398 (1980).

The first inquiry in *Owen* was whether municipalities had a qualified immunity as part of the background of tort liability against which section 1983 must be read. The Court isolated two common law municipal tort immunities. Traditionally, municipalities have had an immunity for "governmental," as distinct from "proprietary," activity[125] and for "discretionary," as distinct from "ministerial," activity.[126]

The Court found that the common law municipal immunity for "governmental" activity did not justify the creation of a section 1983 good faith affirmative defense. First, the Court concluded that the common law immunity for governmental functions is comparable to an absolute immunity that defeats the suit at the outset rather than a qualified immunity or good faith defense that depends on a finding of subjective good faith after a trial on the merits.[127] Second, the Court stated:

> [T]he municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of "persons" subject to liability for violations of the Federal Constitution and laws, Congress —the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed.[128]

The Court also examined the municipality's common law immunity for "discretionary" acts and found that this immunity was inapplicable because the municipality's duty of conforming its activity to the requirements of federal law, as section 1983 requires, is not a discretionary act.[129]

The Court examined the policy considerations supporting the good faith affirmative defense for governmental officials and found that such considerations did not justify extension of the defense to municipalities. First, the Court found that the fear that the imposition of money damages liability would deter the most qualified individuals from taking positions as local government officials is "totally unwarranted . . . once the threat of personal liability is eliminated."[130] Second, it concluded that the threat

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125. *Id.* at 1412-14.

126. *Id.* at 1412, 1414-15.

127. *Id.* at 1413 n.29.

128. *Id.* at 1414 (footnote omitted). It is hard to reconcile this language with the existence of any immunities under § 1983—absolute or qualified. Under this language, it would appear that Congress abolished whatever vestige of common law immunities that judges, legislators, prosecutors, policemen, state governors, state university presidents, state National Guard members, state mental hospital superintendents, and prison officials might have by making all "persons" acting under color of state law potential defendants under the statute.

129. *Id.* at 1414-15.

130. *Id.* at 1417 n.38. The Court seems to ignore the argument that by subjecting municipalities to damages, limited municipal resources are diverted from the provisions of services into compensation for injuries, thus lessening the "quality of life" in the community.

that individuals holding government posts would be deterred from exercising their discretionary decision-making powers "is significantly reduced, if not eliminated, . . . when the threat of personal liability is removed."[131] Third, the Court said there is no danger of unjustly imposing money damages on a public official who acted in good faith when "the damage award comes not from the official's pocket, but from the public treasury."[132] Rather, "the principle of equitable loss-spreading" justifies allocating the cost of a constitutional or federal statutory deprivation to the municipality and thus to the public at large. "[I]t is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration."[133] Thus, it is the public at large which should bear the costs of any constitutional or federal statutory deprivations caused by the acts of municipal agents which "may fairly be said to represent official policy."[134]

2. The Invidiously Discriminatory Animus Requirement of Section 1985(3)

In *Griffin v. Breckenridge*,[135] the Court said that the section 1985(3) language "requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action."[136] The reason given for interpreting the word "equal" as a mental state requirement is "[t]he constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law."[137]

There are three parts in establishing this class-based, invidiously discriminatory animus: (1) the defendant must commit a discriminatory act against a class of persons protected by the statute; (2) the plaintiff must have the proper relationship with the protected class; and (3) the invidiously discriminatory animus must be established.[138]

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131. *Id.* at 1418.

132. *Id.* at 1417.

133. *Id. See also id.* at 1419.

134. *Id.* at 1419 (quoting *Monell*, 436 U.S. at 694).

135. 403 U.S. 88 (1971).

136. *Id.* at 102 (footnote omitted).

137. *Id.* It is unclear as to what "constitutional shoals" the Court was referring. There are at least two possibilities. First, there is the problem of reaching private actors under the fourteenth amendment. Second, by requiring a mental state, the Court might be avoiding an argument that § 1985(3) is unconstitutionally vague. *Cf.* Screws v. United States, 325 U.S. 91 (1945) (construing the criminal counterpart to § 1983 to require a specific intent to deprive another of federal rights in order to avoid holding the statute unconstitutionally vague).

138. *See* Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach*, 64 MINN. L. REV. 635, 641 (1979-1980). *See also* Recent Developments, *Civil Rights—Section 1985(3)—Students Attending*

Griffin requires that the discriminatory animus be class-based. To date, only racial classes have been given protection by the Supreme Court.[139] Nevertheless, racial classes probably were not the only ones intended to be protected by section 1985(3).[140] The Republican Congress that enacted the KKK Act was concerned with the safety of fellow party members who were being harrassed and killed by former Confederates in the South.[141] Therefore, politically based classes might be included as protected classes under section 1985(3).[142] Because lines of conflict during the Civil War period were drawn largely in terms of North vs. South, classes based on geographical area also might have been intended to be included within the protection of the statute.[143] Some lower courts have included as protected such diverse classes as those based on sex,[144]

Private Educational Institutions May Sue School Administrators For Deprivation of Equal Protection of the Laws and Equal Privileges and Immunities, 21 VILL. L. REV. 928, 936 (1975-1976).

139. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

140. The Select Committee of the Senate to Investigate Alleged Outrages in the Southern States made a 600-page report detailing the activities of the Ku Klux Klan and other terrorist organizations during the Reconstruction Period of the South. Many of the victims of the outrages investigated were white. *See* S. REP. NO. 1, 42d Cong., 1st Sess. XIV-XXI (1871). This would indicate that race discrimination was not the exclusive wrong that Congress attempted to remedy by enacting the KKK Act.

141. "The dead and the wounded, the maimed and the scourged are all, all Republicans." CONG. GLOBE, 42d Cong., 1st Sess. 426 (1871) (remarks of Rep. McKee). *See also id.* at 505 (remarks of Sen. Pratt), *quoted in* Monroe v. Pape, 365 U.S. at 178.

142. *See, e.g.*, Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971) (employees who advocate racial equality); Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973) (supporters of a political candidate); Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979) (Black Panther Party), *modified*, 100 S. Ct. 1987 (1980); Means v. Wilson, 522 F.2d 833 (8th Cir.) (Indians with a political view), *cert. denied*, 424 U.S. 958 (1975); Puentes v. Sullivan, 425 F. Supp. 249 (W.D. Tex. 1977) (political supporters). *But see* Rodgers v. Tolson, 582 F.2d 315 (4th Cir. 1978) (political and philosophical opponents of town commissioners were not a protected class).

143. "[I]f . . . it should appear that this conspiracy was formed against this man because he was a Democrat, . . . or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it." CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871) (remarks of Sen. Edmunds).

144. *See, e.g.*, Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979); Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978); Life Ins. Co. of N. America v. Reichardt, 591 F.2d 499 (9th Cir. 1979); Hodgin v. Jefferson, 447 F. Supp. 804 (D. Md. 1978); Curran v. Portland Superintending School Comm'n, 435 F. Supp. 1063 (S.D. Me. 1977); Beamon v. W.B. Saunders Co., 413 F. Supp. 1167 (E.D. Pa. 1976); Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Pa. 1974); Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433 (E.D. Pa. 1973). *But see* Jackson v.

religion,[145] groups exercising first amendment rights,[146] environmentalists,[147] and members of a white middle class family.[148] Other courts have been unwilling to extend protection under section 1985(3) to classes other than those based on discrete insular minorities.[149] Probably the broadest interpretation of the classes included under section 1985(3) would come from a literal reading of the statutory language itself which states that the discriminatory purpose may run to "any person or class of persons."[150]

Once it has been shown that the defendants acted against a class of persons protected by section 1985(3), the proper relationship between the plaintiff and the protected class must be established. If the plaintiff is a

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Associated Hosp. Serv., 414 F. Supp. 315 (E.D. Pa. 1976) (pregnant women not protected class), *aff'd*, 549 F.2d 795 (3d Cir.), *cert. denied*, 434 U.S. 832 (1977).

145. *See, e.g.*, Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973) (Jews); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (white Catholics); Baer v. Baer, 450 F. Supp. 481 (N.D. Cal. 1978) (followers of the Reverend Moon). *See also* Mandelkorn v. Patrick, 359 F. Supp. 692 (D.D.C. 1973) (religious adherent of the "Children of God" could state a claim under § 1985(3)).

146. *See, e.g.*, Brown v. Villanova Univ., 378 F. Supp. 342 (E.D. Pa. 1974).

147. *See, e.g.*, Westberry v. Gilman Paper Co., 507 F.2d 206, *opinion withdrawn*, 507 F.2d 215 (5th Cir. 1975). *But see* Hughes v. Ranger Fuel Corp., 467 F.2d 6 (4th Cir. 1972) (environmentally concerned persons who were taking pictures of a dump site, not a protected class).

148. *See, e.g.*, Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972).

149. *See, e.g.*, Carchman v. Korman Corp., 594 F.2d 354 (3d Cir.) (tenant organizers), *cert. denied*, 444 U.S. 898 (1979); Bova v. Pipefitters & Plumbers Local 60, 554 F.2d 226 (5th Cir. 1977) (nonunion employees); McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) (bankrupts); Studen v. Beebe, 588 F.2d 560 (6th Cir. 1978) (property owners); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (homosexuals); Blevins v. Ford, 572 F.2d 1336 (9th Cir. 1978) (nonlawyers); Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979) (debtors); Smith v. Yellow Freight System, Inc., 536 F.2d 1320 (10th Cir. 1976) (truckdrivers). *See generally* Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach*, 64 MINN. L. REV. 635 (1980).

150. *Griffin*'s class-based motivation requirement that was implied from the word "equal" in § 1985(3) seems to be inherently inconsistent with the language of the statute which states that the conspiracy can be against "*any person* or class of persons." Thus, courts have had difficulty in determining what is a class. *See, e.g.*, Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972) (class of one person cannot exist), *cert. denied*, 410 U.S. 930 (1973); Hughes v. Ranger Fuel Corp., 467 F.2d 6 (4th Cir. 1972) (spontaneous act not part of general plan of discrimination cannot be class-based); Sims v. Jefferson Downs, Inc., 611 F.2d 609 (5th Cir. 1980) (class of one person cannot exist); Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978) (class of one person cannot exist); Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980) (if all in class not discriminated against, no discriminatory animus); Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1976) (no common characteristics of class before misconduct, no class); Potenza v. Schoessling, 541 F.2d 670 (7th Cir. 1976) (not all members discriminated against, no class-based discrimination).

member of the protected class and is injured by the defendant's acts, then no one would contend that the plaintiff is an improper plaintiff. Yet, section 1985(3) may be even broader. It provides that when "one or more persons engaged . . . [in the conspiracy] do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby *another* is injured . . . the party so injured or deprived may have an action for the recovery of damages . . . ."[151] There is no requirement in the statute that the "other" injured by the conspiracy be a member of the class discriminated against, *i.e.*, the statute gives a cause of action to anyone injured by acts in furtherance of the conspiracy. Thus, if an innocent bystander or an advocate of the protected class' rights is injured by an act in furtherance of the conspiracy, then he may have a cause of action under section 1985(3). In *Novotny v. Great American Federal Savings & Loan Association*,[152] the plaintiff was a male officer and director of the defendant-savings and loan. The plaintiff alleged that the defendant-officers and directors "'intentionally and deliberately embarked upon and pursued a course of conduct the effect of which was to deny female employees equal employment opportunity' "[153] in violation of section 601 of Title VII of the Civil Rights Act of 1964.[154] After advocating equal employment opportunities for women in the corporation, the plaintiff was fired. He alleged his termination was a result of his advocacy. The court held that although the discrimination was against women, the male plaintiff was injured because of the conspiracy and thus stated a cause of action under section 1985(3).

The last step in establishing the mental state requirement is to show the invidiously discriminatory animus behind the conspiracy. In *Griffin v. Breckenridge*,[155] the Court stated that the "motivation requirement introduced by the word 'equal' into . . . § 1985(3) . . . must not be confused with"[156] the specific intent requirement for 18 U.S.C. § 242,[157] created in *Screws v. United States*.[158] In *Screws*, the Court was confronted with the criminal counterpart to section 1983, which had formerly been section 2 of the Civil Rights Act of 1866.[159] To avoid a vagueness challenge to section 242, the Court interpreted the word "willfully" in the statute to require "a specific intent to deprive a person of a federal right."[160]

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151. 42 U.S.C. § 1985(3) (Supp. III 1979) (emphasis added).

152. 584 F.2d 1235 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979). *See also* Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971).

153. 584 F.2d at 1237.

154. 42 U.S.C. § 2000e-2 (1976).

155. 403 U.S. 88 (1971).

156. *Id.* at 102 n.10.

157. (1976).

158. 325 U.S. 91 (1945).

159. Ch. 31, 14 Stat. 27 (current version at 18 U.S.C. § 242 (1976)). For a discussion of the history of the Act, see note 2 *supra*.

160. 325 U.S. at 103.

Griffin, in distinguishing the mental state requirement of section 1985(3) from that of section 242 stated, "[T]he motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidious discriminatory animus."[161] The Court may have meant that the invidiously discriminatory animus requirement of section 1985(3) focuses only on the use of a "bad" or invidious criteria, *e.g.*, race, sex, religious affiliation, and not on an intent to deprive a person of a federal right. Thus, one does not have to know that one is depriving another of equal protection of the laws or equal privileges and immunities under the law; all that is required is the use of an invidious or improper criteria in making a decision or committing the complained of conduct.

In *Washington v. Davis*,[162] the Court read into the fourteenth amendment an invidiously discriminatory purpose mental state requirement; a requirement that may be the equivalent of the invidiously discriminatory animus requirement in section 1985(3). The invidiously discriminatory purpose of the fourteenth amendment's equal protection clause does not have to be the sole motivating force behind the complained of conduct.[163]

The invidiously discriminatory purpose requirement is directed only to public organizations or other state actors under the fourteenth amendment; section 1985(3) applies to both state and private actors. Nevertheless, many business entities have a group decision-making process that is similar to the operation of the local governmental unit described in *Village of Arlington Heights*. "Rarely can it be said that" a business concern or a municipality "was motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."[164] If this analogy between the fourteenth amendment and section 1985(3) is valid, then all that may be necessary to show the invidiously discriminatory animus required by section 1985(3) is that the "discriminatory purpose has been *a* motivating factor" in the decision-making process, even though the discriminatory purpose is not the dominant or primary purpose.[165]

Village of Arlington Heights elaborates on the types of evidence to be used in establishing the invidiously discriminatory purpose necessary to show a nonfacial violation of the equal protection clause of the fourteenth amendment. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[166] A nonexhaustive list of relevant factors includes (1) "[t]he historical background of the decision"; (2) the specific sequence of events leading up to the challenged

161. 403 U.S. at 102 n.10.

162. 426 U.S. 229 (1976).

163. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977).

164. *Id.* at 265.

165. *Id.* at 265-66 (emphasis added).

166. *Id.* at 266.

decision; (3) departures from the normal procedural sequence; and (4) contemporary statements by members of the decision-making body, minutes of its meetings, or reports.[167]

The invidiously discriminatory animus requirement of section 1985(3) may create an insurmountable problem in establishing private or public organizational liability under the statute. Because corporations are fictional entities incapable of possessing a mental state, invidiously discriminatory or otherwise, a method must be developed to impute the mental state of corporate officials to the corporation. One might be able to use either the vicarious or identification theory to do this.[168]

C. *Causation*

1. The Vicarious Liability and Systematic Maladministration Problems under Section 1983

In *Rizzo v. Goode*,[169] plaintiffs, who were victims of past unconstitutional conduct by lower-level Philadelphia police officers, brought a class action against high-ranking municipal and police department officials praying for equitable relief to stop the allegedly unconstitutional activity of the lower-level police officers. After hearing a "staggering amount of evidence," the district court found the existence of a persistent pattern of constitutional violations on the part of the lower-level Philadelphia policemen and that this pattern was likely to continue.[170] The district court used its equitable powers to remedy this persistent pattern of constitutional violations by forcing the defendant-supervisory officials to create a system for handling civilian complaints of police misconduct.

The Supreme Court might have reversed on the ground that this pattern of unconstitutional conduct did not show a custom or usage that has the force and effect of law under *Adickes*,[171] but, instead, reversed on a causation rationale.[172] The Court characterized the plaintiff's theory as

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167. *Id.* at 267-68.

168. For a discussion of methods of imputing a mental state to an organization, see text accompanying notes 70-78 *supra*.

169. 423 U.S. 362 (1976). *See* Note, Rizzo v. Goode: *The Burger Court's Continuing Assault on Federal Jurisdiction*, 30 RUTGERS L. REV. 103 (1976); Note, Rizzo v. Goode: *Federal Remedies For Police Misconduct*, 62 VA. L. REV. 1259 (1976).

170. 423 U.S. at 367-69.

171. 398 U.S. 144 (1970). It is unclear whether a persistent pattern of police misconduct is a custom of the state that has the force of law. *See* text accompanying notes 40-43 *supra*.

172. The Court gave three reasons for reversing the lower court. First, there was doubt as to plaintiffs' standing. 423 U.S. at 371-73. Second, the Court created a commission/omission limitation on causation under § 1983. *Id.* at 373-77. Third, the Court indicated that, because of principles of federalism, the equitable powers of the federal courts do not extend so far as to impose on state officials the duty of maintaining a citizen complaint procedure. *Id.* at 377-80.

positing "a constitutional 'duty' on the part of . . . [defendant-supervisory officials] to 'eliminate' future police misconduct," and "a 'default' of that affirmative duty . . . [was] shown by the statistical pattern."[173] The Court rejected this theory by creating a commission-omission dichotomy in section 1983 law. Some affirmative act on the part of the defendant-state officials was necessary to show the required causal link; passive indifference on the part of supervisory state officials who had the authority and ability to stop the pattern of unconstitutional activity was not enough to satisfy the causation requirement of section 1983.[174]

This commission-omission limitation on the causation element of section 1983 puts a kink in a lawsuit whose purpose is to provide prospective relief from some systematic defect in the administration of a public agency or organization. This is ironic in that one of the avowed purposes of the KKK Act was to remedy the systematic maladministration of the laws by state officials.[175] Under *Rizzo*, the problem is creating the "duty" on the part of the supervisory state officials to stop the pattern of unconstitutional behavior by lower-level employees. This duty may have to be found in the Constitution. In *Estelle v. Gamble*,[176] an inmate in a Texas prison brought a section 1983 action for damages against the Director of the Department of Corrections, the Warden of the prison, and the Medical Director of the Department of Corrections, all of whom were supervisory state officials, alleging the failure of these prison officials to provide medical care to the prisoner in violation of the eighth amendment's prohibition of cruel and unusual punishment as incorporated into the fourteenth. The Supreme Court found that the prohibition of cruel and unusual punishment created a duty on the part of the government to provide medical care, because when a state incarcerates a person, the state denies that person the liberty of seeking and securing medical attention for himself. Thus, if the state does not provide some minimal level of medical care, the inmate's medical needs will not be met and physical pain and suffering will result creating a violation of the prohibition of cruel and unusual punishment.

The Court in *Gamble* indicated, however, that not every delict in the provision of the minimal standard of medical care would result in the imposition of damages. The plaintiff must show the defendant-prison officials acted in deliberate indifference to serious medical needs. The Court stated that this deliberate indifference state of mind could be shown to exist if lower-level prison employees intentionally denied, delayed, or interfered with the prisoner's medical treatment and no action was taken by the supervisory employees in charge.[177]

173. *Id.* at 376.
174. *Id.*
175. *See* remarks of Representative Garfield, note 43 *supra*.
176. 429 U.S. 97 (1976).
177. *Id.* at 104-05.

In *Rizzo*, one might have been able to show this mental state of deliberate indifference on the part of some supervisory officials by showing that the intentional acts of misconduct by the lower-echelon policemen were made known to these supervisory officials and nothing was done to prevent future misconduct.[178] It would be interesting to see if this mental state of deliberate indifference could substitute for an act of commission under section 1983.[179] If a supervisory official is not passively allowing lower-level employee misconduct to occur, but is allowing this conduct to occur through deliberate indifference, then it may be possible that a sufficient causal link is established between the supervisory official's indifference and the acts of the lower-level employees subject to his supervision.

The second limitation on the causation element of section 1983 comes from *Monell v. Department of Social Services*.[180] In *Monell*, after holding that municipalities as well as school boards are "persons" under section 1983, the Court, in dicta,[181] limited the use of vicarious liability theories, including the respondeat superior doctrine, against municipalities. A municipality, or other public organization, may be held liable only when the acts of municipal agents "may *fairly* be said to represent official policy" of the municipality.[182] This result rests on three propositions. First, because section 1983 has the word "cause" explicitly in the statute, the use of any vicarious liability theory is precluded; by definition a vicarious liability theory does not include a causation requirement.[183] Second, the

178. 423 U.S. at 382 (Blackmun, J., dissenting) (by implication).

179. The Court in *Rizzo* had to eviscerate Hague v. CIO, 307 U.S. 496 (1939), and Allee v. Medrano, 416 U.S. 802 (1974), to reach its result. These cases indicated that federal courts had the equitable power to enjoin supervisory officials if there were a persistent pattern of misconduct by the supervisory official's subordinates. *Rizzo* indicates that only a supervisory official who *intentionally* fails to correct the misconduct of his subordinates would fall under *Allee*'s rule allowing the equitable relief. Since *Rizzo* distinguishes *Allee* by stating that in *Allee* there was an intentional failure to act, could a showing of deliberate indifference put the facts under *Allee*?

180. 436 U.S. 658 (1978).

181. Justice Stevens pointed out that the limitation on the use of vicarious liability was not necessary for the Court's conclusion and is technically dicta. *Id.* at 714 (Stevens, J., concurring).

182. *Id.* at 694 (emphasis added).

183. The Court looked at the "subjects, or cause to be subjected" language of § 1983 and stated that "the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." *Id.* at 692 (citation omitted). The Court seems to ignore the disjunctive "or" between "subjects" and "cause to be subjected" in § 1983. By ignoring the "or," the Court indicates that a municipality cannot "subject" another to a constitutional or federal statutory deprivation when a nonpolicymaking employee performs the prohibited acts.

use of "respondeat superior would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional."[184] Third, the traditional justifications for the creation of the respondeat superior doctrine, *i.e.*, a deterrence theory[185] and an insurance theory,[186] were implicitly rejected by Congress in its rejection of the Sherman Amendment.

Thus, under the rationale in *Monell* a state custom or policy that is actionable under section 1983 must be made by a "policymaker." It remains to be seen if there is a principled way of distinguishing policymakers from nonpolicymakers, or how the Court will make this distinction.[187] Because of this limitation on the causation requirement in section 1983, at least one commentator has recommended trying to imply a cause of action against municipalities directly from the fourteenth amendment under a *Bivens*-type theory.[188] Ironically, one of the reasons given in *Monell* for overruling *Monroe*'s holding, *i.e.*, a municipality was not a "person" for purposes of section 1983, was to avoid the constitutional question whether one could imply a cause of action from the fourteenth amendment against a municipality.[189]

2. Causation under Section 1985(3): A Hypothetical Section 1985(3) Analysis

Section 1985(3) has an "overt act" causation requirement. To help clarify the rather intricate workings of causation under section 1985(3), an example will be given. For purposes of analysis, the example assumes the facts in the *Rizzo* case where lower-echelon policemen were engaged in police misconduct. In order to state a claim under section 1985(3), the plaintiff first must show that these policemen were legally capable of conspiring. It could be argued under *Dombrowski* that these policemen cannot conspire because they were all agents acting within the scope of their employment and thus there was only a single legal entity involved.[190] The police misconduct may, however, fit one of the exceptions to the *Dom-*

184. 436 U.S. at 693. *See* CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871) (remarks of Rep. Poland), *quoted in* Monell v. Department of Social Servs., 436 U.S. at 664; Monroe v. Pape, 365 U.S. at 190. *See also* notes 10-17 and accompanying text *supra*.

185. 436 U.S. at 693.

186. *Id.* at 693-94. *Cf.* Owen v. City of Independence, 100 S. Ct. 1398, 1419 (1980) ("the principle of equitable loss-spreading has joined fault as a factor in distributing costs of official misconduct").

187. *See* notes 73-78 and accompanying text *supra*.

188. Comment, *Respondeat Superior Liability of Municipalities for Constitutional Torts After* Monell: *New Remedies to Pursue?*, 44 MO. L. REV. 514, 537-48 (1979).

189. *Monell*, 436 U.S. at 712 (Powell, J., concurring).

190. *See* text accompanying note 58 *supra*.

browski rule. *Rizzo* was a class action in which about forty incidents of police misconduct were shown; thus, the multiple acts exception to the *Dombrowski* rule might apply.[191] In *Rizzo*, there were cases of police misconduct of a violent nature, such as beatings and unlawful arrests;[192] thus, the violent acts exception might apply.[193] It also could be argued that the policemen in *Rizzo* were engaged in conduct which the police department had prohibited and, thus, were acting outside the scope of their authority. This would be true especially if the police department had disciplinary procedures for the kind of police misconduct that occurred; thus, the acting outside the scope of agency exception might apply.[194]

The second element the plaintiff must show is that the policemen did in fact conspire. An agreement to engage in unlawful conduct can be inferred from behavior.[195] If the policemen were engaged in joint unlawful conduct similar to that in *Rizzo*, a jury question could be raised as to the existence of an unlawful agreement or understanding.

The third element that the plaintiff must prove is that there is an invidiously discriminatory animus motivating the conspiracy of the police officers.[196] In *Rizzo*, race was a factor in the police misconduct.[197] If race is a motivating factor, then the invidiously discriminatory animus may exist because racial classes are protected under section 1985(3).[198]

The fourth element that the plaintiff must show is that the defendant deprived the plaintiff of the equal protection of the laws or equal privileges and immunities under the laws.[199] In *Rizzo*, the lower-level policemen were engaged in an unusually high incidence of federal constitutional violations. Federal constitutional rights may be privileges and immunities under the laws within the meaning of section 1985(3).[200]

The fifth element the plaintiff must show in a section 1985(3) claim is

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191. *See* Jackson v. University of Pittsburgh, 405 F. Supp. 607, 612-13 (W.D. Pa. 1975); Rackin v. University of Pa., 386 F. Supp. 992, 1005-06 (E.D. Pa. 1974).

192. *See generally* COPPAR v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *aff'd*, 506 F.2d 542 (3d Cir. 1974), *rev'd sub nom.* Rizzo v. Goode, 423 U.S. 362 (1976).

193. *See* Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972). *But see* Cole v. University of Hartford, 391 F. Supp. 888, 893 (D. Conn. 1975).

194. *See* Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 71 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976).

195. *See, e.g.*, Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979).

196. *See* notes 135-68 and accompanying text *supra*.

197. *See generally* COPPAR v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *aff'd*, 506 F.2d 542 (3d Cir. 1974), *rev'd sub nom.* Rizzo v. Goode, 423 U.S. 362 (1976).

198. *See* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). *See also* notes 135-68 and accompanying text *supra*.

199. *See* notes 237-75 and accompanying text *infra*.

200. *See* text accompanying notes 276 *infra*.

that there is some power under the Constitution by which Congress can reach the defendants.[201] Since policemen are state actors, the section 5 power under the fourteenth amendment is available to reach these defendants.

The sixth element that the plaintiff must prove is that there was an overt act in furtherance of the conspiracy,[202] and that the overt act caused injury to plaintiff's person or property, or that the plaintiff was "deprived of having and exercising any right or privilege of a citizen of the United States."[203] Once one shows an overt act in furtherance of the conspiracy, liability is imposed on all co-conspirators, not just on the conspirator who acted. Thus, if the supervisory officials in *Rizzo* were parties to the section 1985(3) agreement,[204] they would be subject to liability.

Alternatively, if one cannot show that any supervisory or policymaking official was a party to the conspiracy, then the supervisory or policymaking official might be liable under section 1986[205] if the plaintiff shows the following two elements: (1) that the defendant-supervisory official knew that injury from the section 1985(3) conspiracy of the lower-level policemen was about to occur and (2) that the supervisory official had the ability to prevent or to aid in the prevention of the wrongs committed by the section 1985 conspiracy. In *Rizzo*, knowledge of future conspiratorial misconduct of lower-level employees might be shown in that some complaints about the misbehaving lower-level employees did reach the supervisory officials.[206] As Justice Blackmun observed in *Rizzo*, it could be inferred that lower-level police misconduct would continue unless abated by these supervisory officials.[207] Thus, if the supervisory official does nothing to prevent future misconduct, that official "knows" that wrongs prohibited by section 1985(3) are about to be committed. The supervisory officials in *Rizzo* also had the ability to prevent or to aid in preventing the misconduct by employees subject to their supervisory con-

201. *See* text accompanying notes 47-56 *supra*.

202. Collins v. Hardyman, 341 U.S. 651, 659 (1951) (limited in Griffin v. Breckenridge, 403 U.S. 88 (1971)).

203. 42 U.S.C. § 1985(3) (Supp. III 1979). It is unclear what the rights or privileges of a United States citizen are. Nevertheless, if there is no damage to the plaintiff's person or property, then the monetary value of whatever rights are encompassed by this language probably is nominal. *See generally* Carey v. Piphus, 435 U.S. 247 (1978).

204. *See* text accompanying notes 70-78 *supra*.

205. 42 U.S.C. § 1986 (1976). *See* note 12 *supra*.

206. COPPAR v. Rizzo, 357 F. Supp. 1289, 1299-1300 (E.D. Pa. 1973) (mother of a 16-year-old boy who had been beaten tried to make out a complaint), *aff'd*, 506 F.2d 542 (3d Cir. 1974), *rev'd sub nom.* Rizzo v. Goode, 423 U.S. 362 (1976); *id.* at 1316 (woman who witnessed black youth's head being banged repeatedly against sidewalk tried to make out complaint against the police officer).

207. Rizzo v. Goode, 423 U.S. at 382 (Blackmun, J., dissenting).

trol. Passive failure to act, in these circumstances, could give rise to money damages liability under section 1986.

D. *Interests or Norms Protected*

1. Interests Encompassed by Section 1983

In *Chapman v. Houston Welfare Rights Organization*,[208] the Court held that section 1983 creates no substantive rights of its own but is merely a statute providing a remedy for the violation of other substantive federal rights. For a claim to lie, there must be a "deprivation" of "any rights, privileges, or immunities secured by the Constitution and laws."[209]

Since section 1983 was enacted pursuant to the enforcement clause of the fourteenth amendment to enforce its provisions,[210] section 1983's reference to the "Constitution" probably encompasses all the rights enumerated in the fourteenth amendment and all rights incorporated or implied from the due process clause of the fourteenth amendment.[211]

It is not clear whether parts of the Constitution which have not been incorporated into the fourteenth amendment are included in section 1983's reference to the "Constitution." Since the statutory language encompasses "*any* rights, privileges, or immunities secured by the Constitution," the statute may have been intended to encompass *all* rights, privileges, or immunities secured by the Constitution.[212] A more serious

208. 441 U.S. 600 (1979).

209. 42 U.S.C. § 1983 (Supp. III 1979).

210. For title to KKK Act, see note 1 *supra*.

211. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the 5th amendment prohibition on double jeopardy into the 14th amendment due process clause); Malloy v. Hogan, 378 U.S. 1 (1964) (5th amendment prohibition on coerced self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (6th amendment right to assistance of counsel); Robinson v. California, 370 U.S. 660 (1962) (8th amendment prohibition on cruel and unusual punishment); NAACP v. Alabama, 357 U.S. 449 (1958) (nonenumerated constitutional right of assembly or association); Wolf v. Colorado, 338 U.S. 25 (1949) (4th amendment prohibition of unreasonable searches and seizures); Everson v. Board of Educ., 330 U.S. 1 (1947) (1st amendment prohibition of state establishment of religion); Cantwell v. Connecticut, 310 U.S. 296 (1940) (1st amendment right of the exercise of freedom of religion); Near v. Minnesota, 283 U.S. 697 (1931) (1st amendment right to free press); Gitlow v. New York, 268 U.S. 652 (1925) (1st amendment right to free speech); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897) (5th amendment right to just compensation).

212. It can be argued that, because the Forty-Second Congress enacted the KKK Act to enforce the newly ratified fourteenth amendment, *see* note 1 *supra*, it intended only that amendment to be encompassed within the word "Constitution." The Court in interpreting 18 U.S.C. § 241 (1976), a statute providing criminal sanctions for the infringement of "the free exercise or enjoyment of any right or privilege secured . . . by the *Constitution or laws of the United States*," however, found that "its language embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United

question is whether Congress has the power to enforce those parts of the Constitution which have not been incorporated into the fourteenth amendment through a statute intended to enforce the fourteenth amendment.[213]

It may be that the supremacy clause is not part of the Constitution for purposes of section 1983. If state law came into conflict with federal statutory law, the supremacy clause would normally secure to a plaintiff all his federal statutory rights. If the words "and laws" of section 1983 refer only to federal statutory law, then that phrase would be meaningless surplusage because a plaintiff would already have secured to him all federal statutory rights through the supremacy clause. Therefore, to put meaning into all the language in section 1983, the Court might read the supremacy clause out of the Constitution for purposes of section 1983.[214] In addition, because the supremacy clause has not been incorporated into the fourteenth amendment, section 1983 may be unavailable to remedy violations of this part of the Constitution.[215]

There may be considerable overlap, however, between rights "secured" by the supremacy clause and rights encompassed by the "and laws" language of section 1983. In *Maine v. Thiboutot*,[216] the Court held that the words "and laws" in section 1983 refer to all federal statutory law. This holding was supported by two propositions. First, the absence of any modifiers to the word "laws" allows the plain meaning of the statute to include all federal statutory law.[217] Second, the Court's earlier decisions explicitly or implicitly suggest that the section 1983 remedy broadly encompasses violations of all federal statutory rights.[218]

Justice Powell, writing for the dissent in *Thiboutot*, argued that the plain meaning rule of statutory construction is not applicable here because the words "and laws" have no plain meaning. "[A] natural reading of the conjunctive 'and' in § 1983 would require that the right at issue be secured by *both* the Constitution and by the laws."[219] Justice Powell also argued that the Court's earlier decisions impliedly allowing a section 1983 suit for the violation of a federal statutory right never explicitly discussed the meaning of the words "and laws" and because of this lack of thoughtful discussion on the matter these earlier cases are poor authority and should

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States." United States v. Price, 383 U.S. 787, 800 (1966) (emphasis added). *See also id.* at 801.

213. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971).

214. *See* Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 612-15 (1979) (construing 28 U.S.C. § 1343(a)(3) (Supp. III 1979), the jurisdictional counterpart to § 1983).

215. *See* text accompanying notes 212 & 213 *supra*.

216. 100 S. Ct. 2502 (1980).

217. *Id.* at 2504.

218. For the cases cited by the majority supporting the proposition that a § 1983 claim lies for violation of federal statutes, see *id.* at 2504-05.

219. *Id.* at 2508 n.1 (Powell, J., dissenting) (emphasis added).

not be relied on.[220] Justice Powell further argued that when Congress revised section 1 of the KKK Act in 1874, by adding the words "and laws" to the statute, it did not intend the addition of these words to refer to anything but federal civil rights statutes affecting equal rights.[221]

Justice Powell's most poignant attack on the majority focused on the potential adverse effect created by the greatly expanded liability of state government and state officials through inclusion of all federal statutory law within the ambit of section 1983. Justice Powell argued that any time there is a federal statute that is administered in a cooperative fashion by the states there is the possibility that federal statutory rights will be violated by persons acting "under color of state law." These state administrators now may be subject to liability under section 1983 for any federal statutory violations they cause.[222]

Because of *Maine v. Thiboutot*'s expansion of liability under section 1983, one may encounter attempts to limit liability in the future. For example, this expansion of liability may induce the Court to choose a negligence, rather than a strict liability, mental state requirement when it decides the standard of care that the plaintiff must plead and prove in a section 1983 action.[223] Another way that *Thiboutot* may be limited in the future is through emphasis of the remedial nature of section 1983. Both section 1983 and section 1985(3) are considered by the Court to be remedial in nature, *i.e.*, the statutes create no substantive rights.[224] If the federal statute that creates the substantive right also provides its own remedy, there is the possibility that the Court will hold that the remedy in the substantive federal statute precludes use of the section 1983 remedy.

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220. *Id.* at 2515 (Powell, J., dissenting).

221. *Id.* at 2512-13 (Powell, J., dissenting). Justice Powell argued that § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(a)(3) (Supp. III 1979), should have the same scope, *i.e.*, the "and laws" language of § 1983 was intended to refer only to civil rights statutes providing for equal rights. *See generally* Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979); text accompanying notes 295-303 *infra*. For the history of the KKK Act, see note 1 *supra*.

222. 100 S. Ct. at 2513-14 (Powell, J., dissenting). *See also id.* at 2519-20 app. (Powell, J., dissenting).

223. It might be argued that holding a public official strictly liable for the violation of *all* constitutional rights and *all* federal statutory rights of persons affected by his decisions puts such an onerous burden on the official that it should be necessary to show that the official acted negligently before a § 1983 claim can lie. *See* notes 101-05 and accompanying text *supra*. This problem may be illusory, however, because most public officials will have available to them a qualified immunity or good faith affirmative defense. *See* notes 106-34 and accompanying text *supra*.

224. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979) (§ 1985(3)); Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617 (1979) (§ 1983). Ironically, § 1983 and § 1985(3) were made remedial so that they would be construed liberally. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871) (remarks of Rep. Shellabarger).

An example of this can be seen in the section 1985(3) context in *Great American Federal Savings & Loan Association v. Novotny*.[225] In *Novotny*, the plaintiff argued that Title VII of the Civil Rights Act of 1964 created a substantive right to be free of sex discrimination in employment and that this right is a privilege and immunity under the law within the scope of section 1985(3). The Court held that Title VII rights are not encompassed within those interests protected by section 1985(3), because to allow plaintiffs to bring an action under section 1985(3) for the violation of those rights would undermine the federal administrative scheme that Congress had created to enforce Title VII.[226]

Looking to the remedial scheme provided by the statute creating substantive rights to determine whether those substantive rights may be remedied by section 1983 or section 1985(3) may lead to some ironic results. If the federal statute creating substantive rights has its own administrative procedures to remedy violations, then the section 1983 remedy may be precluded by the remedies found in the federal statute creating the substantive rights. On the other hand, if the federal statute that creates the substantive rights does not provide a remedy, the section 1983 remedy is not precluded. Thus, where Congress did intend to provide a remedy by creating an administrative procedure for violations of the substantive right, the section 1983 remedy is precluded under the rationale in *Novotny*. But where Congress did not provide a remedy, and even if Congress intended that there be no remedy, then the section 1983 remedy exists under *Maine v. Thiboutot*.

An interesting issue that may arise after *Maine v. Thiboutot* is whether the second statute that creates the substantive right that is the basis of the section 1983 action can be used to reach private parties. In *United States v. Johnson*,[227] the issue was whether 18 U.S.C. § 241,[228] which provides criminal penalties for conspiracies "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the *Constitution or laws* of the United States,"[229] provided a cause of action against persons who prevented blacks from exercising their right to equality of public accommodations under Title II of the Civil Rights Act of 1964. Title II, on its face, provides only equitable relief and states that "[t]he remedies provided in this subchapter shall be the *exclusive* means of enforcing the rights based on this subchapter."[230] The Court held that Title II created a substantive right secured by a law of the United States; thus, injuring a citizen in the exercise of this right was a violation of section 241 and a criminal remedy was available, even though Title II provides an *exclusive* equitable remedy.

225. 442 U.S. 366 (1979).
226. *Id.* at 375-76.
227. 390 U.S. 563 (1968).
228. (1976).
229. 18 U.S.C. § 241 (1976) (emphasis added).
230. 42 U.S.C. § 2000a-6(b) (1976) (emphasis added).

There are at least two problems in applying the *Johnson* analysis to section 1983. First, if one uses two federal statutes to create a cause of action against private actors, one statute to create the substantive right and section 1983 to create the remedy, one may need to have two constitutional sources of power that reach private parties. Section 1983 was enacted pursuant to the enforcement power under the fourteenth amendment, which may not reach private parties. In *Griffin v. Breckenridge*,[231] however, the Court searched elsewhere for a constitutional premise that would support a section 1985(3) claim against private actors.[232] Since the Court allowed the plaintiff in *Griffin* to sift through the Constitution for an appropriate power that reached private parties under section 1985(3), one could argue that the same process should be adopted with respect to section 1983 claims because section 1983 and section 1985(3) both derive from the KKK Act.[233]

The second problem in applying the *Johnson* analysis is the section 1983 requirement that the defendant act "under color of" state law. Although the "under color of" state law requirement has been applied as though it were co-extensive with the state action requirement of the fourteenth amendment,[234] it may be possible to act "under color of" state law and not be a state actor for purposes of the fourteenth amendment. In *Flagg Brothers v. Brooks*,[235] a creditor acted pursuant to a New York state statute in repossessing a debtor's property. The Court held that the creditor was not a state actor for purposes of the fourteenth amendment. Here the creditor was acting pursuant to state statute, *i.e.*, under color of state statute, but was not a state actor under the fourteenth amendment. It could be argued that a corporation that exists by virtue of state incorporation laws and is subject to regulation by a state is acting "under color of" state law, although such an organization may not be a state actor for purposes of the fourteenth amendment.[236]

2. Interests Encompassed by Section 1985(3)

The heart of section 1985(3) is the requirement that the conspirators, or those engaged in the proscribed, disguised activity, act for the purpose of depriving another of the equal protection of the laws or the equal privileges and immunities under the laws. These words remain vague and

231. 403 U.S. 88 (1971).

232. *See* text accompanying notes 49-56 *supra*.

233. *See* note 171 *supra*.

234. *See* text accompanying note 35 *supra*.

235. 436 U.S. 149 (1978).

236. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974) ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."); Cohen v. Illinois Inst. of Tech., 524 F.2d 818, 824 (7th Cir. 1975) (holding that not every corporation is a state actor for purposes of the fourteenth amendment merely because it is incorporated under state law), *cert. denied*, 425 U.S. 943 (1976).

ill-defined, although over one hundred years have elapsed since the enactment of the KKK Act.

A common element in the "equal protection of the laws" and "equal privileges and immunities under the laws" language of section 1985(3) is the word "equal." It is possible to interpret the word "equal" as a limitation on the types of interests protected by section 1985(3) as has been done in the section 1983 context. In *Chapman v. Houston Welfare Rights Organization*,[237] the jurisdictional counterpart of section 1983, 28 U.S.C. § 1343(a)(3),[238] was limited through the use of the word "equal." Section 1343(a)(3) gives district courts jurisdiction to redress deprivations made "under color of" state law of rights secured by the Constitution or "any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." Those federal acts which provide for "equal rights" were interpreted to include only federal civil rights statutes.[239]

Limiting the types of interests protected by section 1985(3) through its use of the word "equal" may be unjustified. In *Griffin v. Breckenridge*,[240] the word "equal" was interpreted to require an invidiously discriminatory mental state.[241] To require the same word to be both a mental state requirement and a limitation on the types of interests encompassed would unjustifiably burden this single word. For this reason the word "equal" in section 1985(3) should be interpreted as a mental state requirement only.

a. Equal Protection of the Laws

Section 1985(3)'s equal protection clause is similar to that of the fourteenth amendment except for one significant difference; section 1985(3) has no state action requirement. Although it is difficult to understand a denial of equal protection of the laws without state action,[242] the United States Court of Appeals for the Fifth Circuit has adopted an independent illegality test for violations of section 1985(3)'s equal protection clause by private actors.[243]

The source of the independent illegality test is *United States v. Harris*,[244] where it was stated:

> A private person cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which a private person can

237. 441 U.S. 600 (1979).
238. (Supp. III 1979).
239. 441 U.S. at 612, 615-20.
240. 403 U.S. 88 (1971).
241. *Id.* at 102. *See* text accompanying notes 144-68 *supra*.
242. *See* 403 U.S. at 97.
243. *See* McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977).
244. 106 U.S. 629 (1883).

> deprive another of the equal protection of the laws is by commission of some offence against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder.[245]

Using this language, the Fifth Circuit, in *McLellan v. Mississippi Power & Light Co.*,[246] held that the object of the conspiracy must deprive the plaintiff of the protections of some law, independent of section 1985(3).[247] The independent illegality test of *McLellan* squares with *Great American Federal Savings & Loan Association v. Novotny*,[248] where the Court held that section 1985(3) is a purely remedial statute and that the substantive interests it protects must all be located in other law.

Commentators have generally been critical of the independent illegality approach.[249] The basic theme of this criticism is that section 1985(3) is redundant if a violation of another statute is needed to have a section 1985(3) cause of action. Nevertheless, *McLellan*'s independent illegality requirement may add some remedies to those provided for the violation of the underlying substantive statute. First, section 1985(3) provides a civil damages remedy to the victim of unlawful conduct that otherwise may be unavailable.[250] Second, section 1985(3) imposes liability once one shows that the object of the conspiracy was to violate the substantive statute and that there was an act in furtherance of the conspiracy. Therefore, it may not be necessary for the plaintiff to prove an actual violation of the underlying substantive statute in order to have a section 1985(3) claim.[251]

Because section 1985(3) is purely remedial, its scope largely depends on the scope of the "laws" that it protects. In *Harris*, the Court indicated that "theft, burglary, arson, libel, assault and murder" are "all laws which protect the rights of persons"[252] that are encompassed by the KKK Act.[253]

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245. *Id.* at 643.

246. 545 F.2d 919 (5th Cir. 1977).

247. *Id.* at 925.

248. 442 U.S. 366 (1979).

249. *See, e.g.*, Note, *Private Conspiracies to Violate Civil Rights*: McLellan v. Mississippi Power & Light Co., 90 HARV. L. REV. 1721 (1977); Comment, *Civil Rights—Section 1985(3)—Independently Illegal Act by Defendant is Necessary Element of Cause of Action Under 42 U.S.C. Section 1985(3)*, 9 RUT. CAM. L.J. 187 (1977).

250. 545 F.2d at 927 n.32.

251. To show that the object of the conspiracy was the violation of a substantive statute, when that substantive statute was not in fact violated, one may have to show that the defendants had a *specific intent* to deprive the plaintiff of the right secured by that statute. This type of mental state requirement, however, was rejected in *Griffin*, 403 U.S. at 102 n.10. *See* text accompanying notes 155-61 *supra*.

252. 106 U.S. at 643.

253. Because one of the purposes of the KKK Act was to supplant or supplement state courts which were ineffective in remedying injuries caused by the Ku Klux Klan, overlap between state law causes of action and causes of action under the KKK Act was contemplated. *See* Monroe v. Pape, 365 U.S. at 183.

This indicates that state statutory law may be included within section 1985(3)'s reference to laws. In addition, libel and assault, two examples of laws under *Harris*, are common law torts. Further, in *Griffin*, the substantive right that was violated may have been common law assault and battery since the act complained of was a beating. The question should be asked whether section 1985(3) must be read against a background of tort liability. If so, tort law could be a substantive law that section 1985(3) was meant to remedy.[254]

b. Equal Privileges and Immunities under the Laws

The second group of interests protected by section 1985(3) is the equal privileges and immunities under the laws. Because that section is purely remedial, the privileges and immunities referred to must exist in law independent of section 1985(3). The privileges and immunities clause of section 1985(3) is similar to the privileges or immunities clause of the fourteenth amendment.[255] Since the KKK Act was enacted to enforce the provisions of the fourteenth amendment, it seems plausible that the statutory language in section 1985(3) was meant to incorporate those rights or interests protected by the fourteenth amendment's privileges or immunities clause.

In the *Slaughter-House Cases*,[256] the Court interpreted the phrase "privileges or immunities of citizens of the United States" in the fourteenth amendment to refer only to those privileges and immunities that exist by virtue of national citizenship. The Court started with the premise that the primary source of citizenship is in the states. Thus, the privileges or immunities of United States citizens are only those privileges or immunities that are added on to the primary privileges and immunities of state citizenship by virtue of national citizenship.[257]

The privileges and immunities clause of section 1985(3) can be distinguished, however, from the privileges or immunities clause of the fourteenth amendment. Section 1985(3) protects those privileges and immunities *under the laws*, while the fourteenth amendment protects privileges or immunities *of citizens of the United States* from infringement by the states. If one focuses on the source of the privilege and immunity under section 1985(3), then the privilege and immunity must derive from the laws. On the other hand, the privileges or immunities under the four-

254. *See id.* at 187 (§ 1983). *But cf.* Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979) (indicates federal statutory law is not generally "law" protected by § 1985(3)).

255. *Compare* 42 U.S.C. § 1985(3) (Supp. III 1979) *with* U.S. CONST. amend. XIV, § 1.

256. 83 U.S (16 Wall.) 36 (1873).

257. The rights of national citizenship include (1) the right to pass freely from state to state, Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44, 48 (1868); (2) the right to petition the government for redress of grievances, United States v.

teenth amendment derive from national citizenship under the *Slaughter-House Cases*.[258]

Distinguishing the privileges and immunities language of section 1985(3) from the holding in the *Slaughter-House Cases* on this basis is supported by the intent of Congress in enacting the KKK Act. One of the purposes in ratifying the fourteenth amendment's privileges or immunities clause was to provide a congressional power which would support section 1 of the Civil Rights Act of 1866.[259] After the Act had been passed pursuant to the enforcement power of the thirteenth amendment, it was argued that the congressional power under that amendment was not broad enough to support the legislation.[260] The fourteenth amendment was ratified then in part to provide that all citizens of the United States have uninfringed by the states those privileges or immunities of national citizenship.[261] Some of the privileges and immunities referred to were rights embodied in section 1 of the Civil Rights Act.[262] Thus, it was to protect the federal statutory rights of the newly emancipated blacks that the fourteenth amendment was ratified and the KKK Act was enacted to enforce those *intended* fourteenth amendment rights. Therefore, section 1985(3)'s reference to privileges and immunities could be read to encompass statutory rights like those in section 1 of the 1866 Act.

Unfortunately, this analysis has not been adopted by the Court. In *Novotny*,[263] the plaintiff argued that the right to be free from employment discrimination on the basis of sex as secured to persons by Title VII of the

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Cruikshank, 92 U.S. 542, 552 (1876); (3) the right to vote for national officers, *Ex parte* Yarbrough, 110 U.S. 651, 662-67 (1884); (4) the right to enter public lands, United States v. Waddell, 112 U.S. 76, 79 (1884); (5) the right to be protected from violence while in the lawful custody of a United States Marshall, Logan v. United States, 144 U.S. 263, 283 (1892); (6) the right to inform the United States authorities of violations of its laws, *In re* Quarles, 158 U.S. 532, 535-36 (1895); (7) the right to carry on interstate commerce, Crutcher v. Kentucky, 141 U.S. 47, 57 (1891); (8) the right under 42 U.S.C. § 1982 (1976) to own property, Oyama v. California, 332 U.S. 633, 640 (1948). *See generally* Twining v. New Jersey, 211 U.S. 78, 97 (1908). *See also* Hague v. CIO, 307 U.S. 496 (1939) (three Justices held that the first amendment rights of free speech and press are privileges or immunities of national citizenship).

258. 83 U.S. (16 Wall.) 36 (1873).

259. Ch. 31 § 1, 14 Stat. 27. *See* J. TENBROEK, *supra* note 2, at 183-84. *See also* Gressman, *supra* note 2, at 1328-29.

260. J. TENBROEK, *supra* note 2, at 156-80.

261. For a discussion of the early privileges and immunities clause cases from which the fourteenth amendment's privileges or immunities clause is derived, see Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 9-15 (1949).

262. *Compare* ch. 31, § 1, 14 Stat. 27 (1866) *with* U.S. CONST. amend. XIV, § 1.

263. 442 U.S. 366 (1979).

Civil Rights Act of 1964 was a privilege and immunity under the law within the meaning of section 1985(3). The Court pointed to the detailed administrative procedure Congress provided for complainants under Title VII and noted that "[i]f a violation of Title VII could be asserted through § 1985(c), a complainant could avoid most if not all of these detailed and specific provisions of the law."[264] Since "the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by the Congress in Title VII," the Court concluded "that § 1985(c) may not be invoked to redress violations of Title VII."[265]

The Court in *Novotny* decided that Title VII was not a privilege and immunity under the law in spite of the holding in *Johnson v. REA, Inc.*[266] that the passage of Title VII did not repeal impliedly 42 U.S.C. § 1981.[267] Section 1981 and Title VII have some area of overlap.[268] Because interests encompassed by section 1 of the Civil Rights Act of 1866, the predecessor of section 1981, were intended to be encompassed by the "privileges and immunities under the laws" language of section 1985(3),[269] the *Novotny* Court's failure to investigate the relationship between section 1981 and Title VII is a serious omission. The Court instead distinguished the rights created by the Civil Rights Act of 1866 from those rights based on the KKK Act, finding that the rights created under the 1866 Act were substantive while those "created" under the KKK Act were only remedial.[270] Apparently, the Court considers it easier to repeal impliedly a remedial statute than a statute creating substantive rights. The Court in *Novotny*, by focusing on the remedy in the substantive right to determine the breadth of "privileges and immunities under the laws," rather than Congress' intent or purpose in using this language may have excluded federal statutory rights as substantive rights that may be remedied by section 1985(3).

The words "privileges and immunities under the laws" were chosen by the Forty-Second Congress for use in section 1985(3) because of a well-known case, *Corfield v. Coryell*,[271] which interpreted the privileges and immunities clause of article IV, section 2 of the Constitution by stating:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their

264. *Id.* at 375-76.
265. *Id.* at 376, 378.
266. 421 U.S. 454, 456-61 (1975).
267. (Supp. III 1979).
268. *See generally* Johnson v. REA, Inc., 421 U.S. 454 (1975).
269. *See* text accompanying notes 259-62 *supra*.
270. 442 U.S. at 377. Additionally, the Court distinguished 42 U.S.C. § 1982 (1976), which derived from § 1 of the 1866 Act, from § 1985(3) on the basis that § 1985(3) created only a remedy while § 1982 created substantive rights. *Id.*
271. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

> nature, *fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union . . . .[272]

By its reference to fundamental rights, *Corfield* may be a basis for the incorporation of due process rights into those privileges and immunities under the laws for purposes of section 1985(3). Some courts hold that fourteenth amendment due process rights are not encompassed by section 1985(3), because section 1985(3) does not have a due process clause.[273] Nevertheless, if the reference to privileges and immunities under the laws in section 1985(3) refers to rights that are *fundamental*, such as the right to hold property as was embodied in section 1 of the Civil Rights Act of 1866, then there is a basis for incorporating fundamental rights protected by the due process clause of the fourteenth amendment into the language "privileges and immunities under the laws."[274]

Such incorporation may, however, introduce a state action requirement into section 1985(3) because fourteenth amendment due process clause rights may exist only as against the states. Therefore, if the privilege and immunity encompassed by section 1985(3) is a fourteenth amendment right, the defendant must be a state actor for purposes of the fourteenth amendment.[275]

III. SUBJECT MATTER JURISDICTION

A. *Federal Subject Matter Jurisdiction*

Two federal statutory provisions, 28 U.S.C. § 1331(a)[276] and 28 U.S.C. § 1343(a),[277] were once both needed as jurisdictional premises for a section 1983 or section 1985(3) claim.[278] Each provision is treated separately in the following discussion.

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272. *Id.* at 551 (emphasis added).

273. *See, e.g.*, Dunn v. Gazzola, 216 F.2d 709, 711 (1st Cir. 1954); Jennings v. Nester, 217 F.2d 153, 154 (7th Cir. 1954), *cert. denied*, 349 U.S. 958 (1955); Weaver v. Haworth, 410 F. Supp. 1032, 1036 (E.D. Okla. 1975); Brosten v. Scheeler, 360 F. Supp. 608, 614 (N.D. Ill. 1973), *aff'd mem.*, 495 F.2d 1375 (7th Cir. 1974); Rundle v. Madigan, 356 F. Supp. 1048, 1050 (N.D. Cal. 1972); Allen v. Corsano, 56 F. Supp. 169, 172 (D. Del. 1944).

274. *See* Action v. Gannon, 450 F.2d 1227, 1234-35 (8th Cir. 1971) (freedom of religion is encompassed by § 1985(3)).

275. *See, e.g.*, Cohen v. Illinois Inst. of Tech., 524 F.2d 818, 828 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972). *But see* Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (the right of freedom of religion extended against private actors).

276. (1976).

277. (Supp. III 1979).

278. At one time it was thought that 28 U.S.C. § 1343(a)(3) (Supp. III 1979) could be used only for the vindication of personal, not property, rights. *See, e.g.*, Hague v. CIO, 307 U.S. 496, 527-31 (1939) (Stone, J., concurring); Eisen v.

1. 28 U.S.C. Section 1331(a)

It is no longer necessary to meet the jurisdictional amount in controversy requirement of 28 U.S.C. § 1331(a),[279] when seeking federal judicial redress for either section 1983 or section 1985(3) claims.[280] Until recently, however, section 1331(a) impeded federal determination of such claims by requiring that "the matter in controversy . . . [exceed] the sum or value of $10,000, exclusive of interest and costs."[281] The controversy must have been capable of monetary valuation for the jurisdictional amount requirement to be satisfied.[282] Even though since 1976 the $10,000 amount in controversy did not need to be met for jurisdiction in a *Bivens*-type[283] action,[284] this requirement was troublesome because claims under either section 1983 or section 1985(3) concerning state actors often involved intangible rights which were impossible to value in monetary terms.[285] Apparently for this reason,[286] Congress chose to repeal the jurisdictional amount in controversy requirement in federal question cases, except in limited circumstances.[287]

Eastman, 421 F.2d 560, 563 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970). This distinction was abolished in Lynch v. Household Fin. Corp., 405 U.S. 538, 542 (1972).

279. (1976) (amended 1980).

280. *See* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (to be codified in 28 U.S.C. § 1331).

281. 28 U.S.C. § 1331(a) (1976) (amended 1980).

282. If a claim was incapable of monetary valuation, then it was dismissed. *See, e.g.*, Lister v. Comm'rs Court, 566 F.2d 490, 493 (5th Cir. 1978).

283. There is an analogue of the § 1983 action against federal actors: a cause of action implied from the Constitution itself. *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980) (8th amendment); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (4th amendment).

284. A 1976 amendment to § 1331(a), Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721, allowed actions to be "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity" without the $10,000 amount in controversy requirement being met. Section 1983 actions, however, are not applicable to federal actors. *See* notes 34-46 and accompanying text *supra*. It is unclear whether a federal actor can be a "person" under § 1985(3). *See* text accompanying note 48 *supra*.

285. *See, e.g.*, Carey v. Piphus, 435 U.S. 247 (1978).

286. The House Report concerning the bill (S. 2357) to eliminate the jurisdictional amount in controversy stated:

> The $10,000 requirement is particularly troublesome because it tells certain citizens . . . that although their Federal rights have been violated, their injury is too insignificant to warrant the attention of a Federal judge. It ignores the fact that many important claims are incapable of economic valuation and it operates in total disregard of the importance, difficulty or far-reaching nature of the Federal claim at issue.

H.R. REP. NO. 1461, 96th Cong., 2d Sess. 2 (1980), *reprinted in* [1981] U.S. CODE CONG. & AD. NEWS 9123, 9123-24.

287. Congress left intact the $10,000 amount in controversy requirement for

In December of last year, Congress passed the Federal Question Jurisdictional Amendments Act of 1980.[288] The legislature left no doubt about the purpose of the Act. According to the House Report, "[t]he purpose of the proposed legislation is to abolish the $10,000 amount in controversy requirement in Federal question cases."[289] Consequently, the impediment of section 1331(a) no longer limits access to the federal courts to vent section 1983 and section 1985(3) claims.

2. 28 U.S.C. Section 1343(a)

a. Section 1983 and Section 1343(a)(3)

The jurisdictional counterpart to section 1983 is 28 U.S.C. § 1343(a)(3).[290] Although section 1343(a)(3) originally may have been coextensive with section 1983, it now does not cover all section 1983 claims.[291] Section 1983 encompasses interests protected by the "Constitution and laws" which have been interpreted to include *all* federal statutory law.[292] Section 1343(a)(3) provides original jurisdiction in district courts for any civil action authorized by law to redress "the deprivation . . . of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."[293] This language has been interpreted to include only "civil rights statutes."[294]

Chapman v. Houston Welfare Rights Organization[295] is the leading case on determining what kinds of constitutional deprivations are included in section 1343(a)(3) and what federal statutes provide for equal rights under section 1343(a)(3). In *Chapman*, a welfare board denied the claimant's request for $163 in emergency assistance funds to pay a heating bill. The request was denied because claimant was not "in a state of homelessness" as was required by state regulations. Claimant's theory was that the state, by impermissibly restricting the eligibility requirements, was denying her funds to which she was entitled under the Social Security Act. The amount in controversy was $163 so section 1331(a)'s $10,000 amount in

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the Consumer Product Safety Act. Federal Question Jurisdictional Amendments Act of 1980, § 3, 94 Stat. 2369-70 (to be codified in 28 U.S.C. § 1331).

288. Pub. L. No. 96-486, 94 Stat. 2369 (to be codified in 28 U.S.C. § 1331).

289. H.R. REP. NO. 1461, 96th Cong., 2d Sess. 1 (1980), *reprinted in* [1981] U.S. CODE CONG. & AD. NEWS 9123, 9123.

290. (Supp. III 1979). Section 1343(a)(3) originated as part of § 1 of the KKK Act, but was separated from the Act and modified during the 1874 revision of the United States Statutes. *See* note 1 *supra*.

291. *See, e.g.*, Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979).

292. *See* Maine v. Thiboutot, 100 S. Ct. 2502 (1980).

293. 28 U.S.C. § 1343(a)(3) (Supp. III 1979).

294. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979).

controversy requirement was not satisfied. The claimant tried to get jurisdiction under section 1343(a)(3) and section 1343(a)(4). There were three relevant theories.

First, claimant argued that the supremacy clause was a part of the Constitution that secured to her federal statutory rights for purposes of section 1343(a)(3) by giving the federal statutory rights priority over state law when the two conflict. The Court held that rights secured by the supremacy clause are not rights "secured by the Constitution of the United States" within the meaning of section 1343(a)(3). The Court reasoned that if it was the intent to include the supremacy clause within those rights, privileges, and immunities "secured by the Constitution of the United States," then that statute's later reference to acts of Congress "providing for equal rights" would be entirely superfluous. Thus, to give meaning to all parts of section 1343(a)(3), the supremacy clause should not be included as a part of the Constitution of the United States for purposes of section 1343(a)(3).[296]

Second, claimant argued that section 1983 was a federal statute that provides for "equal rights" under section 1343(a)(3). The Court rejected this contention because "§ 1 of the Civil Rights Act of 1871 did not provide for any substantive rights—equal or otherwise."[297] Section 1983 creates only a remedy for the violation of a right that exists independent of section 1983; "it does not provide any rights at all."[298]

Third, claimant argued that section 1983 was an act of Congress "providing for the protection of civil rights"[299] under section 1343(a)(4). The Court held that even though section 1983 provides a cause of action or remedy for the protection of civil rights, it is not a statute that provides for the "protection of civil rights," because "§ 1983 does not provide any substantive rights at all."[300] Thus, jurisdiction for a section 1983 claim cannot be found under section 1343(a)(4).

In *Maine v. Thiboutot*,[301] decided after *Chapman*, the Court held that the words "and laws" added to section 1 of the KKK Act during the 1874 revision broadened the scope of section 1983 to include a cause of action based solely on the violation of a federal statutory right. Yet, *Chapman* implied that section 1343(a)(3) cannot be used as a jurisdictional basis for a section 1983 claim that is based solely on a federal statutory right.[302] Therefore, section 1983 claims which were based solely on the

296. *Id.* at 612-15.
297. *Id.* at 617.
298. *Id.* at 618.
299. 28 U.S.C. § 1343(a)(4) (Supp. III 1979).
300. 441 U.S. at 618-20.
301. 100 S. Ct. 2502 (1980).
302. *Chapman* does leave open the possibility that § 1343(a)(3) could be used as a jurisdictional premise for the violation of a civil rights statute.

violation of a federal statutory right were not cognizable in the federal courts unless the $10,000 amount in controversy requirement was met.[303]

b. Section 1985(3) and Its Special Jurisdictional Statutes

Finding jurisdiction for a section 1985(3) action for damages is fairly simple. Section 1343(a)(1) allows jurisdiction to recover damages under section 1985 for injury to one's person or property, or for the "deprivation of any right or privilege of a Citizen of the United States."[304]

It is more difficult to obtain federal subject matter jurisdiction for a section 1985(3) claim for equitable relief. Although section 1985(3), on its face, allows the recovery of only money damages, a number of courts have been unwilling to deny to themselves the power of fashioning an equitable remedy for relief in a section 1985(3) claim.[305] These courts have implied the power to grant equitable relief from section 1985(3) as an inherent power of the judiciary to create equity.

There are at least two problems in finding jurisdiction for this equitable claim. First, sections 1343(a)(3) and (4), the only parts of section 1343 which provide jurisdiction for equitable relief, allow only "action[s] authorized by law."[306] The word "law" may preclude a court from creating jurisdiction by exercise of its equitable powers. Second, section 1985(3) is a purely remedial statute.[307] Thus, under the analysis used in *Chapman*, section 1985(3) cannot be an "Act of Congress providing for the protection of civil rights" under section 1343(a)(4).[308] Thus, section 1343(a)(4) is not available for section 1985(3) claims.

B. *State Subject Matter Jurisdiction*

In *Martinez v. California*,[309] the Court reserved for later decision the question of whether state courts are required to hear section 1983 claims.[310] The states are divided on the question of whether they allow section 1983 claims to be litigated in their courts. The majority view,

303. 100 S. Ct. at 2506 n.6. *See* notes 280, 286-89 *supra*.

304. 28 U.S.C. § 1343(a)(1) (Supp. III 1979).

305. *See, e.g.*, Mizell v. North Broward Hosp. Dist., 427 F.2d 468 (5th Cir. 1970); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971); Freeman v. New Jersey Comm'n of Investigation, 359 F. Supp. 1053 (D.N.J.), *vacated*, 486 F.2d 176 (3d Cir. 1973). The *Mizell* case justifies implying the power to grant equitable relief from § 1985(3) by analogizing § 1985(3) to 42 U.S.C. § 1982 (1976). In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court implied the right to recover money damages and to obtain equitable relief under § 1982, even though § 1982 does not mention explicitly either remedy. *Id.* at 414.

306. 28 U.S.C. § 1343(a) (Supp. III 1979).

307. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979).

308. *See* text accompanying notes 295-303 *supra*.

309. 100 S. Ct. 553 (1980).

310. *Id.* at 558 n.7.

represented by cases such as *Brown v. Pitchess*,[311] allows section 1983 claims in state courts. These courts rely on the rule that jurisdiction for federal claims lies in the state courts unless a federal jurisdictional statute confers exclusive jurisdiction on the federal courts. Section 1343(a)(3) confers original, not exclusive, jurisdiction. The minority view, represented by *Chamberlain v. Brown*,[312] starts with the premise that one of the purposes in enacting the KKK Act was to provide a federal forum for the vindication of federal rights because the state courts were not enforcing federal and state laws against the paramilitary terrorist organizations that sprang up after the Civil War. Therefore, state courts should not entertain section 1983 suits, since section 1983 was directed towards federal, not state, courts.

IV. CONCLUSION

There is a plethora of conflicting notions shaping the interpretations of the remaining remnants of the KKK Act, 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3). The Court has seemingly taken a "seesaw approach" to the interpretation of these statutes and few points of doctrine in this area are certain.[313]

It should be remembered, however, that the KKK Act was enacted to remedy the organized, systematic deprivation of basic civil rights. Over one hundred years after the enactment of that Act, public and private organizations, even organizations less notorious than the Ku Klux Klan, still can and do threaten the integrity of these basic individual rights. For this reason, even though the Court has held that these provisions are only remedial in nature, sections 1983 and 1985(3) should be read sympathetically with respect to organizational liability and liability of supervisory officials.

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311. 13 Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975). *Accord*, New Times, Inc. v. Arizona Bd. of Regents, 110 Ariz. 367, 519 P.2d 169 (1974); Silverman v. University of Colo., 36 Colo. App. 269, 541 P.2d 93 (1975), *rev'd on other grounds*, 192 Colo. 75, 555 P.2d 1155 (1976); Alberty v. Daniel, 25 Ill. App. 3d 291, 323 N.E.2d 110 (1974); Thiboutot v. State, 405 A.2d 230 (Me. 1979), *aff'd*, 100 S. Ct. 2502 (1980); Rzeznik v. Chief of Police, 373 N.E.2d 1128 (Mass. 1978); Dudley v. Bell, 50 Mich. App. 678, 213 N.W.2d 805 (1973); Shapiro v. Columbia Union Nat'l Bank & Trust Co., 576 S.W.2d 310 (Mo. En Banc 1978), *cert. denied*, 444 U.S. 831 (1979); Clark v. Bond Stores, Inc., 41 A.D.2d 620, 340 N.Y.S.2d 847 (1973); Holt v. City of Troy, 78 Misc. 2d 9, 355 N.Y.S.2d 94 (1974); Williams v. Greene, 36 N.C. App. 80, 243 S.E.2d 156 (1978); Commonwealth *ex rel.* Saunders v. Creamer, 11 Pa. Commw. Ct. 160, 312 A.2d 454 (1973), *vacated*, 464 Pa. 2, 345 A.2d 702 (1975); Terry v. Kolski, 78 Wis. 2d 475, 254 N.W.2d 704 (1977).

312. 223 Tenn. 25, 442 S.W.2d 248 (1969). *See also* Beauregard v. Wingard, 230 F. Supp. 167 (S.D. Cal. 1964).

313. *See* Maine v. Thiboutot, 100 S. Ct. at 2515 (Powell, J., dissenting).