

THE FEDERAL GOVERNMENT'S POWER TO PROTECT NEGROES AND CIVIL RIGHTS WORKERS AGAINST PRIVATELY INFLICTED HARM*

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Part II. Remedies

Part I reveals two fundamentally different premises for federal authority to prevent or punish private acts of violence committed against Negroes and civil rights workers. One is conditioned on the state's failure to afford protection; the other rests on entirely independent powers of the federal government. In either case, the political decision whether, and to what extent, to exercise federal powers, will depend in part on the states' willingness or ability to perform their protective functions. But the exercise of federal power of the first sort entails special procedural difficulties, for federal action is constitutionally bound to be selective among states or localities, and must be premised on a finding that the official conduct is unsatisfactory. The present section surveys the range of existing and possible remedies based on both grounds. It does not attempt to draft legislation or to study in detail all procedural problems. The section concentrates on judicial and executive coercive measures, but it should be noted that both Congress and the President have available a number of noncoercive remedies. For example, federal financial and advisory assistance could be given the states for the selection and training of better law enforcement officers.¹ The President may use the prestige of his office to persuade states to offer protection or to dissuade private persons from committing acts of violence; unfortunately, even with the threat of the federal stick lurking in the background, presidential suasion has not proved a notably effective measure in the racial crises faced by Presidents Eisenhower,² Kennedy,³ and Johnson.⁴

* This is the second section of a two-part article excerpted from a paper submitted in June, 1965 in satisfaction of the third-year written work requirement at Harvard Law School. Although some portions would benefit from expansion and refinement and others from contraction or possible omission, lack of time and initiative has left the text pristine except that recent decisions have been noted where appropriate.

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A. Judicial Remedies

1. The Federal Judicial Process.--Several recent studies have pointedly questioned the efficiency, and sometimes the integrity, of the administration of federal justice in the South.⁵ A discussion of the extent to which federal investigators, prosecutors, and judges are biased or incompetent is beyond our scope. Suffice it to remark that, political pressures notwithstanding, it is hardly beyond the realm of present possibility to fill these offices with dedicated and capable men; in many cases they have so been filled.⁶ Because of the President's power of appointment and the broad supervisory powers of Congress and the Supreme Court, the federal system offers a potentially fairer forum for the trial of civil rights cases than many state courts: subtle manifestations of judicial prejudice and conscious delay can be avoided; in civil cases jury excesses can be controlled by ordering new trials, directing verdicts, or entering judgments notwithstanding the verdict when appropriate. Nonetheless, the federal grand and petit juries pose a serious problem to the administration of federal justice. In the civil and criminal actions discussed in this section, the defendants will be either local law enforcement officers or white members of the community; the victims of their offenses will be Negroes or civil rights workers; the offensive litigant will be either the federal government or the victim himself. Even when state officials diligently seek prosecutions the prejudiced state jury often acquits. If the federal system cannot overcome this obstacle, judicial remedies are chimerical at best.⁷

Lawyers representing Negroes and civil rights workers in the South typically prefer federal to state courts, but it is not clear to what extent this is due to greater confidence in the federal jury. In a northern study, many lawyers expressed a preference for federal jurors in the belief that they "were better educated, that they were more intelligent, that they held more responsible positions in society, and that, in general, they were more mature and trustworthy."⁸ Although the differences between federal and state urban jurors in these respects may in fact be negligible,⁹ the differences between southern urban and rural jurors may be significant. Southern urban jurors may well be more educated and responsible--and hence, more likely to render a verdict free from racial bias--than their rural counterparts. The state court that tries a defendant for inflicting harm on a Negro or civil rights workers is often located in a rural area.¹⁰ Federal courts are located in the larger cities; a substantial portion of veniremen is chosen generally from the community within

which the court sits. Whether this difference is more than marginal is open to speculation; the history of acquittals in federal civil rights cases is a happy one only for the defendant.¹¹ It is, nonetheless, worthwhile exploring briefly several approaches that might be taken to remedy jury nullification of federal law.

(a) Improving the Federal Jury.--If there is, in fact, a significant correlation between social and economic position on the one hand and absence of racial bias on the other, jury panels in civil rights cases might be selected with a view to these characteristics. Although it may be proper for a prosecutor to consider the social and economic positions of veniremen in exercising his challenges,¹² empaneling juries on such bases seems improper. The Court has exercised its supervisory power over the federal judiciary to prohibit social and economic discrimination.¹³ And though the Court upheld New York's "blue ribbon" jury practice,¹⁴ alleged to have a similar effect, New York did not in terms make such discriminations, and the petitioners failed to prove clearly that the system in fact operated to their prejudice.¹⁵ In the light of the Court's adherence to the proposition that trial by jury "necessarily contemplates an impartial jury drawn from a cross section of the community,"¹⁶ the constitutionality of the hypothesized practice is doubtful.

A better approach is in the opposite direction: broadening the representation of the southern federal jury so that Negro members of the community have a fair opportunity to serve. Although both Congress¹⁷ and the Supreme Court¹⁸ have curtailed selection practices that tended to assure the absence of Negroes from federal juries, some southern districts continue to achieve the same result. In some courts veniremen are chosen from state jury voter registration rolls.¹⁹ In other districts the jury commissioner selects "key men" to recommend prospective jurors:²⁰ "often, only white persons make these recommendations. Even the Negroes who make them might not be persons of knowledgeable acquaintance in the Negro community. They are often the Negroes who happen to come into contact with white persons."²¹

The Judicial Conference has recommended that the use of state jury lists for the selection of federal jurors be dispensed with entirely; voter registration lists must, a fortiori, be disregarded.²² The venire could be chosen from a list of the area's residents, but if the key man system is retained its base must be broadened to reach further into the Negro community. Ending deliberate or de facto exclusion of Negroes from southern federal juries is, of course, no panacea.

Negroes can still be struck by peremptory challenge;²³ and the presence of a few Negroes hardly assures that their white associates will be free from bias. But changes in this respect would be ameliorative and, combined with liberal allowance of challenges for cause of jurors exhibiting prejudicial tendencies,²⁴ they would substantially alter the character of the southern jury.²⁵

(b) Injunction.--Trial by jury can be circumvented by enjoining the undesirable conduct and punishing violation of the injunction by civil or criminal contempt. The nature of the conduct often renders preventive relief inapposite; the harmful event may pass before an injunction can issue. But mob violence is sometimes predictable or continuing, and federal courts have enjoined participants to desist, and have ordered state officers to protect the victims.²⁶ In some cases, however, statutes or the Constitution may require jury trial for out-of-court contempts. Section 1101 of the Civil Rights Act of 1964 provides a jury trial for any contempt committed under its provisions;²⁷ the Civil Rights Act of 1957 requires a de novo trial by jury for any criminal contempt penalty imposed by a judge in excess of \$300 or forty-five days imprisonment.²⁸ Although other civil rights provisions under which an injunction might issue are not thus limited,²⁹ section 402 of title 18 allows any defendant prosecuted for criminal contempt a jury trial if his act also constitutes a federal crime.³⁰ Moreover, the Supreme Court wrote in United States v. Barnett that "some members of the Court" were of the view that punishment for criminal contempt without jury trial "would be constitutionally limited to that penalty provided for petty offenses."³¹ Imposition of a fine for civil contempt, measured in terms of the harm suffered by the victim, presents a possible alternative.³² Imprisonment for civil contempt is of questionable efficacy, since it is difficult to assure that the defendant will comply with the decree once he is released.³³

(c) Change of Venue.--The sixth amendment, which requires that a federal criminal defendant be tried "by an impartial jury of the State and district wherein the crime shall have been committed," precludes transfer of a prosecution to another state or district except upon the defendant's request.³⁴ No constitutional provision limits the venue in civil actions; the due process clause does not require that trial take place in a state in which the defendant could have been served with process. Section 1404(a) of title 28³⁵ authorizes transfer of a civil action "in the interest of justice," and jury bias constitutes a proper ground for transfer.³⁶ Assuming, however, that a plaintiff can move for change

of venue under this provision,³⁷ the transferee district must be one in which the action "might have been brought;" this means at least that the defendant should be amenable to process in the transferee forum and that venue would be proper there.³⁸ Seldom will state officers or private defendants be amenable to process outside of their home state, and venue will usually be limited to the district in which they reside.³⁹

If section 1404(a) were amended by deleting the "where it might have been brought" proviso, it could perhaps be employed at plaintiff's behest to avoid the racially biased jury. This would present several complex administrative problems: determining the probability that a local jury will be prejudiced, weighing this against inconvenience to the defendant, and deciding on the transferee forum. Typically, when a party asserts jury bias as a ground for change of venue, the prejudice is peculiar to his case--for example, a newspaper has vigorously campaigned for the conviction of a criminal defendant. But here the plaintiff will usually claim only a pervasive and systematic prejudice against Negroes or civil rights workers. The judge is offered no special event or factor to help him determine the danger of prejudice; if he holds that transfer is justified in one case, he will have little ground for holding otherwise in the next. When a criminal defendant moves for change of venue because of local prejudice, the court can generally ascertain the geographic reach of the cause of the bias and transfer to a nearby forum. How can our judge know where to transfer the civil action? Does a Mississippi district court transfer the action to a court in Alabama, to the District of Columbia? He could, of course, proceed on the assumption that every southern jury is likely to be prejudiced, but this might result in unjustified expense and inconvenience to the defendant. The determination we are asking the court to make is not impossible, however. Certainly a judge who lives and works in a southern community has an intuitive feel for racial bias in his own courtroom, and some notion of the extent of prejudice in other forums. Though the issue is difficult to adjudicate, other methods of determination might prove more suitable: for example, a federal agency could study patterns of jury prejudice in southern communities, designating "prejudiced" districts, and the nearest districts free from substantial bias.

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Although the devices of injunction and change of venue may ameliorate, it seems clear that in a large number of cases any judicial remedy must ultimately

rely on the integrity of the southern jury. The jury can be improved, but at present it is not very much to rely on. Faute de mieux, the remainder of this section on judicial remedies assumes that it is worthwhile to bring civil and criminal prosecutions in the South.

2. Coercing the State to Provide Protection.--We noted above that a state may violate the equal protection clause of the fourteenth amendment by failing to afford protection to Negroes or civil rights workers. The denial of protection may be effected by any of four classes of persons: law enforcement officers, prosecutors, judges, or jurors. It is practically impossible to impose coercive sanctions on the last two. Broad discretion is necessary in the performance of their adjudicatory functions.⁴⁰ The threat of civil or criminal sanctions for failure to convict, or for other conduct prejudiced in favor of the defendant, would radically--and undesirably--change the roles of jurors and judges, and would deny the defendant charged with (but presumed innocent of) wrongful conduct against a Negro or civil rights worker important safeguards; injunctive relief is similarly out of the question. Although the prosecutor also enjoys considerable discretion, and though exercise of his discretion also works to safeguard the innocent, his position is less sensitive. He may be designated a quasi-judicial officer, but he is not ultimately responsible for the defendant's life or liberty.⁴¹ The prosecutor has generally been held immune in damage actions under the civil rights acts;⁴² but in the one reported criminal action against a state attorney, the court of appeals sustained a demurrer to the indictment on other grounds, but did not assume that the defendant was immune.⁴³ One can draw a rational distinction between civil damage actions and criminal prosecutions. If not immune from damage actions, the prosecutor might be subject to harassment by every defendant who though he had been wronged; the United States is not likely to bring vexatious prosecutions. Injunctions restraining discriminatory prosecutions have issued under the civil rights acts,⁴⁴ but the injunctive remedy does not hold much promise as a means of compelling a recalcitrant state official to prosecute an action. It would be extremely difficult for a court to ascertain whether the defendant had complied with any meaningful injunction, for effective prosecution entails considerably more than the formal commencement of an action. Officials charged with keeping the peace enjoy the least discretion of the four classes examined. They are not--nor should they be--immune from sanctions to coerce them to protect. The following discussion will deal mainly with law enforcement officers.

(a) Criminal Sanctions.--Section 242 of title 18 provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties . . . by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1000 or imprisoned not more than one year, or both.

Originating in the Civil Rights Act of 1866,⁴⁵ section 242 is the major criminal civil rights provision for the punishment of improper official conduct. State officers have been held criminally liable for a variety of aggressive conduct,⁴⁶ and the section has also been employed to punish unconstitutional official inaction. The most serious barrier to a successful prosecution under section 242 is the doctrine of "specific intent" enunciated in Screws v. United States.⁴⁷ Sheriff Screws arrested a young Negro and with the assistance of two other law enforcement officers beat him to death for no apparent purpose. All three were indicted under section 242 for depriving their victim of the rights to life and fair trial without due process of law. The district court instructed that the jury could find the defendants guilty if, "without its being necessary to make the arrest effectual or necessary to their own personal protection, [they] beat this man, assaulted him or killed him while he was under arrest" ⁴⁸ The jury returned a verdict of guilty. On certiorari to the Supreme Court the defendants claimed, inter alia, that section 242 was unconstitutional: because of the vague and protean nature of the due process clause, incorporated by reference into section 242, the defendants were not forewarned as to what conduct constituted a federal crime. Six members of the court, in three separate opinions, upheld the applicability and constitutionality of the section. Mr. Justice Douglas, writing for four members of the Court, sought refuge in the fact that section 242 punishes only a "willful" deprivation of rights. His argument was essentially this: "the right under the due process clause to be tried by a court rather than by ordeal is well established; when persons act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite;"⁴⁹ a requirement that the act be willful in this sense cures the vagueness of the statute

in any particular case; but the judgment must be reversed because the trial court's instruction did not condition a verdict of guilty upon the defendants' willfulness. A proper instruction would have informed the jury that "it was not sufficient that the petitioners had a generally bad purpose. To convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e.g., the right to be tried by a court rather than by ordeal."⁵⁰

In a sense the Screws doctrine is a sham. It is doubtful that many jurors understand the limitations of the specific intent requirement; understanding has not been fostered by district courts' mechanical adherence to the formula enunciated by Mr. Justice Douglas.⁵¹ Moreover, the requirement that the victim's right--e.g., the right under the due process clause to a fair trial rather than an ordeal--have been enunciated in a previous decision will not in fact forewarn most defendants that they are about to commit a federal crime. On the other hand, the prior decision requirement serves an important function in limiting the Government's power to create novel crimes in order to "get" a particular person. Perhaps the most troublesome aspect of Screws is that the jury must ascertain the defendant's state of mind with some precision. One suspects that at least some of the convictions obtained under section 242 resulted from the jury's misunderstanding of this subtle task. Whatever its merits, the Screws doctrine is the law; in Williams v. United States,⁵² Mr. Justice Douglas' opinion was adopted by a majority of the Court.

What implication does Screws hold for section 242 prosecutions of law enforcement officers who have refused to protect victims from private violence? Presumably, Screws requires (a) that the officer know, or be on notice that arbitrary or discriminatory inaction constitutes a denial of equal protection, and (b) that his inaction is in fact arbitrary or discriminatory. Were the United States now to prosecute an officer for failure to protect, it would have two favorable arguments with respect to the first requirement: first, a series of lower federal court decisions have established, without exception, that such inaction constitutes a denial of equal protection;⁵³ and second, the equal protection clause offers much clearer standards than the due process clause, so that even in the absence of previous elaboration, section 242 can be applied. At least as applied to conduct within the Fourth, Fifth, and Seventh Circuits, the first argument has merit.⁵⁴ The second also seems forceful: it requires little imagination to synthesize the Court's interpretations of the equal protection clause to reach the inescapable conclusion that

discriminatory inaction violates the clause--indeed, the clause says as much in terms.

Even if one accepts the Court's analysis for saving section 242, one must agree with the dissenters' contention that the obligations under the section should be legislatively clarified. The United States Civil Rights Commission recommended that Congress enact a companion provision to section 242 that would describe (nonexclusively) conduct deemed to violate the section. Among the conduct proscribed is "refusing to provide protection to any person from unlawful violence at the hands of private persons, knowing that such violence was planned or was then taking place."⁵⁵ Several bills have been introduced along these lines,⁵⁶ but none has been enacted.

(b) Civil Sanctions.--Section 1983 of title 42 roughly parallels section 242 and provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁵⁷

In Monroe v. Pape,⁵⁸ a section 1983 action against an officer for conducting an improper search and seizure, the Court unanimously rejected the defendant's contention that the Screws requirement of "wilfulness" (a term which, in any case, does not appear in the section) applied in civil actions. The majority wrote that civil liability "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions;"⁵⁹ Mr. Justice Frankfurter, dissenting on other grounds, wrote that "allegations that the respondents in fact did the acts which constituted violations of constitutional rights are sufficient."⁶⁰

If the officer's wrongful inaction can be attributed to an order from a superior state official--the governor, for example--the superior should himself be held liable under section 242 or 1983.⁶¹ Since the officer is, in fact, denying the victims equal protection, the fourteenth amendment permits imposition of liability on him as well. Is it fair, however, to hold liable an officer who is merely obeying a command? It

may be impossible to establish the specific intent required by section 242, but section 1983 seems available. In a case where a restaurant owner was arguably liable under section 1983 for refusing, because of his understanding of state law, to serve a Negro, Judge Edgerton suggested that if the defendant's action "was compelled against its will, principles of equity combine with the purposes of the Act, to dictate relief which would also shield appellee against such compulsion, rather than penalize appellee by imposing damages for surrendering to it."⁶² When the defendant officer is just the cop on the beat, it would be reasonable for a court to follow this approach. But if the defendant is, for example, the commissioner of police, the court could properly expect him to exercise an independent discretion, and to disobey an unconstitutional order at his risk. As Judge Edgerton pointed out, section 1983 is phrased to permit the court to grant appropriate relief; whether damages are proper must probably be determined on an individualized basis.

Can the state subdivision to which the nonacting officer is responsible be held liable under section 1983 for the officer's dereliction? Governmental liability offers two advantages: it may render higher state officials more diligent in requiring proper conduct from their inferiors, and it will assure the victim compensation for his injuries.⁶³ During debate on the predecessor to section 1983, Senator Sherman of Ohio introduced an amendment, adopted in the Senate, that would have made the political subdivision in which any mob violence occurred liable to the victims without fault.⁶⁴ The House was adamant in rejecting the proposal, and the act in terms imposes liability only upon "persons." In Monroe v. Pape,⁶⁵ the Court referred to the section's legislative history and concluded that the city of Chicago, under whose authority the delinquent officers had acted in conducting the search, could not be held liable. Congress could amend section 1983 to hold the subdivision liable in any circumstances in which the officer's conduct violated the equal protection clause.⁶⁶

Section 1986 is a unique and little used provision of title 42. It authorizes recovery of damages against

every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all

damages caused by such wrongful acts which such person by reasonable diligence could have prevented⁶⁷

In the absence of an actionable conspiracy under section 1985, no claim is stated under section 1986. The prior section will be discussed at length below;⁶⁸ for the present it is sufficient to note that section 1985 encompasses not only conspiracies to deprive persons of equal protection of the laws, but private interference with certain federal relationships as well.⁶⁹

(c) Injunctive Relief and Sanctions of Nullification.-- Section 1983 in terms authorizes equitable relief. In United States v. United Klans, Knights of Ku Klux Klans, Inc.,⁷⁰ Judge Johnson held that the failure of the Montgomery, Alabama police to protect the freedom riders denied them equal protection of the laws, and enjoined the Montgomery Commissioner of Public Safety and the Chief of Police "and all those acting in concert with them, from failing to provide protection for all persons traveling in interstate commerce . . ." through the city.⁷¹ Since the United States was plaintiff, the eleventh amendment posed no bar to the affirmative injunctive relief.⁷²

We noted above that the injunction is an inappropriate remedy for compelling a recalcitrant state official to prosecute an action against persons who have inflicted injury on Negroes or civil rights workers. The injunction (as well as reversal of convictions on appeal and habeas corpus) might nonetheless be employed indirectly to the same end. Courts have held that discriminatory abuse of prosecutorial discretion denies the defendant equal protection of the laws, and have enjoined such prosecutions or nullified resulting convictions.⁷³ In the typical case, the defendant claims that he is being prosecuted because he is a Negro or a civil rights worker, or because he has engaged in a constitutionally protected activity such as voting; the discrimination in these cases is based on characteristics possessed by the defendant. But is not discrimination based on the victim's characteristics also invidious? If a Negro accused of a crime can object because a white similarly situated would not be prosecuted, cannot a person accused of committing a crime against a white man object because a person who commits the same crime against a Negro would not be prosecuted? The typical discriminatory prosecution cases rest on the traditional equal protection doctrine that when a state confers a benefit or imposes a burden it must do so with an even hand:⁷⁴ the state is permitting whites to commit crimes with impunity, or at least with less likelihood that they will suffer a

penalty than Negroes who do the same act--this can be seen either as a benefit to the white or a burden to the Negro. Our case is similar: persons who commit crimes against Negroes enjoy the benefit of impunity (or at least of a lower probability of suffering a penalty)--a benefit not conferred on persons who commit the same crimes against whites.

The Supreme Court's recent decision in McLaughlin v. Florida⁷⁵ offers support to the theory herein advanced. Appellants were convicted under a Florida statute that imposed a more severe penalty--regardless of the defendant's own race--upon a defendant who unlawfully cohabited with a member of another race than upon one who cohabited with a member of his own race.⁷⁶ The Court had upheld a similar statute in Pace v. Alabama,⁷⁷ but in McLaughlin the Court held the statute unconstitutional. It rejected Pace's reasoning that there was "no impermissible discrimination because the difference in punishment was 'directed against the offense designated' and because in the case of each offense all who committed it, white and Negro, were treated alike."⁷⁸ Instead, it held that if a criminal statute makes an arbitrary or invidious discrimination with regard to an offense, the defendant is denied equal protection of the laws.⁷⁹

Enjoining prosecutions or nullifying convictions⁸⁰ for violent crimes committed against whites is a heavy stick with which to hit a state; the state is left with a choice between a radical reform of its criminal procedure or a condition of anarchy. Most of the successful discriminatory prosecution cases have involved only minor offenses. Nonetheless, the prosecutor is a state official, and it does not seem unreasonable thus to coerce a state to change its discriminatory policy.

3. Doing the Job for the State.--The discussion in the immediately preceding section indicates that although federal sanctions may effectively coerce law enforcement officers to provide physical protection, they are considerably less successful in coercing a state to reform its judicial processes. If we cannot improve the state judiciary, we may be able to circumvent it. The diversity-of-citizenship clause of article III, implemented by section 1332 of title 28, was designed to safeguard citizens of other states against the hostility of a local judicial system.⁸¹ Section 1332 may provide a federal forum for actions by transient civil rights workers against private wrongdoers. This section inquires whether the fourteenth amendment would permit Congress to make available a federal forum for civil and criminal actions when the state judicial process has failed. Federal jurisdiction would not depend

upon the defendant's having committed a federal crime or tort, but on the proposition that a state's systematic failure to impose civil or criminal sanctions upon persons who injure Negroes and civil rights workers denies members of the latter classes equal protection of the laws.

After the Civil War, many Congressmen were concerned that the southern state judiciaries would not protect the personal security of the emancipated Negro.⁸² The Civil Rights Act of 1866,⁸³ reenacted in the Civil Rights Act of 1870,⁸⁴ provided in section 1 that all citizens should have the right "to full and equal benefit of all proceedings for the security of person and property, as is enjoyed by white citizens" Section 3 of the act, from which the present removal statute derives,⁸⁵ provided in part:

That the district Courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance . . . of all cases, civil and criminal affecting persons who are denied or cannot enforce in the courts of judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act.

Under section 3 the United States could prosecute, in the federal courts, defendants who had committed crimes cognizable only under state law if state justice was discriminatorily defective.⁸⁶ The Supreme Court soon eviscerated this provision, however. In Blyew v. United States⁸⁷ the Government brought a prosecution against two whites for the murder of a Negro. Federal jurisdiction was premised on the fact that a Kentucky statute prohibited Negro witnesses to the event from testifying against the white defendants. Relying on the language of the statute--"affecting persons who are denied or cannot enforce"--the Court held that federal jurisdiction was absent because no person's rights were affected: ". . . an indictment prosecuted by the government against an alleged criminal, is a cause in which none but the parties can have any concern, except what is common to all the members of the community."⁸⁸ In dissent, Mr. Justice Bradley, with whom Mr. Justice Swayne concurred, pointed out that the prohibition against Negro witnesses, making successful prosecution of the white defendants less likely, tended "to expose [a whole class of the community] to wanton insults and fiendish assaults . . . , to leave their lives, their families, and their property unprotected by law."⁸⁹

In the light of the analysis proposed in section I(A),⁹⁰ section 3 of the 1866 act seems a permissible exercise of congressional power under the fifth section of the fourteenth amendment. The removal statute, not different in principle, has been challenged, and sustained as constitutional by the Supreme Court.⁹¹ But the provision under consideration is no longer on the books. In the remainder of this section we will explore possible approaches to new legislation of the same nature.

The most administrable provision would condition federal jurisdiction on the failure of state authorities, after a given period of time, to initiate proceedings against persons alleged to have committed a violent crime.⁹² The Federal Bureau of Investigation or other federal investigatory body could gather evidence; and if after the time period had elapsed the Attorney General believed a case could be made out against the putative wrongdoers and that the state's failure to prosecute was unjustified, he could prosecute them in a federal district court, the case to be governed by the penal laws of the state in which the crime was committed.⁹³ The chief advantage of such a procedure is its simplicity. But it is inadequate. It could be circumvented by disingenuous and halfhearted state prosecution; and it would not remedy possible judicial prejudice and the more pervasive problem of jury bias. Another solution, equally administrable as the first, would permit the Attorney General to bring the federal prosecution after an acquittal in the state court if he believed the acquittal unjustified, or after a conviction if he believed the sentence imposed unduly lenient. This solution is intolerable and probably unconstitutional. As late as 1959, the Supreme Court held that the "two sovereign" doctrine permitted both state and federal prosecutions for commission of the same act.⁹⁴ Two 1964 decisions, however, respectively held the fifth amendment's privilege against self-incrimination binding on the states through the fourteenth amendment,⁹⁵ and abrogated the two sovereign doctrine insofar as the rule made immunity from prosecution granted by a state unenforceable in a federal prosecution.⁹⁶ The Court has yet to apply the double jeopardy provision of the fifth amendment to the states.⁹⁷ But the trend seems clear,⁹⁸ and the two sovereign doctrine seems especially untenable when the federal court is entertaining a prosecution based on state law.

Viable federal legislation thus cannot depend upon how the state criminal process in fact operates in a particular case. It must contain a procedure for forecasting discrimination in the state process; then, the

prosecution could be commenced in or removed to the federal system, and the state court enjoined from further proceedings. The short history of Supreme Court interpretation of section 1443(1) of title 28⁹⁹--the provision under which a defendant can remove a civil or criminal action to the federal system if he is denied equal protection by the state proceeding--illustrates the difficulties of the contemplated procedure. In Strauder v. West Virginia¹⁰⁰ the Court upheld the removal of a state murder prosecution against a Negro, on the ground that a state statute excluded Negroes from jury service. The existence of an obviously unconstitutional statute renders the predictive task easy. In our case, at least if the state court has sustained such a statute against constitutional attack in the past, there is reason to believe that its present proceeding will be tainted, and the Attorney General should be permitted to commence a federal prosecution. Few, if any, such statutes still exist, however,¹⁰¹ and a remedy thus limited would be of little value. Beginning in the same Term as Strauder the Court was presented with a series of removal cases in which the unfairness alleged in the state proceedings resulted either from discriminatory administration of the laws (e.g., exclusion of Negroes from juries) or from other causes (e.g., community hostility) not inherent in any state legislation.¹⁰² The Court ordered these cases remanded to the state system. We shall not explore the Court's reasoning, but Professor Amsterdam is undoubtedly correct in suggesting that "administrative practicality" determined the Court's restrictive construction of the removal provision,¹⁰³ for, as distinguished from a case involving a statutory discrimination, the court must hear evidence of and estimate the probability that a particular aspect of the state trial procedure will be tainted with unconstitutionality; it may be asked, among other things, to predict that the trial judge will fail in his obligation to uphold the Constitution.

Whoever is charged with determining whether federal jurisdiction can be asserted over a person accused of committing a violent crime against members of minority groups is faced with an equally difficult task. He must estimate the probability that the prosecutor, judge, or jury will discriminate in favor of the alleged wrongdoer. Several factors may serve as guides. Proof of systematic exclusion of Negroes from the state jury might constitute a per se ground for federal jurisdiction; indeed, particular procedures for choosing jurors may hold sufficient promise of improper exclusion to justify the federal prosecution. Segregation in the state courtroom¹⁰⁴ could similarly be treated as an indication of judicial bias.¹⁰⁵ More difficult to gather and evaluate is

evidence of a pattern of discriminatory failure to prosecute, acquittal, or imposition of penalties. Although official statements may clarify the underlying motives, statistical evidence must be discounted by the many variables, besides the victim's race or other constitutionally impermissible factors, that could explain the pattern. Once it is determined that a general pattern of pro-defendant discrimination justifies federal prosecution, it remains necessary to leave open a window through which to view possible changes in the state's practice. This could be done if the Attorney General were selective in deciding what cases to remove from the state's hands. The need for such a window would render complex any procedure by which civil litigants could remove for similar reasons; while the Government can be expected to exercise some self-restraint, private parties have only a short-run interest in the outcome of a particular case.

The determination of probable prejudice--the precondition to federal jurisdiction--might be made either by the district court or by the Attorney General. In either case the Attorney General would, of course, make the initial decision to commence the federal proceedings. A determination to prosecute should be reviewable: the Attorney General is vested with so broad a discretion that delegation to him of the ultimate decision seems improper. A distrust of the integrity of some southern district court judges might entail preference for a procedure by which the Attorney General makes the initial determination, subject only to review by the court of appeals.

The chief value of a procedure like the one outlined above is its in terrorem effect. If the state finds federal prosecution of defendants for state crimes obnoxious, it will reform its procedures to whatever extent possible. If the potential wrongdoer cannot predict whether he will be dealt with by a process prejudiced in his favor or in the (presumably impartial) federal system, he is less likely to feel assured of impunity and to commit the wrong.

4. Sanctions for Conspiring with State Officers.--
(a) Conspiracy to Violate Section 242.--Section 242 punishes state officers, acting under color of law, who deprive any person of a right "secured or protected by the Constitution" ¹⁰⁶ Under section 371 of title 18, which makes it criminal to conspire "to commit any offense against the United States . . .," the Government can prosecute private persons who conspire with law enforcement officers to violate section 242. Private defendants have objected to prosecutions under

section 371 on the ground that section 242 is limited, by its language and by the reach of the fourteenth amendment, to official conduct. Courts have answered that it is "immaterial that they [the private defendants] may not have had the capacity to violate the statute . . . if they conspired to violate the statute and if one or more of their fellow conspirators had the capacity to commit the substantive offense."¹⁰⁷ In terms of the rationale of the crime of conspiracy--"that collective action toward an antisocial end involves a greater risk to society than individual action toward the same end"¹⁰⁸--this seems sound, and has been followed in contexts other than civil rights.¹⁰⁹ The collaboration permits an efficient division of labor, and, by mutual encouragement and commitment, strengthens the resolve of each participant so that he is less likely to withdraw than if he had planned the substantive crime alone.¹¹⁰

In the few reported cases of conspiracies to violate section 242, the official has taken an "affirmative" role in the scheme. He has summoned a posse to kill the victim,¹¹¹ or imprisoned and beaten persons as part of an extortion racket.¹¹² Official inaction is also punishable under section 242,¹¹³ and when an officer agrees to refrain from action in a situation where he is constitutionally obliged to intervene, his co-conspirators should be liable under section 371. It is doubtful that a mere custom of official inaction can in itself serve as the basis for a conspiracy conviction. Although reliance on the custom may encourage the private wrongdoers to commit the crime, and though the agreement necessary to conspiracy can be tacit as well as explicit,¹¹⁴ proof of a "meeting of the minds" between the particular officer involved and the private conspirators should be required.¹¹⁵

The usefulness of section 371--as well as of the conspiracy provisions considered below in this section--depends upon the reach of federal power under the substantive civil rights statutes. The "color of law" requirement of the statutes and the analogous "state action" condition of the fourteenth amendment are met even though the state officer's conduct violates state law.¹¹⁶ It is not necessary to the assertion of federal jurisdiction that the state courts "ratify" the officer's conduct by failing to hold him liable. A requirement of "exhaustion" would be difficult to administer, and the Reconstruction Congress apparently presumed that the state judicial processes would not adequately safeguard the victim's interests;¹¹⁷ when the putative defendant is a law enforcement officer this presumption is not without justification today.¹¹⁸ But there remains unanswered the question whether it is necessary to the

imposition of federal liability that the officer have acted in the "course of his employment." To illustrate the problem we might turn to the situation in United States v. Price,¹¹⁹ the pending conspiracy prosecution for the murder of three civil rights workers in Neshoba County, Mississippi. The indictments charge that the officers' part in the scheme was to arrest and detain the victims, and later to release them to co-conspirators. Although the murders might have been carried out without the officers' participation, their cooperation and use of the incidents of office--the power of arrest, the jail, and their very position as officers, which enabled them to detain the victims without the latter resisting--may have facilitated commission of the alleged crime. But in traditional agency terms, it is doubtful that the officers were acting within the course of employment. Conceding that they used powers vested in them by the state, murder is not within the scope of a policeman's duties. Thus, Price is distinguishable from a case where the gravamen of the federal offense is that the officer merely used excessive force in performing an incident of his office--questioning a suspect, for example.¹²⁰

A number of lower federal court decisions¹²¹ have upheld convictions under sections 242 and 371 (conspiracy to violate section 242) arising out of events similar to those alleged in Price. The law enforcement officers in these cases were not pursuing anything remotely resembling the ordinary course of employment, and they were acting for wholly personal reasons. The defendants used official powers of arrest and detention to obtain custody over the victim whom they either beat themselves or released to co-conspirators, and this was held sufficient to subject them to federal penalties for acting under color of state law. These decisions seem correct. Policemen can wield tremendous power by virtue of their state office, and, though not legally immune from prosecutions and private actions in the state courts, they are often not prosecuted for acts of brutality; because of their official status, civil actions are often unsuccessful.¹²² When, as in the Price case, the officers are elected officials, who play an important role in the state's political structure, their power, their de facto immunity, and their danger to the life and liberty of private persons are all the greater. Although the Supreme Court has not explicitly faced the question whether a state officer, acting for wholly personal motives unconnected with the performance of his official functions, is acting under color of state law, the Court has explicitly rejected the agency analogy as a limitation of federal power under the civil rights provisions,¹²³ and has written in

broad dictum that "one who is in possession of state power" can be held liable "even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer."¹²⁴

To what extent does the requirement of "specific intent" enunciated in Screws limit the usefulness of the civil rights provisions herein considered. Screws itself implicitly poses the question. The indictment charged the defendants with having deprived the victim of the right to a proper trial, and also charged in a separate count that the defendant's abridged his right "not to be deprived of life without due process of law." Mr. Justice Douglas ignored the latter count entirely, and suggested that on remand the jury could return a verdict of guilty only if the defendants intended to deprive the victim of "the right to be tried by a court rather than by ordeal." Justices Murphy and Rutledge would have held the defendants criminally liable even if their purpose was not to "try" the victim, but merely to deprive him of life without justification. If the specific intent requirement that saved the constitutionality of section 242 requires a standard more concrete than "deprivation of life without justification," the civil rights provisions may be virtually useless in a case like Price. The indictment for conspiracy to violate section 242 charges that the defendants conspired to deprive the victims of the right "not to be summarily punished without due process of law by persons acting under color of the laws of the State of Mississippi," apparently to stay within the narrow holding of Screws. But did the defendants conspire to "punish," or is it not more likely that they merely conspired to kill the civil rights workers because they disliked them? The latter seems at least as likely a description of their purpose.

The statute recommended as a companion to section 242 by the Civil Rights Commission would explicitly hold state officers liable for "subjecting any person to physical injury for an unlawful purpose," or "aiding or assisting private persons in any way to carry out acts of unlawful violence."¹²⁵ If such provisions could be read into section 242 without further legislation, the conspirators in Price could be held liable. But are not the provisions of the proposed statute themselves unconstitutionally vague? "Unlawful" is a troublesome word. If it refers to a federal common law to be developed under section 242, the statute seems improper. Although there is a broad and relatively inflexible consensus as to what constitute justifications for intentional

homicide and assault, the American trend, fortunately, has been away from common law crimes;¹²⁶ this would be a backward step. Absent a general statutory federal criminal law, however, "unlawful" might be taken to incorporate the law of the state in which the crime was committed.¹²⁷ Holding state officers and their co-conspirators federally liable for "state" crimes seems a permissible exercise of Congressional power under the due process clause.¹²⁸ It is questionable whether the Court should thus interpret section 242 in the absence of additional legislation.

(b) Conspiracy under Section 241.--Section 241 of title 18 provides:

If two or more persons conspire 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, or because of his having so exercised the same; or

If two or more persons go in disguise on the highways, or on the premises of another, with the intent to prevent or hinder his free exercise of enjoyment of any right or privilege so secured--

They shall be fined not more than \$5000 or imprisoned not more than ten years, or both.

By its terms section 241 seems available to punish persons who conspire with law enforcement officers, limited only by the requirement that the victim be a citizen of the United States. In United States v. Williams¹²⁹ the Supreme Court held that it could not be thus employed. This was one of several cases resulting from a Florida corporation's employment of a detective agency to investigate thefts of its property. Among the investigators was the defendant Williams, a "special police officer" of the Miami police force. Williams and a few private detectives took some suspects to a shack on the company's premises and proceeded to coerce confessions from them. Williams was convicted under section 242 for having denied his victim, inter alia, the right to a fair trial; the Court affirmed this conviction.¹³⁰ All the participants in the brutal scheme, including Williams, were convicted for conspiracy to deprive their victims of this and other rights under section 241. The Fifth Circuit reversed, holding that section 241 comprehends only "the federal rights and privileges which appertain to citizens as such and not the general rights extended to all persons by the [due process] clause of the

Fourteenth Amendment";¹³¹ alternatively it held that the trial judge had erred in not instructing the jury that to convict they must find that the defendants "willfully conspired" to deprive the victims of fourteenth amendment rights.

The Supreme Court affirmed the Fifth Circuit's judgment. Mr. Justice Frankfurter, joined by three Justices, held section 241 inapplicable. Mr. Justice Douglas, also joined by three members of the Court, would have upheld the conviction. Mr. Justice Black held the swing vote, and chose to affirm the Fifth Circuit's judgment on the ground that a prior trial resulting in the defendants' acquittal barred the present prosecution.¹³²

Mr. Justice Frankfurter argued that section 241 "applies only to interference with rights which arise from the relation of the victim and the Federal Government, and not to interference by State officers with rights which the Federal Government merely guarantees from abridgment by the States."¹³³ When Congress wanted to reach official action that contravened the fourteenth amendment, it held liable persons acting "under color of law."¹³⁴ But section 241, which was designed to deal with the Klan, has no color of law requirement; indeed, the language, "go on disguise on the highways," seems clearly directed at private action. Moreover, when originally enacted, section 242 encompassed interests "secured or protected" by federal law,¹³⁵ while section 241 contained only "the narrower phrase 'granted or secured'"¹³⁶ Thus, section 241 applies only to those rights "which Congress can beyond doubt secure against interference by private individuals."¹³⁷ Mr. Justice Frankfurter buttressed these arguments with the further point that at the time Congress enacted section 241, a statute equivalent to section 371 (the general conspiracy provision) would already have punished conspiracies to violate section 242; an additional statute punishing conspiracies to invade fourteenth amendment rights would have been superfluous.

For two reasons it is difficult to find subtle distinctions in the language of the statutes. First, the major civil rights legislation¹³⁸ was enacted before the Supreme Court had defined the limits of the fourteenth and fifteenth amendments. Second, as Mr. Justice Frankfurter noted, the legislation was inadequately deliberated and loosely and carelessly phrased. "Privileges," "immunities," "rights," "secured," "protected," and "granted" are not used in a consistent fashion. The word "citizen" seems sometimes to be used in contradistinction to "person," to invoke the privileges and

immunities of national citizenship.¹³⁹ But, if anything, the framers of the Reconstruction legislation regarded the rights of citizenship as broader than, and encompassing, rights secured against the state by the fourteenth and fifteenth amendments.¹⁴⁰ The debates on section 241 and other Reconstruction legislation indicate that a substantial number of congressmen believed that the legislation would make the fourteenth amendment binding on private individuals.¹⁴¹ In short, although section 241 does protect federal relational interests,¹⁴² neither its legislative history nor its language indicates that it was thus limited. Mr. Justice Frankfurter's argument based on the fact that conspiracies to violate the fourteenth amendment were already encompassed by section 371 is not persuasive. As Mr. Justice Douglas pointed out, section 241 imposed more severe sanctions than the general conspiracy provision;¹⁴³ in view of the Reconstruction Congress' special concern for protecting the Negro, the heavier penalties of the civil rights provision are understandable.

Mr. Justice Frankfurter's opinion seems weak,¹⁴⁴ and the Court has not reexamined the question since 1951. In United States v. Price¹⁴⁵ Judge Cox followed Williams in dismissing indictments brought under section 241 against the alleged killers of the civil rights workers in Neshoba County, Mississippi. In April, 1965, the Court noted probable jurisdiction.¹⁴⁶ Should a full Court repudiate Mr. Justice Frankfurter's opinion,* it will then be faced with the problem of the section's vagueness; section 241 is as broad as section 242, but does not in terms require the "wilfulness" that saved the latter section's constitutionality in Screws v. United States.¹⁴⁷

The four dissenting Justices in Williams considered the problem of vagueness, and found that the fact that section 241 punished only "conspiracies" supplied the requisite "specific intent" which wilfulness imported into section 242: "intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it."¹⁴⁸ Their theory seems sound if section 241 is applied with caution. Section 6 of the Civil Rights Act of 1870 punished a conspiracy to

injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right¹⁴⁹

* In United States v. Price, 383 U.S. 787 (1966), the Court sustained the indictments, rejecting Mr. Justice Frankfurter's reasoning in Williams.

In the 1874 revision, for no apparent reason,¹⁵⁰ the word "intent" was dropped from the conspiracy provision (although retained in the provisions of the section that punishes going "in disguise on the highways" or "on the premises of another"), and the present form adopted. The present form's ambiguity could lead a judge to instruct the jury that the only requisite conspiracy is one to injure, oppress, threaten or intimidate the citizen. But the section must be construed to make "in the free exercise or enjoyment of any right" read "for the purpose of preventing or interfering with the free exercise or enjoyment of any right"

(c) Civil Conspiracy.--Section 1985(3) of title 42 may be available to hold private persons acting in concert with state officers liable for civil conspiracy. In relevant part, it provides:¹⁵¹

If two or more persons in any State or Territory conspire or go on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of a conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of such conspiracy, whereby another is injured in his person or any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages

At first glance, section 1985(3) appears to be the civil counterpart of section 241.¹⁵² However, while section 241 protects "any right or privilege secured . . . by the Constitution or laws of the United States," section 1985(3) proscribes the deprivation of "equal protection of the laws, or equal privileges and immunities under the laws" The word "equal," modifying the second phrase of the latter provision, appears to introduce a limitation that renders the section useless for dealing with any but discriminatory conduct. We will return to this problem below,¹⁵³ but thus interpreted, the section still permits recovery for some harm caused by concerted conduct in which state officers participate. If an officer's action or inaction is premised on a "constitutionally irrelevant" characteristic of the victim--for example, that he belongs to the class of Negroes, uppity Negroes, or civil rights workers--the officer is denying his victim the equal protection of

the laws as well as depriving him of life or liberty without due process of law, and the officer's private cohorts should be liable for conspiring to deny the victim "equal protection of the laws or equal privileges and immunities under the laws."

It will generally be easier to establish that the conspirators deprived their victim of life or liberty without due process of law than that they denied him equal protection of the laws.¹⁵⁴ Section 1985(3) could be amended to encompass due process, but in the absence of congressional action it may be possible to hold the conspirators to due process obligations under section 1983¹⁵⁵ by the judicial creation of a federal tort of civil conspiracy to violate section 1983, measuring the damages--as does section 1985(3)--in terms of the harm suffered by the victim. Several lower courts have done this, premising the action either on ambiguous language in section 1983,¹⁵⁶ or on the proposition that "it should be axiomatic that what one person can do, two or more persons can do jointly or in concert. This is in reality all that a civil conspiracy is--concerted action or a sort of civil partnership in the commission of the injury whereby one may act for his partner and both be bound."¹⁵⁷ Section 1988 of title 42¹⁵⁸ offers another possible way of establishing the civil offense. It authorizes a federal court to incorporate relevant state common and statutory law when federal law is "deficient in the provisions necessary to furnish suitable remedies" for the protection and vindication of civil rights.¹⁵⁹

5. Protecting "Pure" Federal Relationships.--In section B of part I, we noted two kinds of relational interests which the Government could protect from private interference. The first type, well established by precedent, comprehends interests pertaining to the victim's enjoyment of a federal benefit or his involvement in a federal process.¹⁶⁰ The second, somewhat conjectural group, encompasses analogous relationships between a person and a state--relationships which are made obligatory on the state by virtue of the fourteenth or fifteenth amendment.¹⁶¹ This section will consider remedies protecting only the first class; the second, as well as private usurpations of state power, are deferred to the next section.

A variety of statutory provisions impose civil and criminal sanctions on private persons who interfere¹⁶² with specific relationships between a person and the federal government. Section 1503 of title 18 punishes the intimidation of witnesses, jurors, and parties in federal judicial proceedings; section 1985(2) of title 42 mirrors this provision, holding conspirators liable

in damages;¹⁶³ and section 1505 of title 18 punishes interference with witnesses and parties in agency and congressional proceedings.¹⁶⁴ Sections 1971(b) of title 42,¹⁶⁵ 1985(3) of the same title, and 594 of title 18 protect voters in federal elections by injunction, assessment of civil damages, and imposition of criminal punishment respectively. Section 1985(3) also protects the giving of "support or advocacy in a legal manner" in favor of a federal candidate. It may be possible to extend some of the voting provisions to protect civil rights workers who urge or assist others to vote, on the theory that harm perpetrated against the civil rights workers serves to intimidate the voters themselves.¹⁶⁶ Rather than interpreting existing legislation so expansively, it would be preferable to enact legislation explicitly protecting the civil rights personnel.¹⁶⁷

Apart from these specialized statutes, section 241 of title 18 has consistently been held available for the protection of federal relational rights.¹⁶⁸ To what extent does section 1985(3) of title 42 create a useful civil analogue to section 241? Amidst various specific provisions, one general clause of section 1985(3) creates an action against conspiracies "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"¹⁶⁹ A consideration of this section must begin with the Supreme Court's 1951 decision in Collins v. Hardyman.¹⁷⁰

In Collins the Court held that the interest in assembling for the purpose of discussing national issues and petitioning federal officials was not protected by the general clause of section 1985(3). The private defendants had forcibly broken up a meeting in California, the purposes of which were to discuss the Marshall Plan and to petition appropriate federal officials in opposition to the Plan. The Court assumed without deciding that interference with the plaintiff's assembly deprived them of having and exercising a "federal right," but held that the defendants had not deprived them of equal protection of the laws or equal privileges and immunities under the laws, because "the only inequality suggested is that the defendants broke up plaintiffs' meeting and did not break up meetings of others with whose sentiments they agreed."¹⁷¹ The plaintiffs' "rights under the laws and to protection of the laws remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as those of any other citizen who suffers violence at the hands of the mob."¹⁷² What conduct does section 1985(3) remedy? The Court referred

to the post-Civil War Klan, and suggested that it might have been of such magnitude as to "dominate and set at naught" state or local governments, and "deprive Negroes of their legal rights and to close all avenues of redress or vindication."¹⁷³

If the Court's decision is correct, the general clause of section 1985(3) does not encompass those federal relational rights--e.g., to unhampered expression on issues of national importance--not protected by the specific provisions surveyed above. Certainly the language of the provision furnishes considerable justification for the Court's restrictive interpretation. The three other general civil rights provisions--sections 241 and 242 of title 18, and section 1983 of title 42--are much broader; they protect rights, privileges, or immunities secured by "the Constitution or laws of the United States." The fact that other clauses of section 1985(3) encompass certain specific federal relational interests--involving voting and federal litigation--may provide further support for excluding such interests from the protection of the general clause.

There the matter might rest, were it not for some incongruent language in the section. For one thing, if, as Collins implies, section 1985(3) is limited to situations where private conspiracies obstruct or defeat the official administration of justice, such cases are explicitly dealt with by other clauses of the section.¹⁷⁴ It could be argued that the general clause is but a summing-up of the explicit provisions--a superfluity--but reiterative clauses generally come at the end of a section, and in both section 1985(3) and the provision of the Civil Rights Act of 1871 from which it derives,¹⁷⁵ it is sandwiched between other, specific clauses. Moreover, under the Court's interpretation, the phrase, "equal privileges and immunities," adds nothing to "equal protection of the laws." Superfluity abounds in the civil rights legislation, but could it not be that "equal" is the superfluous term, meaning only that the victim should not be deprived of those privileges and immunities which are held by all persons or citizens equally? And might these not be the "privileges and immunities of national citizenship" that encompass federal relational interests?¹⁷⁶ This last possibility is supported by the closing provision of section 1985(3), which conditions liability on the commission of an act in furtherance of the conspiracy "whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States" ¹⁷⁷ Finally, the Court's restrictive interpretation of section 1985(3) avoids a satisfying symmetry: section 1983 is to section 242

what section 1985(3) might be to section 241.

The legislative history of section 1985(3) is as ambiguous as its language. The present section is derived--through several revisions--from section 2 of the Civil Rights Act of 1871. Representative Shellabarger, who introduced the House bill, indicated that section 2 was designed to improve on section 6 of the 1870 act (now section 241 of title 18) and that "it rests upon exactly the same legal ground, and is in its constitutional aspects identical with it."¹⁷⁸ Its constitutional basis was that Congress had authority under the fourteenth amendment to protect the fundamental privileges and immunities of national citizenship against private invasion, and that these included the enjoyment of life, liberty, and property.¹⁷⁹ As introduced, the bill protected "privileges and immunities under the laws," with no mention of "equal."¹⁸⁰

Representative Cook added the limiting "equal," with the apparent approval of Shellabarger. Cook feared for the constitutionality of a section that could punish ordinary assaults and batteries, but asserted that "wherever the Constitution of the United States secures a right to a citizen Congress may enforce and protect that right."¹⁸¹ Asked when section 2, as amended, would come into play, he replied, when a combination induces "the legislature of a State by unlawful means to deprive citizens of the equal protection of the laws or to induce the courts to deny citizens the equal protection of the laws"¹⁸² Although Representative Cook explicitly recognized Congress' power to punish interference with federal relational interests,¹⁸³ it is not clear that the phrase "equal privileges and immunities under the laws" was designed to accomplish this. Shellabarger's subsequent explanation of the amendment does not clarify.¹⁸⁴

It is unwise to make too much to run on the ambiguous legislative history of section 1985(3). Mr. Justice Frankfurter's comment that the Civil Rights Act of 1870 was neither carefully considered nor coherent,¹⁸⁵ is applicable to the 1871 act as well. Nonetheless, one is drawn to the conclusion that if section 1985(3) began as a civil rights panacea, running the full range of federal constitutional authority, it emerged as a limited provision. Legislative emendation or supplementation of section 1985(3), resulting in a civil statute equivalent to section 241, seems desirable. Civil litigation does not leave the victim¹⁸⁶ dependent on the Department of Justice, it offers the possibility of bringing the action in or transferring it to an unprejudiced forum, it avoids the constitutional problems inherent in vague criminal

statutes, and it permits recovery under a less rigorous burden of persuasion.

6. Protecting State Relationships and Punishing Private State Action.--This section examines remedies supportable by one or both of two independent constitutional grounds: the Government's power to protect, against private interference, the enjoyment of rights held against the state by virtue of the Civil War amendments, and the power to deal directly under those amendments with persons who usurp state authority.

Section 1985 of title 42 holds liable in damages,

two or more persons [who] conspire [A] for the purpose of impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or [B] to injure him in his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; [or] . . . [C] for the purpose of preventing or hindering the constitutional authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws

if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States¹⁸⁷

Clause A proscribes obstructing or defeating the "due course of justice." Debates on the Civil Rights Act of 1871 are replete with examples of punishment privately inflicted by the Ku Klux Klan,¹⁸⁸ and this clause seems designed to proscribe lynching. Lynching might be more aptly characterized as a deprivation of life without due process of law than a denial of equal protection. The drafters of the clause probably had a similar notion, for the original statute proscribed conspiracies

for the purpose of in any manner impeding, hindering, obstructing, of defeating the due course of justice in any State or Territory, with intent to deny any citizen of the United States the due and equal protection of the laws¹⁸⁹

For no apparent reason, the italicized "due" was omitted in a subsequent code revision. Whether or not it is proper to imply the omitted word, it may often be possible to prove a discriminatory purpose when Negroes or civil rights workers are the victims of privately inflicted punishment.

Clause B makes actionable private interference with a person suing in the state court to enforce rights held against the state by virtue of the equal protection clause. Since almost all such litigation--for example, suit to desegregate schools and public facilities--is usually in the federal courts, this aspect of the clause will probably seldom be used. But "enforcement" is not limited to litigative activities, and clause B should be available to protect persons seeking to enjoy rights to equal protection of the law held against the state. Thus, intimidation of Negroes to prevent them from attending a public school, or intimidation of voters to prevent them from voting in a state election, should be actionable under this provision.

Clause C is applicable in any case where private persons coerce state officials to prevent them from fulfilling obligations owed to others under the equal protection clause. In Brewer v. Hoxie School District, for example, the clause was employed to enjoin conspirators attempting to force the county school board to maintain a segregated school system.¹⁹⁰

Unlike section 1983 of title 42, section 1985 does not in terms allow injunctive relief. Nonetheless, in Hoxie School District the Fourth Circuit upheld an injunction based on the section. Federal courts have long "implied" injunctive remedies from statutes providing only damage relief,¹⁹¹ and some state courts have premised injunctions on civil rights damage provisions.¹⁹² It has been argued, however, that the language of the last clause¹⁹³ of section 1985 does not permit relief until the plaintiff has in fact been injured in his person or property, or deprived of a right, and that an injunction cannot issue prior to the occurrence of such injury or deprivation.¹⁹⁴ This contention seems frivolous. Because section 1985 makes conspiracy rather than the substantive offense actionable, it is desirable to forestall damage suits when the conspiracy has not been consummated. But a court that enjoins the threatened conduct does not have to compute and award damages for unmaterialized harm. It is absurd to allow the apprehended conduct to occur when it is likely to cause actual harm.

Although section 241 of title 18 could be employed

to punish the same conspiracies made actionable by section 1985, the criminal conspiracy provision is so open-ended that, if it is desired to punish lynching and intimidation of state voters, more explicit legislation should be enacted. The Supreme Court might hesitate independently to impose on private persons a federal obligation not to lynch; it would be a constitutional innovation; more significantly, legislative definition of the criminal conduct could be more precise, thereby serving to forewarn effectively and to aid in delineating the offense. A bill introduced in the eighty-sixth Congress suggests a viable approach to antilynching legislation.¹⁹⁵ It defines a lynch mob as an assemblage of persons which

exercise or attempt to exercise, by physical violence against the person, any power of correction or punishment over any citizen or citizens of the United States or other person or persons in the custody of any peace officer or suspected of, charged with, or convicted of the commission of any criminal offense, with the purpose or consequence of preventing the apprehension or trial or punishment by law of such citizen or citizens, person or persons, or of imposing a punishment not authorized by law.

The act punishes the conspirators with a fine not exceeding \$10,000 or imprisonment not exceeding 20 years or both; it imposes less severe penalties on law enforcement officers for negligent or willful failure to prevent the lynching; and holds the subdivision in which the lynching occurred responsible in damages to the victim or his next of kin, unless the subdivision proves that its officers were diligent in preventing the occurrence.

We noted above that federal power over lynching is not limited to privately inflicted punishment for the commission of real crimes, but can reach punishment for breach of extralegal caste customs as well.¹⁹⁶ We also noted that the difference between "punishment" and mere assault or murder depends on the actor's motivation. Motivation is a complex phenomenon, and if it is difficult accurately to ascertain the state of mind of a defendant who allegedly punished for the commission of a crime,¹⁹⁷ it will usually be impossible to do the same with respect to punishment for breach of an unwritten law. The act's restriction to real crimes thus seems wise.

7. Implementing the Commerce Clause.--We have seen

that existing legislation under the commerce clause is of potential use in safeguarding the personal security of Negroes and civil rights workers.¹⁹⁸ The clause also has a self-executing aspect, and one district court has acted in the absence of enabling legislation to enjoin private persons from interfering with the Freedom Riders' safe passage through Alabama.¹⁹⁹ Perhaps the broadest and most radical use to which the commerce clause could be put is based on the hypothesized fact that violence concentrated within a community detrimentally affects the national economy.²⁰⁰ Assuming this to be true, Congress could enact legislation holding perpetrators of the violence criminally or civilly liable. Isolated acts of violence have a submarginal effect on interstate commerce, however, and the drafters would face the initial problem of locating those communities or states in which exercise of federal power is justified. It should not be necessary to prove that the conduct of the defendant or the history of violence of a particular area in fact has an ascertainable impact without the state, so long as Congress finds that localized patterns of violence in general have an interstate effect and provides a mechanism for determining the existence of patterns of significant magnitude.²⁰¹ Assuming that an appropriate administrative agency or officer finds the requisite pattern of violence, federal power should not automatically be asserted over all wrongdoers within the area; there seems no reason for the Government to take upon itself the general administration of criminal and tort law if the state is acting in good faith and has not requested assistance. A viable limitation would condition federal jurisdiction upon a further finding that the state's law enforcement or judicial processes were subject to systematic discriminatory abuse. Although the commerce clause is not constitutionally thus limited, once the existence of constitutional power is determined its assertion should be determined by standards similar to those suggested in the section premising federal jurisdiction on a state's violation of the equal protection clause.²⁰²

8. A Note on Penalties.--Sections 241 and 242 do not punish criminal assault or murder; they proscribe only the invasion of "civil rights." Penalties for violation of the provisions are correspondingly light. The maximum punishment under the former section is \$5000 or ten years imprisonment or both; the maximum under the latter is \$1,000 or one year or both. The general conspiracy statute, section 371 of title 18, imposes a maximum of \$10,000 or five years imprisonment or both, but when commission of the substantive offense is a misdemeanor (as is a violation of section 242), the penalty cannot exceed that of the substantive crime.

The leniency of the civil rights provisions is not without advantage. In the first place, though not the usual practice of the Department of Justice,²⁰³ the United States can initiate a prosecution under section 242 by information. Second, the absence of a severe mandatory minimum penalty makes a verdict against the defendant more likely. Indeed, a clause of section 241 that disqualifies any person convicted thereunder "from holding any office or place of honor, profit, or trust created by the Constitution or laws of the United States," was deleted in 1948 on the ground that its severity created an obstacle to successful prosecutions.²⁰⁴

On the other hand, especially in light of some states' failure to punish crimes of violence that can come within these federal provisions, the penalties often seem incommensurate with the nature of the act, if not the offense, committed. Congress probably has the power to impose graduated sanctions, punishing more severely those invasions of civil rights that are accompanied by violence or murder; some deprivations of rights are more serious than others. Section 7 of the Civil Rights Act of 1870 provided that if in the course of violating the civil rights statutes the defendant commits "any other felony, crime, or misdemeanor," he shall suffer the appropriate punishment imposed by the laws of the state in which the offense was committed.²⁰⁵ This provision was deleted in the 1909 recodification of the criminal code,²⁰⁶ but another civil rights provision is arguably open to a similar interpretation. Section 1988 of title 42, deriving from the Civil Rights Act of 1866, provides that all proceedings under titles 18 and 42 shall be "in conformity with the laws of the United States, so far as such laws are suitable" to protect and to vindicate the civil rights of all persons; but when federal law is "deficient in the provisions necessary to furnish suitable remedies and punish offenses against law," state statutory and common law "shall govern the trial and disposition of the case, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."²⁰⁷ Has Congress, in this provision, incorporated state criminal penalties into the civil rights acts? The text of section 1988 leaves the answer unclear, but several factors militate against such an interpretation. For one thing, sections 241 and 242 explicitly provide maximum penalties which should govern this inexplicit clause. Second, section 1988 was not originally a separate provision; it constituted the last part of section 3 of the Civil Rights Act of 1866, and was preceded by the removal provisions.²⁰⁸ Thus, "the infliction of punishment" clause can reasonably be read to refer only to penalties imposed when a criminal action was removed from the state courts.

The penalties imposed for violation of section 241 may well be adequate; any increase is likely to have a marginal deterrent effect, and would not increase the probability of rehabilitating the convicted defendant. But the one year of \$1000 maximum penalty for violation of section 242 is absurdly small when the victim is injured or killed. It would be desirable to amend section 242 to permit the imposition of more severe penalties when the wrongful conduct results in death or serious injury.²⁰⁹

Conclusion

However deep-rooted the fear and hatred that drives white men to violence, Negroes and civil rights workers would be far safer in the South if state law enforcement and judicial processes were not infected with a vicious and systematic prejudice. It is the state's job to protect the physical security of those within its jurisdiction, and--apart from cases in which the federal government has a strong independent interest in controlling private conduct--the ideal federal remedy would act only to encourage or coerce the southern states to do the job properly. While it may be possible to prevent egregious instances of police inaction by threat of punishment or civil liability, such direct sanctions are inapposite for reforming the state judicial system. Discriminatory failure to prosecute the wrongdoers may be deterred by nullifying other convictions, but it would be anarchistic to apply this sanction to remedy the more serious and pervasive problem of discriminatory acquittals by prejudiced juries. The federal government cannot act directly against the jury. At the most, Congress can compel a state to follow certain procedures in jury selection, but the critical stage of the selection process--the voir dire--is so discretionary as to preclude meaningful external supervision; one must rely on the good faith of the state trial judge.

If Negroes and civil rights workers are to be secured a reasonable degree of protection, the federal courts must undertake to deal directly with the private wrongdoers. We have examined a number of grounds and methods for asserting direct federal power. Without prejudice to any other procedures discussed in the paper, I think that federal jurisdiction premised on discriminatory failure of the state judicial process is the most appropriate remedy for many instances of private violence. Apart from conduct designed to interfere with the clear federal interest in protecting its governmental processes, one must strain to make independent federal crimes of most intentional acts of violence. All such acts are criminal under state law, however

procedure recognizes that the primary responsibility to deal with harmful conduct rests with the states; the United States is mobilized only as a second line of defense, as guarantor of the state obligation. It is unrealistic to expect that the embarrassment of having its job preempted would encourage a state like Mississippi or Alabama to clean its own house, but in a federal system there may be independent value in a procedure that by its very operation proclaims the state failure which justifies federal intervention.

1. See 1963 United States Comm'n on Civil Rights, Report 124-25; cf. 5 United States Comm'n on Civil Rights, Report 84-86 (1961).
2. See Neustadt, Presidential Power 22-63, passim (Signet paperback ed. 1964) (Little Rock, Arkansas).
3. See Barrett, Integration at Ole Miss 123-27, 148-53 (1965) (Oxford, Mississippi).
4. See N.Y. Times, March 20, 1965, p. 1, col. 8 (Selma-Montgomery, Alabama).
5. 5 United States Comm'n on Civil Rights, Report 55-66 (1961); Note, Judicial Performance in the Fifth Circuit, 73 Yale L.J. 90 (1963); Lusky, Justice With a Southern Accent, Harpers Magazine, March, 1964; Southern Regional Council, Racial Discrimination in the Southern Federal Courts (1965).
6. See Peltason, Fifty-Eight Lonely Men, passim (1961).
7. It is difficult to evaluate the in terrorem effect of the prosecution as such. The United States Civil Rights Commission wrote of the Department of Justice's restraint in bringing prosecutions for police brutality:

On the one hand, it seems clear that a large number of unsuccessful section 242 prosecutions throughout the country would be almost certain to generate widespread contempt for the statute. On the other hand, even an unsuccessful prosecution can have an educative and therapeutic effect upon the entire community.

United States Comm'n on Civil Rights, Report 63 (1961).

8. Summers, A Comparative Study of the Qualifications of State and Federal Jurors, Wisconsin Bar Bull., Oct. 1961, at 38. The survey was made in Milwaukee County, Wisconsin. Of seventy lawyers interviewed, 31% held views similar to this; 69% thought there was no appreciable difference; no lawyers believed state jurors to be superior. Id., at 35.
9. Professor Summers' studies indicated that the lawyers' preference was not clearly supported in fact. Id. at 38-42. Milwaukee County is largely urban and suburban, encompassing only a small rural population.

10. See, e.g., Highsaw and Fortenberry, The Government and Administration of Mississippi (1954). For example, the trial of the men accused of murdering Mrs. Viola Liuzzo was held in Haynesville, Alabama; a federal prosecution would probably take place in Montgomery.
11. 100 prosecutions brought under 18 U.S.C. §§ 241 & 242 during the period 1959-64 (the large majority of which were in southern states) resulted in 60 "no true bills," 27 acquittals, and 13 convictions. (19 others were not finally disposed of by the courts.) Letter from John Doar, Assistant Attorney General, Civil Rights Division, to author, May 12, 1965. "[A]lthough the majority of indictments . . . involved white offenders and Negro victims there have been no convictions in this type of case." Ibid. For regional statistics of the disposition of § 242 prosecutions for the period 1954-59, see Shapiro, Limitations in Prosecuting Civil Rights Violations, 46 Corn. L.Q. 532 (1961). See also President's Committee on Civil Rights, To Secure These Rights 123 (1947); Hearings on S. 1731 Before the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 113-14 (1963).
12. See Swain v. Alabama, 380 U.S. 202, 211-22 (1965).
13. Thiel v. Southern Pac. Co., 328 U.S. 217 (1946).
14. Moore v. New York, 333 U.S. 565 (1948); Fay v. New York, 332 U.S. 261 (1947).
15. See generally Note, Desirability of Blue Ribbon Juries, 13 Hastings L.J. 479 (1962).
16. Smith v. Texas, 311 U.S. 128, 130 (1940).
17. Compare 28 U.S.C. § 1861 (1958) with 28 U.S.C. § 1861 (1948), 92 Stat. 951, ch. 646 (1948).
18. See Avery v. Georgia, 345 U.S. 559 (1953); Cassell v. Texas, 339 U.S. 282 (1950).
19. Southern Regional Council, Racial Discrimination in the Southern Federal Courts 8 (1965).
20. Judicial Conference, The Jury System in the Federal Courts, 26 F.R.D. 409, 428-29 (1960).
21. Southern Regional Conference, supra note 19, at 7.

22. Judicial Conference, supra note 20, at 421, 428.
23. See Swain v. Alabama, 380 U.S. 202 (1965).
24. See Greenberg, Race Relations and American Law, 329-330 (1959).
25. Federal legislation governing jury selection and challenge procedures in the state courts, cf. 18 U.S.C. § 243 (1958), is a possible remedy not considered in this paper. Although Congress probably enjoys extensive powers under section 5 of the fourteenth amendment, enforcement would be difficult, evasion simple.
26. E.g., United States v. United Klans, Knights of Ku Klux Klan, Inc., 194 F. Supp. 897 (M.D. Ala. 1961); Williams v. Wallace, Civil Action No. 2181-N, M.D. Ala., March 17, 1965 (Selma-Montgomery march).
27. 78 Stat. 268 (1964), 42 U.S.C. § 2000h (Supp. VI, 1965). This would include contempts for violation of section 203.
28. 71 Stat. 638 (1957), 42 U.S.C. § 1995 (1958).
29. E.g., 42 U.S.C. §§ 1983, 1985(3), pp. 9, 23 infra.
30. Most violations of 42 U.S.C. §§ 1983 and 1985(3) are also violations of 18 U.S.C. §§ 242 and 241.
31. 376 U.S. 681, 695 n.12 (1964); see id. at 728 (Goldberg, J., dissenting) (limited to "trivial penalties").
32. See Note, Developments in the Law--Injunctions, 78 Harv. L. Rev. 994, 1090 (1964).
33. Ibid.
34. Arguably the prosecution could constitutionally be transferred to a northern state if a jury from the defendant's district were also transported there. But the unfamiliar and possibly hostile surroundings would probably exacerbate rather than cure the prejudice.
35. For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

36. Canuel v. Oskoian, 23 F.R.D. 307 (D.R.I. 1959) (dictum), aff'd 269 F.2d 311 (1st Cir. 1960).
37. See, e.g., Phillip Carey Mfg. Co. v. Taylor, 286 F.2d 782 (6th Cir.), cert. denied, 366 U.S. 948 (1961). But see Note, Limitations on the Transfer of Actions Under the Judicial Code, 64 Harv. L. Rev. 1347, 1348-49 (1951).
38. See Hoffman v. Blaski, 363 U.S. 335 (1960); The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 260 (1964).
39. See 28 U.S.C. § 1441 (1958).
40. See, e.g., Roberts v. Barbosa, 227 F. Supp. 20 (S.D. Calif. 1964); Note, The Proper Scope of the Civil Rights Act, 66 Harv. L. Rev. 1285, 1296-97 (1953); Note, Liability of Public Officers to Suit Under the Civil Rights Acts, 46 Colum. L. Rev. 614 (1946). The decision in Picking v. Pennsylvania R.R., 151 F.2d 240 (3d Cir. 1945), holding a judge liable, is an aberration, but judges are not immune when performing "ministerial" functions, and can be held liable for excluding jurors because of their race. 18 U.S.C. § 243 (1958); Ex parte Virginia, 100 U.S. 339 (1879).
41. See Note, Section 1983: A Civil Remedy for the Protection of Federal Rights, 39 N.Y.U.L. Rev. 839, 854 (1964).
42. E.g., Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959); Scolnick v. Winston, 219 F. Supp. 836 (S.D.N.Y. 1963) (failure to protect), aff'd, 329 F.2d 716 (2d Cir. 1964); cf. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).
43. United States v. Hunter, 214 F.2d 356 (5th Cir.), cert. denied, 348 U.S. 888 (1954). It would be difficult to make out a criminal case against a state prosecutor for failure to protect. The Government would have to establish a systematic pattern of discriminatory nonprosecution of persons committing crimes against Negroes or civil rights workers.
44. United States v. Wood, 295 F.2d 772 (5th Cir. 1961), cert. denied, 369 U.S. 850 (1962); cf. Dombrowski v. Pfister, 380 U.S. 479 (1965).
45. Act of April 9, 1866, § 2, 14 Stat. 27.

46. See, e.g., Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945).
47. 325 U.S. 91 (1945).
48. Id. at 94.
49. Id. at 105.
50. Id. at 107.
51. See 5 United States Comm'n on Civil Rights, Report 50-51 (1961); Shapiro, Limitations in Prosecuting Civil Rights Violations, 46 Corn. L.Q. 532 (1961).
52. 341 U.S. 70 (1951).
53. United States v. Konovsky, 202 F.2d 721 (7th Cir. 1953); Lynch v. United States, 189 F.2d 476 (5th Cir. 1951); Catlette v. United States, 132 F.2d 902 (4th Cir. 1943). See also Downie v. Powers, 193 F.2d 760 (10th Cir. 1951); Picking v. Pennsylvania R. Co., 151 F.2d 240 (3d Cir. 1945).
54. See note 53 *supra*. It is debatable whether, in the absence of Supreme Court precedent in point, the rule established by these courts can put law enforcement officers in states outside those circuits on notice.
55. United States Comm'n on Civil Rights, Report (Justice) 112 (1961).
56. E.g., H.R. 351, 86th Cong., 1st Sess. (1959).
57. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.
58. 365 U.S. 167 (1961).
59. Id. at 187.
60. Id. at 208.
61. Cf. 18 U.S.C. § 2 (1958); Nye & Nissen v. United States, 336 U.S. 613 (1949); Wellman v. United States, 227 F.2d 757 (6th Cir. 1955).
62. Williams v. Hot Shoppes, Inc., 293 F.2d 835, 847 (D.C. App. 1961) (dissenting opinion).
63. Cf. Note, Communal Liability for Mob Violence, 49 Harv. L. Rev. 1362 (1936).

64. For the relevant legislative history, see *Monroe v. Pape*, 365 U.S. 167, 187-92 (1961).
65. 365 U.S. 167 (1961).
66. The eleventh amendment does not prohibit damage actions against political subdivisions. *Lincoln County v. Luning*, 133 U.S. 530 (1890). It is doubtful that the fourteenth amendment would sustain the imposition of absolute liability on any such subdivision.
67. Act of April 20, 1871, ch. 22, § 6, 17 Stat. 15.
68. Pp. 23-24 infra.
69. See *Robeson v. Fanelli*, 94 F. Supp. 62 (S.D.N.Y. 1950). If, as the language "every person" suggests, section 1986 is applicable to private individuals as well, it poses more difficult constitutional problems with respect to them. It would then seem to make federal agents, pro tanto, of all persons. This may be a proper exercise of power to protect federal relationships and processes, but if the violation of section 1985 rests on the fourteenth amendment, application of section 1986 to private persons failing to prevent such violation is of doubtful validity.
70. 194 F. Supp. 897 (M.D. Ala. 1961).
71. Id. at 903.
72. In *Williams v. Wallace*, Civil No. 2181-N, M.D. Ala. March 17, 1965, Judge Johnson enjoined the Governor and Director of Public Safety of Alabama and the sheriff of Dallas County "from failing to provide police protection" for persons participating in the Selma-Montgomery march. The United States intervened as a plaintiff, thus avoiding potential problems posed by the eleventh amendment. It is not clear whether the eleventh amendment would prevent such an action by a private litigant. The rationale of *Ex parte Young*, 209 U.S. 123 (1908), seems inapposite. However, see *Griffin v. County School Bd.*, 377 U.S. 218 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Louisiana State Bd. of Educ. v. Baker*, 339 F.2d 911, 914 (5th Cir. 1965) (Wisdom, J.):

The time may even have come when it would be well to admit the realities, face up to the fact that in these [school desegregation]

actions against a state agency or public official the party at interest is the State, and hold that the Eleventh Amendment does not contemplate a suit based on state action contrary to the United States Constitution.

73. See Note, The Right to Nondiscriminatory Enforcement of State Penal Laws, 61 Colum. L. Rev. 1103 (1961).
74. Id. at 1111.
75. 379 U.S. 184 (1964).
76. Compare Fla. Stat. Ann. §§ 798.01-03 (1961), with Id. §§ 798.04-05. The only races dealt with are Caucasian and Negro.
77. 106 U.S. 583 (1882).
78. McLaughlin v. Florida, 379 U.S. 184, 189 (1964).
79. Of course, no statute requires or authorizes a state prosecutor to initiate proceedings for crimes committed against whites but not those committed against Negroes. In view of the principle enunciated in Yick Wo v. Hopkins, 118 U.S. 356 (1886), it matters not that the prosecutor, a state official, is discriminating on his own authority.

An alternative ground for nullifying victim-oriented discriminatory prosecutions would rest on the theory that a state's discriminatory failure to protect a class of persons through its criminal processes denies members of the class equal protection of the laws. The defendant accused of committing a crime against a white person could assert this constitutional claim of the Negro community. Cf. Mapp v. Ohio, 367 U.S. 643 (1961); Bender, The Retroactive Effect of Overruling a Decision: Mapp v. Ohio, 110 U. Pa. L. Rev. 650, 660-62 (1962).
80. An injunction could issue despite 28 U.S.C. § 2283 (1958) (prohibiting federal injunctions of state court proceedings) if the United States were plaintiff, see Developments in the Law--Injunctions, 78 Harv. L. Rev. 994, 1052-53 (1965), or if the injunction were sought by the potential defendant before commencement of the state prosecution, see Dombrowski v. Pfister, 33 U.S.L. Week 4321, 4322 n.2 (Sup. Ct. 1965). Habeas corpus is also available.
81. See The Federalist No. 81 (Hamilton).

82. See *Monroe v. Pape*, 365 U.S. 167, 171-80 (1961).
83. Act of April 9, 1886, 14 Stat. 27.
84. Act of May 31, 1870, 16 Stat. 140, § 18.
85. 28 U.S.C. § 1443(1) (1958).
86. See, e.g., *United States v. Rhodes*, 27 Fed. Cas. 785 (No. 16151) (D. Ky. 1866) (Negro victim of burglary not entitled to testify against white defendant in state court).
87. 80 U.S. (13 Wall.) 581 (1871).
88. *Id.* at 591.
89. *Id.* at 599. See also the perceptive opinion of Swayne, J., in *United States v. Rhodes*, 27 Fed. Cas. 785 (No. 16151) (D. Ky. 1866).
90. See Brest, The Federal Government's Power to Protect Negroes and Civil Rights Workers Against Privately Inflicted Harm, 1 Harv. Civ. Rts--Civ. Lib. L. Rev. 2, 4-7 (1965).
91. Ex parte Virginia, 100 U.S. 339 (1879).
92. See H.R. 1507, 75th Cong., 1st Sess. (1957) (30 days).
93. Since the defendant has (by hypothesis) committed no federal crime, there seems no justification for creating a federal criminal law to govern the action. Cf. Cong. Globe, 39th Cong., 1st Sess., Jan. 29, 1866, at 425 (Senator Trumbull). Query, though, whether the case arises under the Constitution or laws of the United States. U.S. Const. art. III, § 2, cl. 1. Compare *United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824), and *Wechsler, Federal Jurisdiction and the Revision of the Judicial Code*, 13 L. & Contemp. Prob. 216, 224-25 (1948), with *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 474-475 (1957) (Frankfurter, J., dissenting), and *Mishkin, The Federal "Question" Jurisdiction of the District Courts*, 53 Colum. L. Rev. 157, 184-96 (1953).
94. *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959).
95. *Malloy v. Hogan*, 378 U.S. 1 (1964).
96. *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), 78 Harv. L. Rev. 227-30.

97. See *Brock v. North Carolina*, 344 U.S. 424 (1953); *Palko v. Connecticut*, 302 U.S. 319 (1937).
98. See Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L.J. 74 (1963); cf. Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746 (1965).
99. Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district and division embracing the place wherein it is pending;
(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof
100. 100 U.S. 303 (1879).
101. But see Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793, 862 n.257 (state jury lists based on unconstitutional voter registration lists).
102. *Kentucky v. Powers*, 201 U.S. 1 (1906); 103 U.S. 370 (1881); *Neal v. Delaware*, 103 U.S. 370 (1881); *Virginia v. Rivers*, 100 U.S. 313 (1880); see Amsterdam, supra note 101 at 842-63.
103. Amsterdam, supra note 101, at 858; see also id. at 911-12.
104. See *Johnson v. Virginia*, 373 U.S. 61 (1963).
105. For an enumeration of some other factors that might justify federal jurisdiction, see Amsterdam, The Defensive Transfer of Civil Rights Litigation From State to Federal Courts (NAACP Legal Defense and Educational Fund 1964).
106. See text preceding note 45, supra.
107. *United States v. Trierweiler*, 52 F. Supp. 4 (E.D. Ill. 1943).
108. Note, Developments in the Law--Conspiracy, 72 Harv. L. Rev. 920, 923-24 (1959).

109. See, e.g., Wilson v. United States, 230 F.2d 521 (4th Cir. 1956), cert. denied, 351 U.S. 931 (1956).
110. See Note, supra note 108, at 924. Under the same reasoning, private persons might also be held liable under 18 U.S.C. § 2 (1958) (aiding and abetting). See Wilson v. United States, supra note 109.
111. United States v. Trierweiler, 52 F. Supp. 4 (E.D. Ill. 1943).
112. Brown v. United States, 204 F.2d 247 (6th Cir. 1953); Culp v. United States, 131 F.2d 93 (8th Cir. 1942).
113. See pp. 8-9 supra.
114. Perkins, Criminal Law 530 (1957).
115. But cf. Direct Sales Co. v. United States, 319 U.S. 703 (1943).
116. Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). Compare Barney v. City of New York, 193 U.S. 430 (1904).
117. See Monroe v. Pape, 365 U.S. 167, 172-80 (1961).
118. See note 122, infra.
119. Crim. No. 5215, S.D. Miss., Feb. 24, 1965; Crim. No. 5216, S.D. Miss., Feb. 25, 1965, 383 U.S. 787 (1966).
120. See Williams v. United States, 341 U.S. 97 (1951); Monroe v. Pape, 365 U.S. 167 (1961) (search and seizure).
121. Lynch v. United States, 189 F.2d 476 (5th Cir. 1951); Crews v. United States, 160 F.2d 746 (5th Cir. 1947); Catlette v. United States, 132 F.2d 902 (1943).
122. 5 United States Comm'n on Civil Rights, Report 79-82 (1961).
123. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).

124. Id. at 281. To the same effect see Screws v. United States, 325 U.S. 91, 109 (1945), quoting United States v. Classic, 313 U.S. 299, 326 (1941): "Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of' state law."
- Screws itself is peculiarly ambiguous on the relation of the officer's motivation to the color of law requirement. In the section discussing the color of law requirement, Mr. Justice Douglas emphasizes that the officer-defendants killed their victim in the course of effecting an arrest. But in the portion of the opinion discussing specific intent and defining their federal offense, he emphasizes that their crime was to try the victim by ordeal.
125. 5 United States Comm'n on Civil Rights, Report 112 (1961).
126. See Note, Common Law Crimes in the United States, 47 Colum. L. Rev. 1332 (1947).
127. Cf. 18 U.S.C. § 13 (1958) (assimilative crimes act). Query whether the liability of conspirators who acted in different states should be governed by their respective laws or by the law of the state in which the substantive crime was committed.
128. If violation of state law is a necessary condition to liability under section 242, should it also be sufficient? In the typical civil rights case the conduct at issue is universally held criminal. But the due process clause may set an independent upper limit on liability, as where the state defendant would be denied a defense of justification because of an unreasonable technicality.
129. 341 U.S. 70 (1951).
130. Williams v. United States, 341 U.S. 97 (1951).
131. Williams v. United States, 179 F.2d 644, 648 (5th Cir. 1950).
132. Mr. Justice Balck implied that he believed section 241 to be applicable. See 341 U.S. at 86.
133. 341 U.S. at 81-82.
134. Compare 18 U.S.C. § 242, p. 7 supra; 42 U.S.C. § 1983, p. 9 supra.

135. See Act of April 9, 1866, § 2, 14 Stat. 27; Act of May 31, 1870, § 17, 16 Stat. 144.
136. 241 U.S. at 78; see Act of May 31, 1870, § 6, 16 Stat. 144. The word "granted" was dropped without apparent reason in the revision of 1874-78, Rev. Stat. § 5508, and remains absent in the present section.
137. 241 U.S. at 77 (emphasis added).
138. Act of April 9, 1866, 14 Stat. 27; Act of May 31, 1870, 16 Stat. 140; Act of April 20, 1871, 17 Stat. 13.
139. See, e.g., Act of April 20, 1871, § 2, 17 Stat. 13, now 42 U.S.C. § 1985.
140. See the remarks of Rep. Shellabarger, infra note 141. Cf. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1873): among the privileges and immunities of national citizenship are "the rights secured by the 13th and 15th articles of Amendment, and by the other [due process and equal protection] clause of the Fourteenth"
141. See Cong. Globe, 41st Cong., 2d Sess., at 3611, 3613 (remarks of Senator Pool); Cong. Globe, 42d Cong., 1st Sess., March 28, 1871, app. at 71 (remarks of Senator Shellabarger); Flack, Adoption of the Fourteenth Amendment (1908). See also United States v. Hall, Fed. Cas. No. 15282 (C.C.E.D. Ala. 1871).
142. See pp. 20-21 supra.
143. 341 U.S. at 88 n.2.
144. With characteristic restraint, the Harvard Law Review remarked of the plurality opinion: "Their interpretation of the section is perhaps unexpected." Note, The Supreme Court, 1950 Term, 65 Harv. L. Rev. 107, 139 (1951).
145. Crim. No. 5215, S.D. Miss., Feb. 24, 1965.
146. 33 U.S.L. Week 3345 (April 27, 1965). See also United States v. Guest, 383 U.S. 787 (1966).
147. 325 U.S. 91 (1945).
148. 341 U.S. at 94.

149. Act of May 31, 1870, § 6, 16 Stat. 141.
150. For the subsequent history of section 6, see Brief for the United States, pp. 32-38, *United States v. Williams*, 341 U.S. 70 (1951); see also 341 U.S. at 83 (Comparative Table of Successive Phraseology).
151. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13.
152. In three respects section 1985(3) is broader than section 241. It protects "persons" rather than "citizens," and is clearly phrased to reach conduct that violates the fourteenth amendment. Most important, being a civil statute, its vagueness does not raise the serious constitutional problems that attend sections 241 and 242. See p. 9 supra.
153. See pp. 25-28 infra.
154. The scope of the equal protection clause and its relation to the due process clause is unclear. A denial of equal protection is likely to violate the due process clause, see *Bolling v. Sharpe*, 347 U.S. 497 (1954), but the converse is not necessarily true. The Court has indicated that for an officer merely to do to one person what he would not have done to another does not violate the equal protection clause; there must be an "intentional or purposeful discrimination." *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). But cf. *Blocker v. Board of Educ.*, 226 F. Supp. 208 (E.D.N.Y. 1964); Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564 (1965). When a person is injured or unprotected because he is a member of an identifiable class such as Negroes or civil rights workers, the clause's application seems clear. See *Lynch v. United States*, 189 F.2d 476, 479 (5th Cir. 1951). But the mere official venting of a wholly personal prejudice has also been held to contravene the equal protection clause. *People v. Walker*, 14 N.Y. 2d 200 N.E.2d 779, 252 N.Y.S. 2d 96 (1964), 78 Harv. L. Rev. 884 (alleged discriminatory prosecution because defendant refused to pay bribe).
155. See text accompanying note 57 supra.
156. The section imposes liability on the conspirator who "subjects or causes to be subject any . . . person within the jurisdiction . . . to the deprivation of any rights." See *Scolnick v. Winston*, 219 F. Supp. 836, 842 (S.D.N.Y. 1963), aff'd in part on

other grounds, 329 F.2d 716 (2d Cir. 1964); Watkins v. Oaklawn Jockey Club, 86 F. Supp. 1006 (D. Ark. 1949), aff'd, 183 F.2d 440 (8th Cir. 1950).

157. Hoffman v. Halden, 268 F.2d 280, 292 (9th Cir. 1959); Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), cert. denied, 375 U.S. 975 (1964). Contra: Jennings v. Nester, 217 F.2d 153 (7th Cir. 1955), cert. denied, 349 U.S. 958 (1955).
158. Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144.
159. It may be objected that creation of a new tort-- i.e., civil conspiracy--is beyond the proper powers of the federal judiciary. Cf. Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947) (on remand). But cf. Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963).
160. Brest, supra note 90, at 16-25.
161. Brest, supra note 90, at 25-32.
162. "Interfering," as used in this section and the next, comprises (a) preventing the victim from enjoying the fruits of the relationship, and (b) punishing him for having exercised or attempting to exercise rights arising out of the relationship.
163. 17 Stat. 13 (1871).
164. Supp. V (1964).
165. 71 Stat. 637 (1957).
166. Cf. United States v. Wood, 295 F.2d 772 (5th Cir. 1961) (enjoining state prosecution of one Negro because it would intimidate other Negroes from voting).
167. Cf. Voting Rights Bill of 1965, H.R. 6500, § 11 [Committee Print], March 17, 1965.
168. See Brest, supra note 90, at 16-20.
169. For the surrounding text, see text accompanying note 151 supra.
170. 341 U.S. 651 (1951).
171. 341 U.S. at 661.
172. Id. at 661-62.

173. Id. at 662.
174. See text accompanying note 187 infra.
175. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13.
176. See Brest, supra note 90, at 24.
177. See text accompanying note 151 supra.
178. Cong. Globe, 42d Cong., 1st Sess., app. at 69 (1871).
179. Ibid.
180. Id., app. at 94-95.
181. Id. at 825.
182. Ibid. But it is possible that he was referring to another clause of the section. See text accompanying note 187 infra.
183. Id. at 486.
184. See id. at 478-79.
185. United States v. Williams, 341 U.S. 70, 74 (1951).
186. Or his estate. See Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961), cert. denied, 368 U.S. 921 (1961).
187. 17 Stat. 13 (1871).
188. See Cong. Globe, 42d Cong., 1st Sess. (1871).
189. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13.
190. 238 F.2d 91 (8th Cir. 1956). The Civil Rights Act of 1960 supplements section 1985(3) by making it a misdemeanor to interfere "with the due exercise of rights or the performance of duties" under any federal court order. 18 U.S.C. § 1509 (Supp. V, 1964).
191. See Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963); cf. J. I. Case Co. v. Borak, 377 U.S. 426 (1964).
192. E.g., Orloff v. Los Angeles Turf Club, Inc., 30 Cal. 2d 110, 180 P.2d 311 (1947).

193. See text accompanying note 151 supra.
194. Note, Implementation of Desegregation by the Lower Courts, 71 Harv. L. Rev. 486, 501-02 (1957).
195. H.R. 351, tit. I, 86th Cong., 1st Sess. (1957).
196. Brest, supra note 90, at 12-13.
197. Cf. Screws v. United States, 325 U.S. 91 (1945), and the problems it has presented in subsequent litigation. 5 United States Comm'n on Civil Rights, Report 50-51 (1961); Shapiro, Limitations in Prosecuting Civil Rights Violations, 46 Corn. L.Q. 532 (1961).
198. Brest, supra note 90, at 32-34.
199. United States v. U.S. Klans, Knights of Ku Klux Klans, Inc., 194 F. Supp. 987 (M.D. Ala. 1961). The limited potential of this use of the commerce clause does not merit extensive discussion. But query to what extent the injunction in this case is open to the criticisms leveled against In re Debs, 158 U.S. 564 (1895).
200. See Brest, supra note 90, at 34.
201. Cf. Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). If the legislative history is adequate, formal findings are unnecessary. Katzenbach v. McClung, supra, at 299.
202. See pp. 14-16 supra.
203. 5 United States Comm'n on Civil Rights, Report 64-66 (1961); Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong. 1st Sess., ser. 4, pt. II, at 1230-31 (1963) (statement of Burke Marshall, Ass't Attorney General).
204. See Reviser's Note to 18 U.S.C. § 241 (1958).
205. Act of May 31, 1870, 16 Stat. 140; Rev. Stat. § 5509 (1875).
206. See Act of March 4, 1909, 35 Stat. 1088.
207. 14 Stat. 27 (1870)(emphasis added).

208. Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27.
For the removal provisions, see note 79 supra; see
also text following note 85 supra.
209. See H.R. 351, § 202, 86th Cong., 1st Sess. (1957).