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COMMENTS

RACIALLY-MOTIVATED VIOLENCE AND INTIMIDATION: INADEQUATE STATE ENFORCEMENT AND FEDERAL CIVIL RIGHTS REMEDIES

I. INTRODUCTION

A rising wave of extremist group violence is sweeping the nation. The number of violent attacks and threats directed at Blacks, Jews, and other minorities has increased markedly during the last four years.¹ Since mid-1979, hundreds of acts of racial and religious violence have occurred in nearly all parts of the country. In November 1979, for example, a group of thirty Ku Klux Klansmen and American Nazis fired on demonstrators at an anti-Klan rally in Greensboro, North Carolina, killing five communist demonstrators and injuring several others.² After a cross-burning ceremony in Chattanooga, Tennessee, in April of 1980, a group of Klansmen seriously injured five elderly black women in an unprovoked shotgun attack.³ A former member of the Ku Klux Klan and the American Nazi Party shot Vernon E. Jordan, then President of the National Urban League, in Fort Wayne, Indiana, in May of 1980.⁴ The same man later shot and killed two young black men while they were jogging in a Salt Lake City park with two white women.⁵

¹ See generally *Increasing Violence Against Minorities: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 124-25 (1980) [hereinafter cited as *Increasing Violence*]; *Polls reflect increase in racist attitudes*, POVERTY L. REP., Mar./Apr. 1982, at 15; J. Turner, B. Stanton, M. Vahala & R. Williams, *The Ku Klux Klan: A History of Racism and Violence* 48-59 (1981) (available from the Southern Poverty Law Center, Montgomery, Alabama) [hereinafter cited as *A History of Racism and Violence*].

² Charns, *Grand jury investigates Klan killings*, IN THESE TIMES, Sept. 22-28, 1982, at 9, col. 1.

³ *Increasing Violence*, *supra* note 1, at 26 (statement of Arthur Kinoy).

⁴ Telephone interview with Daniel Rinzel, Director of the Criminal Section, Civil Rights Division of the United States Department of Justice, Washington, D.C. (Jan. 14, 1983) [hereinafter cited as *Telephone interview*]; see *infra* note 163.

⁵ U.S. COMMISSION ON CIVIL RIGHTS, PUB. NO. 77, INTIMIDATION AND VIOLENCE: RACIAL AND RELIGIOUS BIGOTRY IN AMERICA 2 (1983) [hereinafter cited as *COMMISSION STATEMENT*].

Such occurrences are not isolated incidents, but reflect a paramilitary movement that is growing among these violent extremist groups. In special camps near Birmingham, Alabama, Klan members undergo paramilitary training, including instruction in automatic weapons firing, guerrilla war tactics, and survival techniques.⁶ Organizing themselves into private military forces, the trainees and their leaders talk of killing blacks in a coming "race war,"⁷ which they believe is inevitable.⁸

Growing racial tensions in many areas have encouraged racist organizations to increase their violent activities and recruiting efforts.⁹ There are presently 9,500 to 11,000 active members of the Ku Klux Klan, up from 6,500 in 1975.¹⁰ The number of nonmember sympathizers who donate money to the Klan, attend rallies, or read Klan literature has grown to 100,000¹¹—twice as many as three years ago.¹² A significant degree of tacit public acceptance of racist and religious bigotry continues to exist and further emboldens violent extremist groups.¹³

Racial and religious violence¹⁴ persists in part because existing state legislation and state court systems fail to adequately deter and punish

⁶ *The KKK Goes Military*, NEWSWEEK, Oct. 6, 1980, at 52. Other states where similar Klan and Nazi paramilitary activities have been reported include Utah, Connecticut, Georgia, North Carolina, Texas, Mississippi, Florida, Pennsylvania, Illinois, Tennessee, and California. *Id.*; A History of Racism and Violence, *supra* note 1, at 54.

⁷ A History of Racism and Violence, *supra* note 1, at 54.

⁸ *Id.* Roger Handley, second-highest officer of the Louisiana-based Invisible Empire, Knights of the Ku Klux Klan, has said, "[w]e are going into revolution in this country . . . [and] the Communists, through the Negroes, are going to bring it on. It will be a war between the races." *Id.*

⁹ *See generally* A History of Racism and Violence, *supra* note 1, at 48-49. Many factors have been cited as contributing to racial tensions, including recession, high unemployment, increased foreign competition, an influx of legal and illegal aliens, and cutbacks in social programs. Historically, such economic and social difficulties have often led to fear, isolationism, and the search for scapegoats. At such times, racist extremist groups exploit legitimate social and political issues, exaggerate the size and scope of existing problems, and exacerbate tense local situations. Recruiting efforts are increased. *See infra* note 106; COMMISSION STATEMENT, *supra* note 5, at 9-15.

¹⁰ Nesselson, *Disrobing the Klan: Under the Hoods—Hoods!*, 8 BARRISTER, Spring 1981, at 10, 10.

¹¹ King, *The Violent Rebirth of the Klan*, N.Y. Times, Dec. 7, 1980, § 6 (Magazine), at 150, 152; *Increasing Violence*, *supra* note 1, at 79 (statement of Irwin Suall).

¹² Nesselson, *supra* note 10, at 10.

¹³ *See infra* text accompanying notes 103-09. Violent extremist group members tend to interpret the current shift to a conservative political philosophy and federal retrenchment in social spending and civil rights initiatives as giving them "license to express and act out their racial and religious hostility." COMMISSION STATEMENT, *supra* note 5, at 13. It has been suggested that "[w]hat the Klans and the neo-Nazis are doing now can be regarded as a kind of testing, both of public opinion and of official response. Official responses which are tolerant, apathetic, or simply ineffective are likely to encourage more extremist action." *Id.* at 14 (quoting statement of Ted Gurr, *Increasing Violence*, *supra* note 1, at 8).

¹⁴ "Racial and religious violence" shall refer herein to violence directed against racial and religious minorities.

the perpetrators of these crimes.¹⁵ Moreover, some state laws may prove to be unenforceable because they interfere with the constitutional rights of free speech and association guaranteed members of extremist groups.¹⁶ Well-established federal criminal and civil remedies for racial and religious violence and intimidation exist.¹⁷ Neither the United States Department of Justice nor the victims of racist violence, however, have yet taken full advantage of the broadly written Reconstruction Era civil rights statutes,¹⁸ which were enacted to deter and punish racial terrorism whenever state criminal prosecutions fail to do so.¹⁹

This Comment evaluates the inadequacies of state legislation and criminal enforcement procedures intended to deter and punish racially motivated violent crime, and advocates increased reliance on federal criminal and civil remedies. The most effective approach to deter racial violence and punish its perpetrators is a two-tiered system of enforcement that combines federal prosecution and civil remedies with improvements in state legislation and enforcement systems.

II. THE FAILURE OF THE STATES TO ADEQUATELY DETER RACIAL AND RELIGIOUS VIOLENCE

A. CONSTITUTIONAL PROBLEMS WITH STATE LEGISLATION

Many states have long had laws designed to deter or prevent violent extremist groups from harassing and intimidating others. Such laws include anti-cross burning laws,²⁰ anti-mask laws,²¹ and laws restricting or prohibiting the formation of private paramilitary organiza-

¹⁵ See *infra* text accompanying notes 82-110.

¹⁶ See *infra* text accompanying notes 20-81.

¹⁷ See *infra* text accompanying notes 111-233.

¹⁸ The major civil rights statutes of the Reconstruction Era included the Civil Rights Act of 1866, 1 ch. 31, 14 Stat. 27 (1866); the Enforcement Act of 1870, 2 ch. 114, 16 Stat. 140 (1870); and the Civil Rights Act of 1871, 1 ch. 22, 17 Stat. 13 (1871) (popularly known as the "Ku Klux Klan Act"). This Comment will focus primarily on the remedies available under 18 U.S.C. § 241 (1982), a modern criminal statute derived from § 6 of the Enforcement Act of 1870, and 42 U.S.C. § 1985(c) (1976), a civil statute derived from § 2 of the Civil Rights Act of 1871.

¹⁹ See generally Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

²⁰ See, e.g., FLA. STAT. ANN. §§ 876.17-18 (West 1976); MD. ANN. CODE art. 27, § 10A (1982); N.J. STAT. ANN. §§ 2C:33-10, -11 (West 1982); N.C. GEN. STAT. § 14-12.12 (1981); S.C. CODE ANN. § 16-7-120 (Law. Co-op. 1976); VA. CODE § 18.2-423 (1982).

²¹ See, e.g., ALA. CODE § 13A-11-9(4) (1982); GA. CODE ANN. § 26-2913 (1983); LA. REV. STAT. ANN. § 14:313 (West 1974); MICH. STAT. ANN. § 28.628 (Callaghan 1982); MINN. STAT. ANN. § 609.735 (West 1964); N.M. STAT. ANN. § 30-22-3 (1978); N.C. GEN. STAT. § 14-12.14 (1981); OKLA. STAT. ANN. tit. 21, § 1301 (West 1983); S.C. CODE ANN. § 16-7-110 (Law. Co-op. 1976); TENN. CODE ANN. §§ 39-2-703, -704 (1982); VA. CODE § 18.2-422 (1982).

tions.²² The recent rise in extremist group violence has led some legislators to call for stricter enforcement of these existing laws.²³ It has also spurred efforts to enact new, and sometimes constitutionally suspect, statutes.

In the past three years, thirteen state legislatures have enacted laws in response to growing racial and religious terrorism. Most of these statutes prohibit acts of harassment, intimidation, and defacement of property.²⁴ Some forbid mask-wearing²⁵ or the carrying of weapons in certain circumstances.²⁶ Two prohibit paramilitary training,²⁷ and one new law requires that separate criminal statistics be kept by state police for "incidents apparently directed against racial, religious, or ethnic groups."²⁸ California has adopted a proposal that allows courts to enjoin advocacy of the commission of any act of violence at group meetings under certain circumstances.²⁹ Texas has considered but not

²² See, e.g., ALA. CODE § 31-2-125 (1983); ARIZ. REV. STAT. ANN. § 26-123 (Supp. 1983); CAL. PENAL CODE § 11460 (West 1982); CONN. GEN. STAT. ANN. §§ 27-101, -102 (West 1975); FLA. STAT. ANN. § 870.06 (West 1976); IDAHO CODE § 46-802 (1977); ILL. ANN. STAT. ch. 129, § 220.94 (Smith-Hurd Supp. 1983); IOWA CODE ANN. § 29A.31 (West 1978); KAN. STAT. ANN. § 48-203 (1976); KY. REV. STAT. ANN. § 38.440 (Baldwin 1980); LA. REV. STAT. ANN. § 29.31 (West 1975); ME. REV. STAT. ANN. tit. 37-A, § 1107 (1978); MD. ANN. CODE art. 65, § 35 (1983); MASS. GEN. LAWS ANN. ch. 33, §§ 129-31 (West 1983); MICH. STAT. ANN. § 28.634 (Callaghan 1982); MISS. CODE ANN. § 33-1-31 (1972); NEB. REV. STAT. §§ 55-176, -177 (1978); NEV. REV. STAT. § 203.080 (1979); N.D. CENT. CODE § 37-01-21 (1980); WASH. REV. CODE ANN. § 38.40.120 (1964); W. VA. CODE § 15-IF-7 (1979); WYO. STAT. § 19-1-106 (1977). A compilation of state criminal anti-Klan statutes is available from the Klanwatch Project of the Southern Poverty Law Center, Montgomery, Alabama.

²³ *Anti-Klan Legislation Introduced in Texas, Alabama Legislatures*, KLANWATCH INTELLIGENCE REP., Mar. 1981, at 8.

²⁴ CAL. PENAL CODE §§ 11410, 11411 (West 1982); CONN. GEN. STAT. § 46a-58 (1980); MASS. GEN. LAWS ANN. ch. 265, § 37 (West 1982); N.J. REV. STAT. §§ 2C:33-10, -11 (1981); N.Y. CIV. RIGHTS LAW § 40-c (McKinney Supp. 1983); OR. REV. STAT. §§ 166.155, .165 (1981); R.I. GEN. LAWS §§ 11-53-1, -2 (Supp. 1983); TENN. CODE ANN. § 39-2-710 (1982); WASH. REV. CODE § 9A.36.080 (1983); see also N.Y. RELIG. CORP. LAW § 28 (McKinney Supp. 1983) (limited liability of parents for children's destruction or defacement of religious property); OR. REV. STAT. §§ 30.190, .200 (1981) (providing civil liability for violation of OR. REV. STAT. §§ 166.155, .165).

²⁵ CONN. GEN. STAT. ANN. § 53-372 (West Supp. 1983); FLA. STAT. ANN. § 876.155 (West Supp. 1983).

²⁶ N.C. GEN. STAT. § 14-277.2 (Supp. 1983); 18 PA. CONS. STAT. ANN. § 5515 (Purdon 1983).

²⁷ CONN. GEN. STAT. ANN. § 53-206b (West Supp. 1983); 18 PA. CONS. STAT. ANN. § 5515 (Purdon 1983).

²⁸ MD. ANN. CODE art. 88B, §§ 9, 10 (Supp. 1983).

²⁹ CAL. CIV. PROC. CODE § 527.7 (West Supp. 1984) provides in part:

(a) It shall be unlawful for any group, association, organization, society, or other assemblage of two or more persons to meet and to advocate, and to take substantial action in furtherance of, the commission of an unlawful act of violence or force directed to and likely to produce the imminent and unlawful infliction of serious bodily injury or death of another person within this state.

(b) Whenever it reasonably appears that any group, association, society, or other assemblage of two or more persons has met and taken substantial action in furtherance of

adopted a proposal to prohibit members of secret societies from bringing firearms to their meetings.³⁰

Many state laws thus attempt to restrict both the violent and non-violent activities of extremist groups, rather than focusing directly on their violent activities.³¹ Anti-mask statutes and laws restricting meeting activities raise serious first amendment questions. The constitutional rights of Klan members and Nazis to freedom of expression and association may well limit the effectiveness of legislative efforts to curtail their activities.

1. *Speech Rights and Violent Extremist Groups*

The first amendment guarantees of free speech and free association³² apply to all citizens regardless of the views they espouse. In the landmark first amendment case of *Brandenburg v. Ohio*,³³ the United States Supreme Court overturned the conviction of a Klan leader for violation of an Ohio criminal syndicalism statute. Brandenburg had been convicted for suggesting in a speech at a Klan rally that it might be necessary to take some "revengeance" if the federal government continued "to suppress the white, Caucasian race"³⁴ The Court held that:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.³⁵

Brandenburg created a broad protection for the speech activities of violent extremist groups. Neither the states nor the federal government can punish such groups for merely advocating violence as a means of achieving their ends. Only when speech amounts to the planning or

the commission of an act of violence made unlawful by subdivision (a) and will engage in those acts in the future, any aggrieved individual may bring a civil action in the superior court to enjoin the advocacy of the commission of any act of violence made unlawful by subdivision (a) at any future meeting or meetings. Upon a proper showing by clear and convincing evidence, a permanent or preliminary injunction, restraining order, or writ of mandate shall be granted.

See *Update on Recent Legislative Efforts to Curtail Klan Activities*, KLANWATCH INTELLIGENCE REP., June 1981, at 4.

³⁰ *Anti-Klan Legislation*, *supra* note 23, at 8.

³¹ Presumably, states already have criminal statutes proscribing violent crimes such as murder, rape, assault, battery, and robbery. State legislatures have not focused on improving the enforcement of these statutes in cases of racially motivated violence. See *infra* notes 82-110 and accompanying text.

³² U.S. CONST. amend. I provides in part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble"

³³ 395 U.S. 444 (1969).

³⁴ *Id.* at 446.

³⁵ *Id.* at 447 (footnote omitted).

encouragement of imminent criminal conduct, where such conduct is likely to occur, can the government proscribe the speech itself.³⁶ *Brandenburg's* distinction between mere advocacy and the planning of imminent violence makes it difficult to draft a statute that will meet its standard, and even more difficult to enforce such a statute in a manner that will prevent violence.

The first amendment may also protect the wearing of masks, military-style uniforms, or swastikas as symbolic expression. Underlying state anti-mask statutes is the assumption that people are more likely to engage in violent or unlawful activities if their identities are unknown, as well as the knowledge that identification of those who engage in such activities assists police efforts to make arrests.³⁷ Anti-mask statutes, however, face constitutional problems.

State courts have struck down statutes prohibiting the public wearing of masks that conceal the identity of the wearer. In *Ghafari v. Municipal Court of San Francisco*,³⁸ the California Court of Appeal invalidated that state's anti-mask statute³⁹ on overbreadth,⁴⁰ vagueness⁴¹ and equal

³⁶ The Court in *Brandenburg* also stated that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 298 (1961)). This reference seems to indicate that a statute such as the California law forbidding meetings for the purpose of planning violent attacks on others might be constitutional if it is applied only to meetings of groups planning imminent violence. See *supra* text accompanying note 29; see also *Hess v. Indiana*, 414 U.S. 105 (1973) (to be proscribed, words must be intended to produce, and likely to produce, imminent disorder).

³⁷ See *Aryan v. Mackey*, 462 F. Supp. 90, 91 (N.D. Tex. 1978); Johnson, *Can the State Unmask the Klan?*, 45 KY. BENCH & B., Apr. 1981, at 8, 9.

³⁸ 87 Cal. App. 3d 255, 150 Cal. Rptr. 813 (1978).

³⁹ Section 650 of the Penal Code provided:

It is a misdemeanor for any person, either alone or in company with others, to appear on any street or highway, or in other public places or any place open to view by the general public, with his face partially or completely concealed by means of a mask or other regalia or paraphernalia, with intent thereby to conceal his identity. This section does not prohibit the wearing of such means of concealment in good faith for the purpose of amusement, entertainment or in compliance with any public health order.

CAL. PENAL CODE § 650a (West 1976).

⁴⁰ 87 Cal. App. 3d at 262, 150 Cal. Rptr. at 816. The statute was held overbroad because its complete prohibition infringed first amendment activities (here, a demonstration by masked Iranian students protesting the rule of the Shah of Iran). As in the *Aryan* case, *infra* note 49 and accompanying text, the students feared reprisals against themselves and their families if their identities were known. *Id.* at 259, 150 Cal. Rptr. at 814. The *Ghafari* court also expressed the view that the statute's prohibition went beyond any legitimate law enforcement concern because another state statute, CAL. PENAL CODE § 185 (West 1976), existed that prohibited the wearing of a mask for the purpose of avoiding identification in the commission of an offense. *Id.* at 261-62, 150 Cal. Rptr. at 816.

⁴¹ The statute was held unconstitutionally vague because the exception for amusement or entertainment purposes forced speakers, the police, and courts to make impossible distinctions along a continuum of forms of expression, thereby causing a chilling effect on first amendment rights. *Id.* at 263-64, 150 Cal. Rptr. at 817-18.

protection grounds.⁴² In *Robinson v. State*,⁴³ the Florida Supreme Court invalidated Florida's anti-mask statute⁴⁴ because it was overbroad.⁴⁵ *Ghafari* and *Robinson* make it clear that blanket prohibitions on mask-wearing are not acceptable under the first amendment.⁴⁶ The appellants in both cases also argued that their mask-wearing was a form of symbolic speech fully protected by the first amendment,⁴⁷ but neither the *Ghafari* nor the *Robinson* court reached that issue.⁴⁸

The only court to consider whether the first amendment protects the wearing of masks where it is a form of symbolic speech upheld the right to wear masks. In *Aryan v. Mackey*,⁴⁹ Iranian students successfully challenged a Texas Technical University decision forbidding them to wear masks during their demonstration against the Shah of Iran. The district court noted that the wearing of masks by Iranian demonstrators had become "a symbol of opposition to a regime which is of such a character that its detractors believe they must disguise their identity to protect themselves."⁵⁰ The court relied heavily on the University's failure to support its assertions that the anonymity of the demonstrators would foster disruptive or violent conduct.⁵¹

⁴² The statute was held to violate the equal protection clause of the fourteenth amendment because it abridged fundamental first amendment rights and did not serve a compelling state interest. Moreover, the statute created impermissible content regulation because of its exception for amusing or entertaining speech. *Id.* at 264-65, 150 Cal. Rptr. at 818; *see also* Note, *Constitutional Law—Statute Prohibiting the Wearing of Masks in Public is Unconstitutional as Overbroad and Vague and as Denying Equal Protection of the Laws*, 19 SANTA CLARA L. REV. 1137 (1979).

⁴³ 393 So. 2d 1076 (Fla. 1980).

⁴⁴ FLA. STAT. ANN. § 876.13 (West 1976) provided:

No person or persons shall in this state, while wearing any mask, hood, or device whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer, enter upon, or be, or appear upon or within the public property of any municipality or county of the state.

⁴⁵ 393 So. 2d at 1077. The statute was fatally overbroad because it was "susceptible of application to entirely innocent activities." *Id.* A few months later, the Florida legislature enacted a provision limiting the application of the statute to situations in which the mask is worn with the intent to intimidate or harass another, or while engaged in criminal conduct, or in other specified circumstances. FLA. STAT. ANN. § 876.155 (West Supp. 1982).

⁴⁶ *See supra* notes 38-45.

⁴⁷ *Ghafari*, 87 Cal. App. 3d at 266 n.5, 150 Cal. Rptr. at 819 n.5; *Robinson*, 393 So. 2d at 1077; *see also* *Anti-Mask Law Ruled Out in Florida*, KLANWATCH INTELLIGENCE REP., Mar. 1981, at 4.

⁴⁸ *See* sources cited *supra* note 47.

⁴⁹ 462 F. Supp. 90 (N.D. Tex. 1978).

⁵⁰ *Id.* at 92.

⁵¹ *Id.* at 91, 93-4. Under *United States v. O'Brien*, 391 U.S. 367 (1968), and *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), both involving "symbolic speech" claims, a governmental regulation imposing incidental restrictions on free expression is valid if: (1) "it furthers an important or substantial governmental interest," *Aryan*, 462 F. Supp. at 93, (2) "the governmental interest is unrelated to the suppression of free expression," *id.*, (3) "there is a sufficient nexus between the restriction and the interest," *id.*, and (4) the incidental

The wearing of masks undoubtedly preserves the anonymity of Klan members.⁵² Mask-wearing, however, may also have a communicative aspect in certain circumstances that raises the wearing of the traditional white hood-masks⁵³ to the level of protected "symbolic speech."⁵⁴ Although the first amendment does not grant an absolute right to anonymity,⁵⁵ freedom of speech may be impaired "when there is such a nexus between anonymity and speech that a bar on the first is

restriction of expression "is no greater than is essential to the furtherance of that interest," *id.* See *O'Brien*, 391 U.S. at 376-77; *Tinker*, 393 U.S. at 508-09. The *Aryan* court held that the third requirement was not met, 462 F. Supp. at 93, as there was "no concrete proof that these students in this demonstration will erupt into the violence that the no mask regulation is supposed to prevent." *Id.* at 94. Because the connection between the mask prohibition and the University's interest in preventing violence was "merely speculative," the regulation unconstitutionally infringed free expression. *Id.*

⁵² The main purpose of wearing the masks may vary in different contexts. In a Klan-only gathering, the primary purpose may be symbolic or ceremonial, as other members presumably know the identity of the wearer. In a march or public gathering, one purpose may be to conceal the identity of the wearer, so as to avoid reprisal for espousing racist views or to facilitate criminal conduct, or both. Another purpose may be to convey a symbolic message to onlookers. See *infra* note 54 and accompanying text.

⁵³ The traditional Klan regalia of white robe and pointed hood-mask dates back to the Reconstruction Era, when the Klan was founded, although originally the costumes were much more elaborate. See generally *A History of Racism and Violence*, *supra* note 1, at 6-19; D. CHALMERS, *HOODED AMERICANISM* 11-16 (1965). Klan members have continued to wear the masks during public marches and at Klan ceremonies.

⁵⁴ The Supreme Court has yet to articulate a complete test for determining whether particular conduct constitutes "symbolic speech" within the protection of the first amendment. It is clear that conduct may not be labeled "speech" simply because "the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376. The Court has looked to "the nature of . . . [the] activity, combined with the factual context and environment in which it was undertaken," to determine whether protected expression was involved. *Spence v. Washington*, 418 U.S. 405, 409-10 (1974). In *Spence*, the Court held that the taping of a peace symbol to an American flag in protest of the Cambodian invasion and Kent State killings was a form of protected "symbolic speech," and that the state had not demonstrated a compelling interest in prohibiting such a display. *Id.* at 415. The Court noted that the defendant had "[a]n intent to convey a particularized message," and that "the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11. The particular messages conveyed by Klan members wearing robes and hood-masks are undoubtedly that they consider themselves to be an "invisible empire" (i.e., that they are representatives of an invisible government), and that they continue to espouse the views and traditional practices of their racist predecessors dating back over a century. See, e.g., J. MECKLING, *THE KU KLUX KLAN: A STUDY OF THE AMERICAN MIND* 68, 77, 97, 106-7 (1963). The intense opposition of many to organized marches by Klan members suggests that their message is understood. See, e.g., *Texas Klan Marches to Provoke Outrage Among Citizens*, *KLANWATCH INTELLIGENCE REP.*, June/July 1983, at 1-2. The context in which the mask is worn, however, is crucial to this analysis. The wearing of Klan masks in a scheduled march, with an adequate police presence to prevent violence, may well be a form of protected "symbolic speech." See generally *Johnson*, *supra* note 37, at 8. But the wearing of masks in public by Klan members when not engaged in such established first amendment activities is unlikely to constitute a form of "symbolic speech," because it becomes less likely that the purpose of wearing the mask is to convey a message. See *infra* note 58.

⁵⁵ See *Aryan*, 462 F. Supp. at 92.

tantamount to a prohibition on the second.”⁵⁶ Because Klan members may face private reprisals upon revelation of their membership,⁵⁷ free exercise of the right to publicly demonstrate may be possible only when members are allowed to preserve their anonymity. Thus, in the context of a scheduled public demonstration,⁵⁸ a state can constitutionally prohibit Klan members from wearing their masks only when it can demonstrate that violence is reasonably likely to occur.⁵⁹

The first amendment also protects the right of violent extremist groups to publicly demonstrate, and to wear military uniforms and the swastika, even in communities strongly opposed to the groups' presence. In a series of state and federal decisions⁶⁰ arising out of the planned march of American Nazis through Skokie, Illinois, the courts held that residents could not prevent the Nazi march nor preclude the wearing of the party uniform, the display of the swastika, or the distribution of anti-Semitic literature.⁶¹ The Skokie litigation establishes that permissible limitations on the speech and demonstrations of violent extremist

⁵⁶ *Id.* The Supreme Court has long recognized the close connection between anonymity in some contexts and the preservation of first amendment freedoms. In *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court invalidated a state statute requiring the NAACP to turn over its membership lists, where it was clear that members would be subjected to reprisals because of their membership in the organization. In *Talley v. California*, 362 U.S. 60 (1960), the Court invalidated a city ordinance requiring those printing or distributing handbills to print their names and addresses on the handbills. In both cases, the Court expressed concern that those espousing dissident beliefs would be deterred from engaging in speech and association activities if their identities were known. *NAACP*, 357 U.S. at 462; *Talley*, 362 U.S. at 64; see also *Bates v. Little Rock*, 361 U.S. 516, 523-24 (1960). As the Court explained in *Talley*, “[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.” *Talley*, 362 U.S. at 64.

⁵⁷ See *infra* note 80.

⁵⁸ Only in the context of a public demonstration do the symbolic speech and anonymous association purposes served by the masks sufficiently outweigh the masks' potential for encouraging or facilitating criminal conduct. Outside the context of public demonstrations, which are overseen by adequate police force to prevent violence, the wearing of masks by Klan members can be properly regulated.

⁵⁹ Compare *Ghafari*, *supra* notes 38-42, 46-48 and accompanying text, with *Aryan*, *supra* notes 49-51 and accompanying text.

⁶⁰ A discussion of the events and cases that eventually decided the controversy can be found in G. GUNTHER, *CONSTITUTIONAL LAW*, 1275-78 (1980).

⁶¹ Skokie, a community with a large Jewish population including many Holocaust survivors, obtained an Illinois trial court injunction prohibiting the National Socialist Party from parading in the party uniform, displaying the swastika, and distributing anti-Semitic and racist literature. Both the Illinois appellate court and Supreme Court refused to stay the injunction pending appeal, but the United States Supreme Court reversed these decisions. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). The Illinois appellate court then modified the injunction, retaining only the requirement that the Nazis not display the swastika. The court held that such a display was analogous to “fighting words” in this context, and therefore not protected symbolic speech. *Village of Skokie v. National Socialist Party of America*, 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977). The Illinois Supreme Court then held the entire injunction unconstitutional as an unlawful restraint of

groups are minimal.⁶²

Thus, the *Brandenburg* standard⁶³ of incitement to imminent lawless action, and the possible validity of narrowly drawn anti-mask statutes⁶⁴ seem to mark the limits of constitutional legislation against the speech-related activities of violent extremist groups.

2. *Associational Rights and Violent Extremist Groups*

Legislative efforts to curb the violent activities of extremist group members may also infringe the members' right of association. In *NAACP v. Alabama*,⁶⁵ the first case to recognize such a right explicitly, the United States Supreme Court invalidated an Alabama statute requiring membership lists of the NAACP's Alabama chapters as an unconstitutional restraint on the members' right to associate freely for lawful purposes. The Court weighed the state's interest in obtaining the lists⁶⁶ against the "uncontroverted showing" of the NAACP that past disclosures of members' names had subjected them to hostile economic and social pressures.⁶⁷ Finding that disclosure of the names had little bearing on the state's legitimate interests, the Court ruled that the de-

protected expression. *Village of Skokie v. National Socialist Party of America*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978) (holding that the swastika was protected symbolic speech).

Skokie then passed three new parade permit ordinances, in a second attempt to prevent the demonstration. The ordinances required (1) that public liability (\$300,000) and property damage (\$50,000) insurance be obtained before issuance of parade permits, *SKOKIE, ILL., VILLAGE CODE* ch. 27, §§ 50-67 (1977); (2) that no material inciting racial or religious hatred could be distributed with intent to incite such hatred, *SKOKIE, ILL., VILLAGE CODE* ch. 28, § 43 (1977); and (3) that no military-style uniforms could be worn by demonstrating political parties *SKOKIE, ILL., VILLAGE CODE* ch. 28, § 42 (1977). A federal district court and the United States Court of Appeals for the Seventh Circuit struck down all three ordinances on first amendment grounds. *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978). Skokie's plea to the United States Supreme Court for a stay of the Seventh Circuit's ruling pending appeal was denied. *Smith v. Collin*, 436 U.S. 953 (1978). The denial of the stay came thirteen days before the scheduled march. Having won the fight, the Nazis cancelled the Skokie march three days before it was to take place, but used the precedents created to gain long-denied access to Chicago city parks. *G. GUNTHER*, *supra* note 60, at 1277. Skokie's petition for review of the denial of the stay was also refused. *Smith v. Collin*, 439 U.S. 916 (1978).

⁶² See *Smith v. Collin*, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting). Symbolic speech issues raised in the Skokie cases seem to firmly establish first amendment protection for the wearing of military uniforms and the swastika in public demonstrations. For discussion of a later argument that paramilitary training should be considered protected speech and association, see *infra* notes 221-23 and accompanying text.

⁶³ See *supra* text accompanying notes 33-36.

⁶⁴ See *supra* text accompanying notes 38-59.

⁶⁵ 357 U.S. 449, 462-63 (1958).

⁶⁶ The "exclusive purpose" of the state in requesting the membership lists "was to determine whether [the NAACP] was conducting intrastate business in violation of the Alabama foreign corporation registration statute." *Id.* at 464. The Court held that disclosure of rank-and-file members' names would have no substantial bearing on this issue. *Id.*

⁶⁷ *Id.* at 462.

mand for membership lists infringed unduly on the associational interests of members of the NAACP.⁶⁸

The Court in *NAACP* carefully distinguished *Bryant v. Zimmerman*,⁶⁹ in which the Court in 1928 had upheld a New York statute requiring certain unincorporated associations to turn over various information, including a complete membership roster.⁷⁰ In rejecting a New York Klansman's challenge to the validity of the statute, the Court in *Bryant* took judicial notice of the Klan's violent and unlawful activities and assumed that the New York legislature knew of such activities when it drafted the statute.⁷¹ The Court concluded that the statute was valid as a reasonable exercise of the state's police power.⁷²

The Court in *Bryant* allowed the states to treat the Ku Klux Klan differently from other organizations because of the Klan's unlawful activities.⁷³ In *NAACP*, the Court reasoned that the states could require membership lists from local Klans, but not from NAACP chapters, because of the "markedly different considerations in terms of the interest of the State in obtaining disclosure."⁷⁴ This newly created balancing test weighs the likelihood and gravity of a chilling effect on the exercise of association against the state's legitimate interest in obtaining the information.⁷⁵ Where an organization's purpose is to engage in unlawful conduct, such as violence and intimidation, the compelling interest of the state in regulating such activities would presumably outweigh all but the strongest free association claims.

The distinction made in *Bryant* and reaffirmed in *NAACP* may be losing its vitality, however. *Bryant* was decided in 1928, long before the "right of association" was even recognized as such.⁷⁶ Moreover, enforce-

⁶⁸ *Id.* at 463-65.

⁶⁹ 278 U.S. 63 (1928), cited in *NAACP*, 357 U.S. at 465-66.

⁷⁰ *Bryant*, 278 U.S. at 66.

⁷¹ *Id.* at 76; *NAACP*, 357 U.S. at 465. The Court in *NAACP* also distinguished *Bryant* on the basis that the Klan organization involved there had made no effort to comply with any part of the New York statute, whereas the NAACP had complied with all provisions of the Alabama disclosure law, except the membership list requirements. *NAACP*, 357 U.S. at 465-66.

⁷² *Bryant*, 278 U.S. at 72.

⁷³ *Id.* at 73-76; *NAACP*, 357 U.S. at 465.

⁷⁴ *NAACP*, 357 U.S. at 465.

⁷⁵ The courts continue to use this test today. See, e.g., *Black Panther Party v. Smith*, 661 F.2d 1243, 1264-72 (D.C. Cir. 1981); *Hastings v. North East Indep. School Dist.*, 615 F.2d 628, 632 (5th Cir. 1980); *Familias Unidas v. Briscoe*, 544 F.2d 182, 192 (5th Cir. 1976); see also *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968) (Klan leader convicted of contempt of Congress for failure to submit subpoenaed information), cert. denied, 393 U.S. 1024 (1969).

⁷⁶ The balancing test applied in *NAACP* was not used in *Bryant* because "freedom of association" was simply not yet a defined constitutional right. In fact, the first amendment was not even discussed in *Bryant*. The defendant's arguments were based on the privileges or immunities, due process, and equal protection clauses of the fourteenth amendment. 278 U.S. at 65, 71-73.

ment of the New York statute in *Bryant* did not pose the danger that Klan members would face harassment or economic hardship when their affiliation was revealed.⁷⁷ Today, while the Klan appears to be gaining in acceptance among some segments of society,⁷⁸ other segments appear adamantly opposed to it.⁷⁹ Thus, Klan members may well face economic and social reprisals upon revelation of their membership.⁸⁰ In these circumstances, the associational interests of Klan members may outweigh any legitimate interest of the state in obtaining membership lists.

Klan members do not have, however, an absolute right to anonymity whenever they face private reprisals. While the first amendment guarantees the freedom to associate for the purpose of espousing and advocating racism, it does not protect association for the purpose of pursuing racist ends through violence and intimidation.⁸¹ The outcome of applying the *NAACP* balancing test to the question of whether a state can obtain Klan membership lists depends on the particular circumstances involved, such as the severity of the group's unlawful conduct and the likelihood that the members' freedom to associate would be threatened.

B. PROBLEMS WITH STATE ENFORCEMENT SYSTEMS

State legislation that meets the constitutional standards described above can deter extremist group violence only if police, prosecutors, and courts enforce the statutes. In the early 1960's, state court systems com-

⁷⁷ When the New York statute upheld in *Bryant* was enacted in the mid-1920's, the Klan was at the peak of its size and power. Klan membership reached four to five million, and Klansmen and former Klansmen served as governors, congressmen, senators, and other high officials, both state and federal. Supreme Court Justice and former United States Senator Hugo L. Black had been a member during this period. See *A History of Racism and Violence*, *supra* note 1, at 17, 19-20; D. CHALMERS *supra* note 53, at 3-5, 313-16. Future exercise of Klan members' right of association probably would not have been affected significantly by revelation of their identities in 1928. However, future exercise of the right of association by many NAACP members would have been rendered all but impossible by revelation of their identities in 1958. See *NAACP*, 357 U.S. at 462, 466.

⁷⁸ See *infra* notes 103-09 and accompanying text.

⁷⁹ This is apparent from the growth of community opposition to Klan marches, for example, and the growth of an anti-Klan movement. See, e.g., *Texas Klan Marches to Provoke Outrage Among Citizens*, *supra* note 54.

⁸⁰ In at least two recent federal civil rights cases, employees have sued their employers on claims that they were fired because of revelations of their membership in the Ku Klux Klan. See *Bellamy v. Mason's Stores*, 508 F.2d 504 (4th Cir. 1974); *Savina v. Gebhart*, 497 F. Supp. 65 (D. Md. 1980).

⁸¹ The difficulty of legislating within this constitutional boundary is that while all Klan groups engage in unlawful activities to some degree, the inclination of individual Klan groups toward violence varies substantially. See generally D. CHALMERS, *supra* note 53, at 296-99, 376; Nesselson, *supra* note 10, at 12.

pletely failed to curb the violent activities of organized racist groups.⁸² The failure of local prosecutors to bring suit against,⁸³ and of local juries to convict,⁸⁴ perpetrators of racial violence during the 1960's resulted in increased pressure on the United States Department of Justice to enforce the Reconstruction Era federal civil rights statutes.⁸⁵

Successful federal prosecutions of some of the perpetrators of racial violence demonstrated the failure of state court systems.⁸⁶ The defendants in *United States v. Price*⁸⁷ were eventually convicted of civil rights violations for the murders of three civil rights workers in Philadelphia, Mississippi, in 1964, though a local grand jury had refused to indict the killers for murder.⁸⁸ Although a Georgia jury found two Ku Klux Klansmen⁸⁹ not guilty of the murder of a black educator in 1964,⁹⁰ they were later convicted of violating the victim's civil rights.⁹¹ In a case involving the Selma, Alabama slayings of two civil rights demonstrators by Klansmen in 1965, an Alabama state court acquittal of the defendants⁹² was followed quickly by their indictment and conviction for violations of the federal criminal civil rights statutes.⁹³

Some government officials believe that state court systems have been generally more reliable in the prosecution and conviction of perpetrators of racial violence in the 1980's than they were in the 1960's.⁹⁴ State court juries still fail to convict some apparently guilty defendants,

⁸² *Increasing Violence*, *supra* note 1, at 28; Comment, *Federal Civil Action Against Private Individuals for Crimes Involving Civil Rights*, 74 YALE L.J. 1462, 1463 (1965); Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, 1302 (1965).

⁸³ Note, *Discretion to Prosecute*, *supra* note 82, at 1301; Comment, *Federal Civil Action*, *supra* note 82, at 1463.

⁸⁴ See *infra* text accompanying notes 86-93; Comment, *Federal Civil Action*, *supra* note 82, at 1463.

⁸⁵ It took the brutal slayings of civil rights activists during the summer of 1964 and the national outrage that resulted from state court acquittals of their murderers to induce the Justice Department to prosecute the offenders under the criminal civil rights statutes. Fisher, *Double Jeopardy and Federalism*, 50 MINN. L. REV. 607 (1966); Comment, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007, 1041 (1966).

⁸⁶ These 1960's prosecutions also made possible judicial review and reinterpretation of the Reconstruction Era criminal civil rights statutes. See *infra* notes 124-29.

⁸⁷ 383 U.S. 787 (1966).

⁸⁸ A History of Racism and Violence, *supra* note 1, at 22 (inset).

⁸⁹ Comment, *supra* note 85, at 1041 n.165.

⁹⁰ *United States v. Guest*, 383 U.S. 745, 748 n.1 (1966) (quoting from district court opinion, 246 F. Supp. 475, 487 (1965)).

⁹¹ The United States Supreme Court reversed the dismissal of the federal indictment against the Klansmen. *United States v. Guest*, 383 U.S. 745 (1966); see B. SHIPP, MURDER AT BROAD RIVER BRIDGE 78-84 (1981).

⁹² Fisher, *supra* note 85, at 607 (Viola Liuzzo murder).

⁹³ Comment, *supra* note 85, at 1041 n.165.

⁹⁴ Telephone interview, *supra* note 4. The improvement is due largely to the increased willingness of local prosecutors to seek indictments against offenders, particularly in well-publicized incidents of violence.

however. For example, an all-white jury acquitted the six Klansmen and Nazis tried for the killings of the Greensboro demonstrators,⁹⁵ even though the jury was shown television films of the defendants removing their guns from an automobile trunk, deliberately stalking their victims, and of at least one of the defendants firing several bullets into the body of a demonstrator.⁹⁶

The state criminal prosecutions of three members of the Justice Knights of the Ku Klux Klan charged with shooting five elderly black women in Chattanooga⁹⁷ ended in two acquittals and one twenty-month jail sentence.⁹⁸ Yet a subsequent civil lawsuit against the Klansmen and the Justice Knights brought in federal court under the federal civil rights statutes resulted in a jury damages award of \$535,000 for the victims.⁹⁹

Other problems with state criminal prosecutions persist. Assault and intimidation convictions in racial violence cases are often met with short or suspended sentences, and even some severe injury and death cases result in relatively lenient sentences.¹⁰⁰ Moreover, local prosecutors often dismiss incidents of intimidation as "pranks," without serious investigation.¹⁰¹ Local prosecutors sometimes ignore housing interference incidents, such as shootings into blacks' homes that do not cause physical injuries.¹⁰²

Many factors contribute to the failure of local prosecutors to bring suit and of local juries to convict. The continued prevalence of racism and prejudice helps to explain the inadequate response of local legal systems to racial violence and intimidation. In a random-sample survey of the nine-county Chattanooga area in early 1982,¹⁰³ over thirty-two

⁹⁵ See *supra* note 2 and accompanying text.

⁹⁶ A History of Racism and Violence, *supra* note 1, at 49; King, *supra* note 11, at 160. The reasons for the state court acquittal are not altogether clear. One commentator observed, "[a]t that time, many trial observers state[d] that trial improprieties—including the unabashed anti-Communist bias of the district attorney and jury combined with defense team red-baiting—all but precluded a guilty verdict." Charns, *supra* note 2, at 9. A federal grand jury investigation that ended in April 1983 resulted in indictments of five out of the six who were acquitted and four other alleged conspirators. Charns, *Jury indicts Nazis and Klan in killings*, IN THESE TIMES, May 4-10, 1983, at 6, col. 1. All nine defendants were acquitted, however, at the conclusion of the federal trial in April 1984. See *infra* note 163.

⁹⁷ See *supra* note 3 and accompanying text.

⁹⁸ *Increasing Violence*, *supra* note 1, at 81; Seltzer, *Survey Finds Extensive Klan Sympathy*, POVERTY L. REP., May/June 1982, at 7. The convicted defendant was paroled after four months.

⁹⁹ Seltzer, *supra* note 98, at 7; *Crumsey v. Justice Knights of the Ku Klux Klan*, Civ. Act. No. 1-80-287 (E.D. Tenn. 1980). Commentators have suggested that in civil rights cases damages are easier to obtain than criminal convictions. Comment, *supra* note 82, at 1464 & n.11.

¹⁰⁰ Telephone interview, *supra* note 4.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ The National Jury Project conducted the survey in connection with the Chattanooga civil case of *Crumsey v. Justice Knights of the Ku Klux Klan*, Civ. Act. No. 1-80-287 (E.D.

percent of all white respondents reported that they liked the Ku Klux Klan or some aspects of it.¹⁰⁴ Even more disturbing were the findings of the survey that over forty-eight percent of the respondents agreed that the right of blacks to demonstrate should be restricted, and that almost fifty-five percent thought that "[t]here needs to be an organization to stand up for the rights of white people."¹⁰⁵ The intensity of such feelings tends to increase during periods of racial tension, making convictions of guilty defendants even more difficult to obtain.¹⁰⁶

While such attitudes are more prevalent in some areas than others, racism is still a nationwide problem. Studies indicate that twenty-five to thirty-five percent of all Americans still harbor anti-Semitic stereotypes.¹⁰⁷ In addition, Gallup polls have shown a noticeable increase over the past ten years in the number of persons who approve of Klan activities.¹⁰⁸ Such attitudes have been shared by enough voters in some areas to result in major party nominations of avowed Klan and Nazi Congressional candidates.¹⁰⁹

Tenn. 1980). The success of the plaintiffs in this federal lawsuit against the defendants who were acquitted or given light sentences in the state criminal prosecution (*supra* notes 98-99 and accompanying text) adds weight to the asserted connection between the attitudes reflected in the survey and the failure of state court systems to respond adequately to racially-motivated violence.

¹⁰⁴ Seltzer, *supra* note 98, at 7.

¹⁰⁵ *Id.* at 8, 13.

¹⁰⁶ See generally A History of Racism and Violence, *supra* note 1, at 41. The failed state prosecutions in Greensboro and Chattanooga followed shooting incidents that occurred in the context of tense racial situations. In Greensboro, the shooting occurred during the last of a series of clashes between anti-Klan demonstrators and Klansmen in North Carolina. *Eighty-eight Seconds in Greensboro*, Frontline (Public Broadcast System) (Jan. 24, 1983). In Chattanooga, the shooting occurred soon after televised debates between local NAACP officers and Klan leaders, and in the midst of a recruiting drive by local Klan factions. Telephone interview with George A. Key, President of the Chattanooga Chapter of the NAACP (April 23, 1984). In such circumstances, the relative swiftness with which local prosecutions come to trial may actually be a detriment to success, because the often all-white jury is drawn from a local populace that well remembers the tense period of confrontation. Aware that punishment is less likely and less severe when violent attacks on minorities occur in the context of riots or other social unrest, Klan members instigate or exacerbate such situations, attempting to create a climate in which they can engage freely in beatings, killings, and other violence. A History of Racism and Violence, *supra* note 1, at 51. As a result, local legal systems are least likely to produce a certain and adequate response to such violence when it is needed most. See *infra* note 113 and accompanying text.

¹⁰⁷ Polls reflect increase in racist attitudes, *supra* note 1, at 15.

¹⁰⁸ In a 1980 Gallup Poll, 10% of the national population expressed favorable attitudes toward the Klan. *Increasing Violence*, *supra* note 1, at 80 (statement of Irwin Suall, Anti-Defamation League, New York).

¹⁰⁹ In 1980, Tom Metzger, an outspoken racist and leader of the California Knights of the Ku Klux Klan, won the Democratic nomination for Congress in the San Diego area. Although he lost in the general election, he still garnered 35,000 votes (14%). *Id.* at 79. Gerald Carlson, a former Klansman and neo-Nazi, who openly espoused racist and anti-Semitic beliefs, captured the Republican nomination for Congress in the Dearborn, Michigan area. Carlson also lost in the general election, but received 53,000 votes. *Id.* at 80. In 1982, Jerry

The continuing inability of state and local legal systems to deter and punish racially motivated violent criminals should be met consistently with efforts to improve state legislation and judicial enforcement.¹¹⁰ Such improvements, however, can be realized only over a long-term period. Increased reliance on federal civil rights remedies would provide an immediate and effective supplement to state enforcement systems. These federal civil rights remedies are explored in the next section.

III. AN ALTERNATIVE APPROACH: ENFORCEMENT OF RECONSTRUCTION ERA FEDERAL CIVIL RIGHTS ACTS

While long-term improvements in state enforcement systems can and should be made,¹¹¹ immediate remedies for racial violence and intimidation are available under the federal civil rights statutes.¹¹² Federal criminal prosecutions and private civil suits under federal civil rights laws offer an effective alternative or supplement to state court systems. Because the Department of Justice or a private litigant prosecutes or brings suit in federal court, the biases of local citizens have less impact on the initiation of an action. As federal district court juries are drawn generally from a much wider area than local juries,¹¹³ there is less chance that the racial tensions that may have surrounded a violent inci-

Brown defeated Metzger for the California Democratic nomination for the United States Senate, but Metzger received 76,502 votes (7%). *Voters reject Klan-backed candidates*, POVERTY L. REP., Nov./Dec. 1982, at 4.

¹¹⁰ As the bias of state court juries seems to present a major problem, improvement efforts should include ending the prevalence of all-white juries and improving public education on racial issues. Present efforts to make state court juries representative of local populations, however, are being hampered by the Supreme Court's refusal to review the rule of *Swain v. Alabama*, 380 U.S. 202 (1965), which upheld the right of local prosecutors to use peremptory challenges to exclude blacks from juries in individual cases. *McCray v. New York*, 103 S. Ct. 2438 (1983); see also *Riley, Selecting a Trial Panel: Whose Peers Are They?*, NAT'L L.J., Feb. 20, 1984, at 1, col. 3. Other ways to improve the state system include establishing mandatory maximum sentences for crimes of violence involving racial animus and encouraging public officials to speak out against acts of racial violence and intimidation.

¹¹¹ See *supra* note 110.

¹¹² As stated in the introduction, the most effective approach to deterring and punishing racial violence is a two-tiered system of federal prosecution and civil remedies, combined with improvements in state legislation and enforcement systems.

¹¹³ *Mishkin, The Federal Question in the District Courts*, 53 COLUM. L. REV. 157, 175 (1953). As Mishkin notes:

With the possible exception of a place like the Southern District of New York, the federal judicial district will generally be larger than the comparable state unit. Despite the provisions for appointment of jurors within a district, 28 U.S.C. § 1865 (Supp. 1952), the federal venue will tend to include a greater mixture of urban dwellers, suburbanites and rural residents, with their varying social and economic backgrounds, than will the state panels.

Id. at 175 n.87.

dent will have undue influence.¹¹⁴ Finally, federal involvement in a tense racial situation, through a grand jury investigation¹¹⁵ or a prosecution, can help to deter future acts of violence.¹¹⁶

A. RECENT CRIMINAL CASES UNDER FEDERAL CIVIL RIGHTS STATUTES

Several federal criminal statutes, both new and old,¹¹⁷ can effectively punish and deter the perpetrators of racist and religious violence. Enforcement of these statutes is especially important when a state criminal prosecution has failed, or has resulted in a lenient sentence that is unlikely to deter future outbreaks of violence.¹¹⁸ Federal prosecution of defendants acquitted in state trials does not violate the double jeopardy rule,¹¹⁹ and the penalties available under the federal civil rights statutes are adequate to deter and punish racial and religious violence.¹²⁰ Since the mid-1970's, the United States Department of Justice has increased the number of prosecutions brought against private defendants under

¹¹⁴ See *supra* note 106 and accompanying text.

¹¹⁵ A federal grand jury hears evidence as presented by a United States Attorney, to determine whether there is probable cause to believe that a federal crime has been committed. See generally A.B.A. SEC. JUD. AD., FEDERAL GRAND JURY HANDBOOK 11 (1959).

¹¹⁶ *Increasing Violence*, *supra* note 1, at 29.

¹¹⁷ This Comment discusses those civil rights statutes that reach private acts of racial or religious violence and intimidation, as opposed to conduct involving "state action." The majority of such violence and intimidation is now limited to the private context, and the standards of conduct affecting state officers are now defined with relative clarity. See generally F. INBAU, M. ASPEN & J. SPIOTTO, PROTECTIVE SECURITY LAW 1-20, 33-43, 93-102 (1983).

The Comment focuses primarily on the two surviving Reconstruction Era statutes directed at private racial violence and intimidation (18 U.S.C. § 241 (1982) and 42 U.S.C. § 1985(c) (1976)), rather than on modern civil rights statutes (see, e.g., 18 U.S.C. § 245 (1982), discussed *infra* at notes 160-63), because the explicit language of the modern statutes clearly defines their scope. They do not possess the broad language and potential for expanded interpretation of the older statutes. See *infra* note 153 and accompanying text.

¹¹⁸ See *supra* notes 86-99 and accompanying text.

¹¹⁹ The fact that someone has been tried for an offense in a state court, whether found guilty or acquitted, does not preclude prosecution of the same defendant for the same physical act in a federal court, so long as the act is an offense under federal law. *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959). This is a well-established exception to the "double jeopardy" rule, a prohibition of double prosecution for the same crime, guaranteed by the fifth amendment.

¹²⁰ Violators of 18 U.S.C. § 241, a felony statute, face fines up to \$10,000 and imprisonment up to ten years, or both. When death results from a violation of § 241, violators are subject to imprisonment for any term of years or for life. 18 U.S.C. § 241 (1982).

Violators of 18 U.S.C. § 245 may be fined \$1000 or imprisoned up to one year, or both. Where bodily injury results from a violation of § 245, violators are subject to fines up to \$10,000 and imprisonment up to ten years, and if death results, violators are subject to imprisonment for any term of years or for life. 18 U.S.C. § 245 (1982).

the federal civil rights statutes,¹²¹ but calls for more vigorous enforcement continue.¹²² Federal prosecutions for private racial violence are brought primarily under three statutes; 18 U.S.C. §§ 241 and 245, and 42 U.S.C. § 3631.¹²³

The broad language of 18 U.S.C. § 241¹²⁴ prohibits private conspir-

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Year	No. of Prosecutions	No. of Defendants
1977	0	0
1978	0	0
1979	2	2
1980	7	13
1981	2	5
1982	10	17
1983	11	25

Sources: *Increasing Violence*, *supra* note 1, at 90 (statement of Drew S. Days III, then Assistant Attorney General, Civil Rights Division, U.S. Dept. of Justice); Telephone interview, *supra* note 4; Telephone interview with Daniel Rinzel, Deputy Assistant Attorney General, Civil Rights Division of the United States Department of Justice, Washington, D.C. (Mar. 6, 1984).

¹²² COMMISSION STATEMENT, *supra* note 5, at 24 nn.26 & 29; *National Anti-Klan Network Launches Drive Against Racial Violence*, KLANWATCH INTELLIGENCE REP., Apr. 1983, at 1.

¹²³ As discussed *supra* in note 117, this section focuses on 18 U.S.C. § 241 (1982). For a discussion of 18 U.S.C. § 245 (1982), see *infra* notes 160-63 and accompanying text. For a discussion of 42 U.S.C. § 3631 (1976), see *infra* note 156 and accompanying text.

¹²⁴ 18 U.S.C. § 241 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 highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

Section 241 is the current version of § 6 of the Enforcement Act of 1870, 2 ch. 114, 16 Stat. 140 (1870), enacted immediately after ratification of the fifteenth amendment to enforce that amendment. Section 241 has been the subject of longstanding disagreement among courts and commentators on two related questions of constitutional import: (1) to what extent does the section proscribe wholly private conduct, as opposed to conduct involving "state action," and (2) what are the rights "secured by" the Constitution and laws of the United States?

The first question depends largely on whether Congress can proscribe wholly private action under the fifth section of the fourteenth amendment in order to enforce that amendment. The United States Supreme Court held in *The Civil Rights Cases*, 109 U.S. 3 (1883), that Congress' power under the first and fifth sections extended only to the correction of discriminatory state action. See Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952). The Supreme Court has not since ruled directly on this issue, although six Justices stated in *United States v. Guest*, 383 U.S. 745 (1966), that Congress did have the power to reach private action under the fifth section of the fourteenth amendment if necessary to enforce that amendment. See *id.* at 761-62, 774-86. At least one United States Circuit Court of Appeals has held that Congress has such power under section five. *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971); see also *Westberry v. Gilman Paper Co.*, 507 F.2d 206, *vacated as moot*, 507 F.2d 216 (5th Cir. 1975) (upheld 42 U.S.C. § 1985(c) as proper exercise of congressional power under section five of the fourteenth amendment). But see *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976). While all of these cases subse-

acies against any citizen's "free exercise . . . of any right or privilege secured . . . by the Constitution or laws of the United States" ¹²⁵ Reading the statute in light of the relatively few cases interpreting it, ¹²⁶

quent to *Guest* have ruled on the question from the perspective of § 1985(c), rather than § 241, the issue of congressional power is the same for both sections. See Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964) and sources cited therein at 1353 n.4.

The Supreme Court recently reaffirmed the view that the fourteenth amendment itself "protects the individual against *state action*, not against wrongs done by *individuals*," without specifically addressing the question of Congress' power under the fifth section of the amendment. *United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 103 S. Ct. 3352, 3357 (1983) (emphasis in original). In *Scott*, the Court held that § 1985(c), a civil provision roughly analogous to § 241, does not provide a remedy for private conspiracies against the fourteenth amendment rights of citizens "unless . . . the state is involved in the conspiracy or . . . the aim of the conspiracy is to influence the activity of the state." *Id.* at 3357. Specifically, the Court ruled that wholly private conspiracies against the first amendment right of association are not actionable under § 1985(c). *Id.* at 3358. While it does not follow directly from *Scott* that § 241 is similarly limited, the decision casts doubt on whether § 241 will be construed to prohibit wholly private conspiracies against fourteenth amendment rights. See *Scott*, 103 S. Ct. at 3357.

The second question, concerning which rights are "secured by" the Constitution and laws of the United States, also has a volatile history. The United States Supreme Court held in *United States v. Cruikshank*, 92 U.S. 542 (1875), that the rights "secured by" the Constitution and the laws of the United States and protected by § 241 (then § 6 of the Enforcement Act of 1870) were only those rights that are attributes of national citizenship. The Court suggested that these rights included the right to peaceably assemble for the purpose of petitioning Congress for a redress of grievances, and the right not to be barred from voting solely on account of race. This narrow category of rights was analogous to those protected from governmental interference under the Court's narrow view of the privileges or immunities clause of the fourteenth amendment, as interpreted in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). The Court continued to limit the reach of § 241 to only this narrow class of rights because by its terms it obviously proscribed private conspiracies, and the Court had long since held that Congress' power under the fourteenth amendment did not reach private action. See, e.g., *United States v. Williams*, 341 U.S. 70 (1951). Thus, § 241 was limited to protecting rights "arising from the substantive powers of the Federal Government," which Congress could "beyond doubt constitutionally secure against interference by private individuals." *Id.* at 73, 77.

The narrow category of rights "secured by" the Constitution or laws of the United States was broadened to include fourteenth amendment due process rights in *United States v. Price*, 383 U.S. 787 (1966), and fourteenth amendment equal protection rights in *United States v. Guest*, 383 U.S. 745 (1966). The Court in *Price* and *Guest* expanded the scope of the statute's protection to its intended breadth—"any right or privilege secured . . . by the Constitution or laws," 18 U.S.C. § 241 (emphasis added)—without reaching the Constitutional issue of congressional power to reach private action through the fifth section of the fourteenth amendment, because both cases involved allegations of state action. *Price*, 383 U.S. at 798; *Guest*, 383 U.S. at 753.

¹²⁵ 18 U.S.C. § 241 (1982). The history of the section and its few changes are charted in an appendix to the opinion of Justice Frankfurter in *United States v. Williams*, 341 U.S. 70, 83 (1951). Under *United States v. Price*, 383 U.S. 787 (1966), and *United States v. Guest*, 383 U.S. 745 (1966), it is clear that § 241 protects the exercise of *all* rights secured by the Constitution and all federal laws, including rights guaranteed by the fourteenth amendment.

¹²⁶ In *United States v. Price*, 383 U.S. 787 (1966), the Court detailed the history of cases applying § 241 to punish private conspirators. *Price* and *United States v. Guest*, 383 U.S. 745 (1966), expanded the reach of the statute to protection of fourteenth amendment rights. See

the elements of the crime become readily apparent. Two or more persons must: (1) conspire, or go in disguise on the highway or on the premises of another, (2) in order to injure, oppress, threaten, or intimidate a citizen, (3) with a specific intent to interfere with a federal right defined by decision or other rule of law.¹²⁷ Although the federal rights protected by section 241 are all those rights secured by the Constitution or the laws of the United States,¹²⁸ the rights so secured must be within the power of Congress to protect from interference by the defendant. For example, if the defendant acted in a wholly private capacity, the federal right relied upon must be one that Congress can constitutionally protect from interference by private individuals.¹²⁹

Recent cases applying section 241 illustrate how the statute may be used to punish racially motivated acts of private violence and intimidation. In *United States v. Kilgore*,¹³⁰ a young black man and his white wife, residents of Tennessee, were victims of an unprovoked attack while driving through Alabama. A carload of four white men assaulted the couple and battered the husband with rocks and bricks, injuring him

supra note 124. *Guest* also held that § 241 protects the right of interstate travel. The earlier cases holding § 241 applicable are: *United States v. Classic*, 313 U.S. 299 (1941) (right to vote in federal elections); *In re Quarles*, 158 U.S. 532 (1895) (right to inform of violations of federal law); *Logan v. United States*, 144 U.S. 263 (1892) (right to be secure from unauthorized violence while in federal custody); *United States v. Waddell*, 112 U.S. 76 (1884) (right to perfect a homestead claim). Viewing this "narrow and relatively unimportant category of rights" previously protected by § 241, and reviewing the legislative history of the section (see *Price*, 383 U.S. at 807-20 for the remarks of Senator Pool, the sponsor of the section), the Court in *Price* rejected the former, narrow interpretation of the statute and held it applicable to all rights secured by the Constitution and laws of the United States.

¹²⁷ In *Screws v. United States*, 325 U.S. 91 (1945), the Court held that 18 U.S.C. § 242 (1982), a criminal statute analogous to § 241, but including an "under color of law" limitation, was not unconstitutionally vague. The Court in *Screws* construed the word "willfully" in § 242 narrowly, and required "an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U.S. at 104. Acting "willfully" in this sense means acting "in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite." *Id.* at 105.

In *Guest*, the Court applied the same "strict scienter" requirement to violations of § 241, noting that "the gravamen of the offense is conspiracy, [therefore] the requirement that the offender must act with a specific intent to interfere with the federal rights in question is satisfied." 383 U.S. at 753-54.

¹²⁸ *United States v. Price*, 383 U.S. 787 (1966); see *supra* note 124.

¹²⁹ See *United States v. Price*, 383 U.S. 787 (1966); *United States v. Guest*, 383 U.S. 745 (1966); see also *supra* notes 124-26 and accompanying text. The Court has not yet decided whether § 241 protects fourteenth amendment due process and equal protection rights from wholly private interference. See *Guest*, 383 U.S. at 781-86 (Brennan, J., dissenting in part); *supra* note 124. For a discussion of the particular rights traditionally protected by § 241 against private interference, see Feuerstein, *Civil Rights Crimes and the Federal Power To Punish Private Individuals for Interference With Federally Secured Rights*, 19 VAND. L. REV. 641 (1966).

¹³⁰ Indictment, No. 81C 27-M (N.D. Ala. Feb. 6, 1981).

seriously.¹³¹

The four defendants were charged with violating 18 U.S.C. § 241 by conspiring to "injure, oppress, threaten and intimidate" the young couple "in the free exercise and enjoyment of the right" to interstate travel.¹³² Three of the defendants pled guilty to the charge; the other was convicted.¹³³

The second count of the indictment charged the defendants with violating 18 U.S.C. §§ 2(a)¹³⁴ and 245(b)(2)(E)¹³⁵ by aiding and abetting each other to "willfully injure, intimidate and interfere with" the complainant, "because of his race and color," and because he was traveling in interstate commerce.¹³⁶ The same three defendants pled guilty to this second charge, and the other was convicted.¹³⁷

In *United States v. Bishop*,¹³⁸ five Klansmen planned to kill one black man for moving into a "white" neighborhood, and to kill another for frequenting a "white" bar.¹³⁹ The first attack was called off,¹⁴⁰ but the second resulted in two attempts to shoot the victim, first as he left the bar, and again when he arrived home.¹⁴¹

In connection with the aborted attack, two of the defendants were convicted of violating 18 U.S.C. § 241 by conspiring to "injure, oppress, threaten and intimidate" a citizen "in the free exercise and enjoyment of the right" to "hold property and to occupy a dwelling without injury, intimidation, or interference" because of race or color.¹⁴² Three of the

¹³¹ When the black man asked why he was being attacked, one of the defendants replied that it was because he was with a white girl. See *infra* notes 191-96 and accompanying text for discussion of a later civil suit arising out of this incident.

¹³² *Kilgore*, indictment at 1. For the full text of § 241, see *supra* note 124. That § 241 protects the right to engage in interstate travel free of private interference was established in *United States v. Guest*, 383 U.S. 745 (1966).

¹³³ Telephone interview, *supra* note 4.

¹³⁴ 18 U.S.C. § 2(a) (1976) provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

¹³⁵ 18 U.S.C. § 245 enumerates a host of "federally protected activities." See *infra* note 161 for full text of the relevant sections of the statute.

¹³⁶ *Kilgore*, indictment at 3.

¹³⁷ Telephone interview, *supra* note 4. The convicted conspirator appealed the decision, but the appeal was dismissed in favor of the United States. The other three defendants were first given sentences of several years, which were subsequently reduced to a few months. *Id.*

¹³⁸ Indictment, No. 80-80536 (E.D. Mich. Sept. 10, 1980).

¹³⁹ *United States v. Bishop*, sentencing memorandum, No. 80-80536 (E.D. Mich. Dec. 31, 1980). The defendants also intended to kill the white bartender because he was "friends" with the black man. *Id.* at 2, 5.

¹⁴⁰ *Bishop*, indictment at 3-5; *Bishop*, sentencing memorandum at 1. The attack was averted only because the "hit" man changed his mind, and local police had been warned of the plan. *Bishop*, sentencing memorandum at 4.

¹⁴¹ *Bishop*, sentencing memorandum at 3; *Bishop*, indictment at 2-3.

¹⁴² *Bishop*, indictment at 3-5 (Count 4). The first planned attack still constituted a conspiracy in violation of § 241, though it was never carried out. One defendant received a four-year

defendants were also convicted of violating section 241 by conspiring to injure the victim of the attempted shooting in "the free exercise and enjoyment" of his right to "full and equal use of a place of public accommodation without discrimination on the basis of race, color, religion, or national origin" ¹⁴³

In *United States v. Redwine*, ¹⁴⁴ three defendants were convicted of violating section 241 by conspiring to "injure, oppress, threaten or intimidate" a black family in the free exercise of its right to occupy a dwelling without interference because of race. ¹⁴⁵ The defendants had harassed the family for moving into an all-white neighborhood by throwing rocks and bottles through the windows, shouting racial epithets, and finally firebombing the home. ¹⁴⁶ That the defendants may not have been aware that such harassment constituted interference with a federally protected right was held not to bar prosecution under section 241. ¹⁴⁷

Kilgore, *Bishop*, and *Redwine* demonstrate that section 241 can reach many private acts of racially motivated violence. The *Kilgore* indictment relied on the implied constitutional right of free interstate travel, long protected against interference by governmental action, but also held to be a right protected against private interference in *United States v. Guest*. ¹⁴⁸ The constitutional bases for the enforcement of section 241 in

sentence to be served concurrently with his sentence for conviction under Count 1. The other received a one-year sentence. D. Nesselson, *Klan Related Litigation 2* (Feb. 1981) (unpublished memorandum).

¹⁴³ *Bishop*, indictment at 1 (Count 1). The language quoted here substantially tracks the language in § 201 of Title II of the Civil Rights Act of 1964, guaranteeing the right of equal access to places of public accommodation. Thus, rights that become established in the federal law ("made definite") also become cognizable under, and therefore protected by, § 241, as it "embraces all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United States." *United States v. Price*, 383 U.S. 787, 800 (1966) (emphasis in original). Two of the defendants received four-year sentences, one received a two-year sentence, and one was acquitted. D. Nesselson, *supra* note 142, at 2.

¹⁴⁴ 715 F.2d 315 (7th Cir. 1983).

¹⁴⁵ *Id.* at 318. The defendants were also convicted under 42 U.S.C. § 3631 for interference with housing rights. See *infra* notes 154-56 and accompanying text for discussion of another prosecution under § 3631. Two of the defendants in *Redwine* were sentenced to prison for a total of six years each. The third defendant, a minor, was committed to the Attorney General for supervision under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1982). *Redwine*, 715 F.2d at 318-19.

¹⁴⁶ *Id.* at 317-18.

¹⁴⁷ As the court stated,

We note that while specific intent to interfere with a federally protected right must be shown, it is not necessary that the defendant be shown to have a legalistic appreciation of the federally protected nature of that right. *United States v. Guest*, 383 U.S. 745 . . . (1966). The evidence amply permits a finding beyond a reasonable doubt that a conspiracy existed to intimidate the Williams family in the exercise of their right to occupy their home, and that the defendants fully participated in that conspiracy.

Id. at 319-20.

¹⁴⁸ 383 U.S. 745 (1966); see Feuerstein, *supra* note 129, at 659-65.

Bishop and *Redwine* are thirteenth amendment property rights,¹⁴⁹ and public accommodations rights as established pursuant to the commerce power.¹⁵⁰ Because section 241 extends to "any right . . . secured . . . by the Constitution or laws of the United States," that is, to rights "made definite" by decision or other rule of law,¹⁵¹ the conduct that can be prosecuted under the statute constantly expands as Congress and the courts define new rights.¹⁵² Thus, the criminal penalty mandated by section 241 will be even more useful in punishing racial violence and intimidation as statutory and constitutional rights expand.¹⁵³

Increased enforcement of other federal criminal civil rights statutes may also help curb the rising incidence of racial violence and intimidation. These statutes were used effectively in *United States v. Johns*¹⁵⁴ to punish ten Klansmen and associates for three racially motivated violent attacks. The defendants fired shotguns into the home of two racially

¹⁴⁹ These rights stem from part of § 1 of the 1866 Civil Rights Act (currently 42 U.S.C. §§ 1981, 1982 (1976)) as interpreted in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and Title IX of the 1968 Civil Rights Act (The Fair Housing Act), 42 U.S.C. § 3631 (1976).

¹⁵⁰ See *supra* note 143. Congress based the public accommodations provisions of the 1964 Civil Rights Act on the commerce power.

¹⁵¹ 18 U.S.C. § 241 (1982); see *supra* notes 124-28 and accompanying text.

¹⁵² See, e.g., *United States v. Bishop*, No. 80-80536 (E.D. Mich. Sept. 10, 1980) (using the public accommodations right established in the 1964 Civil Rights Act to invoke § 241); *United States v. Redwine*, 715 F.2d 315 (7th Cir. 1983) (using the right to equal housing opportunity established by the 1968 Civil Rights Act to invoke § 241). Because § 241 is a felony provision, it carries far stiffer penalties than those usually available for enforcement under the statutes creating these federal rights. See *supra* note 124 for text of § 241.

¹⁵³ This aspect of § 241 offers the greatest potential for expanded protection of citizens from racially motivated acts of violence and intimidation. Under a theory of national citizenship, in which the federal government is considered the primary guarantor of all fundamental rights of citizens, the protection of § 241 would extend to all threats to life, liberty, and property, both from the state and from private individuals. See generally R. NEWMAN & C. NEWMAN, *THE ROLE OF LAW IN SOCIETY* (1958); Newman, *A Forgotten Right of United States Citizenship*, 39 ILL. L. REV. 367 (1945). Under this view, federal enforcement of fundamental rights would be used only when state protection is inadequate, but this limitation would, of course, be voluntary.

Another possible theory the Supreme Court could adopt is that the privileges or immunities clause of the fourteenth amendment comprises the fundamental rights of citizens. Under such an expanded view of the clause, the question of Congressional power to enforce fourteenth amendment rights against private interference would again possibly limit the reach of § 241. See *supra* note 124. Assuming the Court would also uphold such congressional power under the fifth section of the fourteenth amendment, § 241 could presumably again reach all threats to life, liberty, and property.

If either of these constitutional views were adopted, the rather broad reach of § 241 could be limited to areas in which the federal government has a legitimate interest, and in which state protection is demonstrably deficient. Thus, amendment of the statute to require a racial or religious motivation on the part of the perpetrator of the crime could provide a limit to its protection, while insuring that acts of racial violence and intimidation do not go unpunished simply because no adequate basis of federal jurisdiction exists under present interpretations of the statute and the Constitution.

¹⁵⁴ 615 F.2d 672 (5th Cir. 1980).

mixed couples, and the homes of two local NAACP leaders.¹⁵⁵

Four defendants were convicted of violating the Fair Housing Act¹⁵⁶ and of conspiring with three others to violate the Act¹⁵⁷ by firing into the home of the couples.¹⁵⁸ The Fair Housing Act protects an individual's right to live in any home regardless of race. Although the Klansmen's primary motive in the attack was to discourage the couples from continuing their interracial relationships,¹⁵⁹ the jury in *Johns* found that another motive was to end interracial cohabitation in the dwelling.¹⁶⁰

Eight defendants were convicted of violating 18 U.S.C. § 245(b)(5),¹⁶¹ and for conspiring to violate the same,¹⁶² by firing into the homes of the NAACP leaders. The defendants intended to discour-

¹⁵⁵ *Id.* at 674.

¹⁵⁶ 42 U.S.C. § 3631 (1976) provides in part:

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(a) any person because of his race . . . and because he is or has been . . . occupying . . . any dwelling . . . shall be fined not more than \$1,000, or imprisoned not more than one year, or both . . .

Section 3631 not only provides broad protection for minorities' housing rights, but protects landlords who rent to them as well. For an excellent discussion of a recent conviction under § 3631 for racially-motivated harassment of a landlord and his black tenant, see Harrington & Johnson, *Get Rid of the Niggers*, 38 GUILD PRAC. 33 (1981).

¹⁵⁷ 18 U.S.C. § 371 (1982) (general conspiracy statute) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

¹⁵⁸ *Johns*, 615 F.2d at 674.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 675. The United States Court of Appeals for the Fifth Circuit, upholding all the convictions on appeal, stated that "[t]he legislative history accompanying 42 U.S.C. § 3631 and 18 U.S.C. § 245(b) indicates a clear congressional intent to impose criminal sanctions on persons who engage in the conduct appellants were found to have participated in and with the intent appellants were found to have had." *Id.*

¹⁶¹ 18 U.S.C. § 245 (1982) provides in part:

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

* * *

(2) any person because of his race, color, religion or national origin and because he is or has been—

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or

age the NAACP's efforts to secure better employment opportunities for local blacks, an activity protected from private interference by section 245.¹⁶³ All ten defendants received sentences of two to four years.¹⁶⁴

using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

* * *

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than \$10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

¹⁶² See *supra* note 157 for text of 18 U.S.C. § 371 (1982).

¹⁶³ *Johns*, 615 F.2d at 676; 18 U.S.C. § 245(b)(2)(C); see also *supra* note 160. Because § 245 specifically enumerates the federal rights it protects and carries a sliding scale of penalties, it is an excellent prosecutorial tool for punishing private racial violence and intimidation in many circumstances. Some recent successful prosecutions under it include: *United States v. Creekmore*, No. CR80A00012NW (N.D. Ala. Feb. 19, 1980) (two black ministers attacked by two white men outside a public restaurant); *United States v. Brown*, No. 79-H-296 (N.D. Ala. Jan. 15, 1980) (Vietnamese refugees threatened at knifepoint and told to leave their jobs by Klan officer); and *United States v. Franklin*, No. CR-80-125J (D. Utah Mar. 23, 1981) (two black men murdered while jogging with two white women in a city park).

The narrow language of § 245 is also often a detriment to federal prosecution. The defendant in *Franklin* was the same man who had earlier shot Vernon Jordan, then President of the National Urban League, outside a Fort Wayne, Indiana hotel in 1980. Franklin was also prosecuted for that crime in 1982, under § 245, but was acquitted. Although the jury was apparently convinced that Franklin shot Jordan, it was not convinced that he did so *because* Jordan was enjoying the services of the hotel. Telephone interview, *supra* note 4. The nine former Klansmen and Nazis prosecuted under § 245 for killing five communist demonstrators in Greensboro, North Carolina in 1979 were also acquitted. See *supra* note 96. Racial or religious motivation must be shown for an offense to be cognizable under § 245. The Greens-

Kilgore, Bishop, Redwine, and Johns illustrate the versatility and breadth of the federal criminal civil rights statutes. These laws are especially well-adapted for the kind of organized conspiracies that characterize the terroristic activities of violent extremist groups.¹⁶⁵ In view of the increasing rise in violence directed at racial and religious minorities,¹⁶⁶ the inadequacies of state legislation,¹⁶⁷ and the tendency of local juries to become less likely to convict guilty defendants during periods of racial tension,¹⁶⁸ the United States Department of Justice should prosecute more vigorously the perpetrators of racial and religious violence, and seek to expand present court interpretations of private conduct prohibited by these statutes.¹⁶⁹

The procedure followed by the Department of Justice in enforcing the criminal civil rights statutes has been to investigate occurrences of racial or religious violence.¹⁷⁰ When a decision is made to prosecute at the local level, the Department usually defers action, and awaits the outcome of the state trial.¹⁷¹ This "waiting period" is at least several months, and often a year or more. If the perpetrators of a serious racial crime are acquitted, or are convicted but given lenient or suspended

boro federal jury apparently felt that the defendants went to the anti-Klan rally and attacked the victims only because of the victims' communist political beliefs. Hirsley, *Prosecutors Blamed for Acquittal in Klan-Nazi Attack*, Chicago Tribune, April 22, 1984, at 5, col. 1.

¹⁶⁴ D. Nesselson, *supra* note 142, at 1.

¹⁶⁵ This is due to the origins of § 241; as § 6 of the Enforcement Act of 1870, the statute was specifically directed at the activities of the Reconstruction Era Ku Klux Klan and similar groups.

¹⁶⁶ See *supra* notes 1-13 and accompanying text.

¹⁶⁷ See *supra* notes 33-81 and accompanying text.

¹⁶⁸ See *supra* note 106 and accompanying text.

¹⁶⁹ See *supra* note 153 and accompanying text.

¹⁷⁰ *Increasing Violence*, *supra* note 1, at 90-94, 103-04 (statement of Drew S. Days III). The Department carries out its investigations in cooperation with local law enforcement agencies.

¹⁷¹ *Id.* at 91, 93-94 (statement of Drew S. Days III), 117-18 (statement of Althea T.L. Simmons, Director, Washington Bureau, NAACP). This "wait and see" policy apparently has reasserted itself in full force. The Department of Justice policy prior to 1977 concerning dual prosecutions of an individual for the same act was to defer to the state investigation and prosecution and to proceed only when the conduct involved was particularly egregious and elicited intense public outrage. *Id.* at 28, 32 (referring to the circumstances of *United States v. Price*, 383 U.S. 787 (1966)). A new policy was instituted under Attorney General Griffin Bell in 1977 that mandated consideration of each criminal civil rights violation on its own merits, "regardless of whatever related enforcement action has been taken by the states." Memorandum to All United States Attorneys, *Dual Prosecution Policy in Cases Involving Violations of Civil Rights*, from Griffin B. Bell, Attorney General (July 12, 1977), reprinted in *Increasing Violence*, *supra* note 1, at 121. By 1980, it was apparent that the Department was not living up to its stated objective and was still deferring to local proceedings, taking action only when local prosecutors failed to produce adequate results. *Increasing Violence*, *supra* note 1, at 118 (statement of Althea T.L. Simmons). By 1983, consideration of the adequacy of a state prosecution for racial violence was no longer considered irrelevant to the question of proceeding with a federal prosecution. Such consideration had become an integral part of the decision whether to prosecute federally. Telephone interview, *supra* note 4; see *infra* note 173.

sentences, the Department will assess its chances of success, weighing the evidence and the claim of federal jurisdiction,¹⁷² and then decide whether to convene a grand jury.¹⁷³ Indictments and eventually convictions may be secured, perhaps as long as three or four years after the crime has been committed.¹⁷⁴

This system has failed adequately to deter and punish racially motivated violence. The Department of Justice should not defer to state prosecutions when it has an adequate basis for proceeding immediately.¹⁷⁵ Convening a federal grand jury soon after outbreaks of racial violence in an area can have a strong deterrent effect on future vio-

¹⁷² That is, the Department determines whether the conduct involved is cognizable under one or more of the federal criminal civil rights statutes. See, e.g., *supra* note 124.

¹⁷³ The Department of Justice presently employs three criteria in determining whether to prosecute in a criminal civil rights case:

- (1) The meeting of the relatively narrow jurisdictional requirements of one or more federal criminal civil rights statutes;
- (2) The likelihood of conviction of the accused (*i.e.*, is the accused the actual perpetrator of the crime);
- (3) The action taken at the state level. Was there a state prosecution? If there was, what was the result, both as to the verdict and the sentence, if any? Was the sentence adequate in view of the seriousness of the crime?

Telephone interview, *supra* note 4.

Dual prosecution in general is disfavored by the Department as a matter of policy. However, the standard for going ahead with an additional prosecution is somewhat lower in the civil rights area. Telephone interview, *supra* note 4.

¹⁷⁴ The Greensboro killings, see *supra* text accompanying note 2, took place in November 1979. The unsuccessful state criminal prosecution ended a year later, in November 1980. The Justice Department initially claimed, in December 1980, that there was no basis for federal jurisdiction; that is, that no rights cognizable under the federal criminal civil rights statutes had been violated. Pressure for federal intervention continued to mount. In May 1981, the U.S. Attorney for the Middle District of North Carolina made public his recommendation that federal civil rights prosecutions be brought against the Klan and Nazi killers. In March 1982, a federal grand jury was impanelled. One year later, in April of 1983, three and one-half years after the Greensboro shootings, the grand jury finally handed down federal indictments. See *supra* note 96. The federal trial was not concluded until April 1984. See *supra* note 163.

In most instances, obtaining indictments and convictions under federal civil rights statutes does not take so long, as federal authorities are usually quick to prosecute when it is apparent that no state prosecution is forthcoming. When federal officials defer to a state prosecution and await its outcome, however, the dangerous perception of a weak and ineffectual governmental response arises and exacerbates an already tense situation. See generally *Increasing Violence*, *supra* note 1, at 93-94, 95-98; Charns, *supra* note 2, at 9, col. 1. When a state prosecution fails to convict or adequately sentence defendants in racial violence and intimidation cases, violent extremist groups claim victory and "vindication" of their actions and ideas. Several of the defendants acquitted in the Greensboro state prosecution have since become heroes of Klan-Nazi society, and now frequently appear as speakers at rallies. A History of Racism and Violence, *supra* note 1, at 50.

¹⁷⁵ That the Justice Department has the constitutional authority to proceed with a federal prosecution is clear. See *supra* text accompanying note 119. The present "wait and see" policy is antithetical to the Department's duty to enforce the federal criminal law. Although inadequacy of local law enforcement was certainly a primary reason for the original enactment of § 241 (see *United States v. Price*, 383 U.S. 787, 810-19 (1966) (appendix to the opinion of the

lence.¹⁷⁶ If the state also prosecutes the offenders, the deterrent effect is even greater, but state prosecution does not relieve federal officials of their responsibility to enforce federal law. American history, from the Reconstruction Era to the Civil Rights Movement, indicates that the federal government has of necessity become the primary guarantor of individual civil rights,¹⁷⁷ especially the right to be free of injury or intimidation because of one's race or religion. Responsibility rests, therefore, on the federal government to prosecute actively all acts of racial and religious violence and intimidation that are subject to federal jurisdiction.

B. RECENT CIVIL CASES UNDER FEDERAL CIVIL RIGHTS STATUTES

The power of the criminal civil rights statutes to deter racial violence and harassment is of course limited; the statutes can only punish the perpetrators of harm after-the-fact, and can only be enforced by the federal government, not by private parties. Suits brought by private plaintiffs under the civil sections of the federal civil rights acts can prevent racial violence,¹⁷⁸ enjoin racial harassment,¹⁷⁹ or compensate the victims of racial violence and intimidation.¹⁸⁰

The primary federal civil statute for rectifying civil rights interference by private individuals is 42 U.S.C. § 1985(c),¹⁸¹ which grants a private right of action to any person deprived "of the equal protection of the laws, or of equal privileges and immunities under the laws" by pri-

Court, containing the remarks of Senator Pool, the sponsor of § 241)), Congress simply did *not* make it an element of the § 241 offense.

¹⁷⁶ *Increasing Violence*, *supra* note 1, at 29.

¹⁷⁷ Congress, in enacting the Reconstruction Era civil rights statutes, made the federal courts "the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." *Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (emphasis in original); *cf.* *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972) ("[a]s a result of the new structure of law that emerged in the post-Civil War era . . . the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established").

¹⁷⁸ *See infra* notes 197-212 and accompanying text.

¹⁷⁹ *See infra* notes 229-32 and accompanying text.

¹⁸⁰ *See infra* notes 191-96 and accompanying text; *see also infra* note 233.

¹⁸¹ 42 U.S.C. § 1985(c) was formerly designated § 1985(3). It provides in part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person or class of persons . . . of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . [and] if one or more [conspirators] . . . does . . . 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 States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1985(c) is derived from part of § 2 of the 1871 Civil Rights Act, also known as the Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13-14 (1871).

vate conspirators.¹⁸² The elements of a cause of action under section 1985(c), as outlined by the United States Supreme Court in *Griffin v. Breckenridge*,¹⁸³ are: (1) the defendants "must conspire or go in disguise on the highway or on the premises of another," (2) "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws," (3) the defendants must act in furtherance of the object of the conspiracy, whereby (4) another is (a) injured in person or property, or (b) "deprived of having and exercising any right or privilege of a citizen of the United States."¹⁸⁴

As interpreted by the Court in *Griffin*, "intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."¹⁸⁵ As with 18 U.S.C. § 241,¹⁸⁶ the rights allegedly violated by the defendant in a section 1985(c) suit must be those within the power of Congress to protect from private interference.¹⁸⁷

Since the Supreme Court's broad interpretation of section 1985(c)

¹⁸² See *supra* note 181.

¹⁸³ 403 U.S. 88 (1971). In *Griffin*, the Court expanded the formerly narrow reach of § 1985(c) as interpreted in earlier cases. See, e.g., *Collins v. Hardyman*, 341 U.S. 651 (1950). In rejecting its earlier approach, which in effect had placed a "state action" limitation on the statute, see Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 495-96 (1974), the Court in *Griffin* held § 1985(c) applied to private conspiracies. But to limit the reach of the broad language of the statute, the Court interpreted the "purpose of depriving . . . any person . . . of the equal protection of the laws" language in the statute to mean that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102. Because the *Griffin* plaintiffs suffered deprivations of thirteenth amendment rights and the right of interstate travel, the Court did not decide whether the statute reached wholly private conspiracies against fourteenth amendment rights. Thus, the Court in *Griffin* also did not consider whether Congress has power to reach private action under section five of the fourteenth amendment. 403 U.S. at 105-06.

¹⁸⁴ *Griffin*, 403 U.S. at 102-03 (quoting petitioners' complaint).

¹⁸⁵ *Id.* at 102 (emphasis in original). In *United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 103 S. Ct. 3352 (1983), the United States Supreme Court held that § 1985(c) does not reach wholly private conspiracies against fourteenth amendment rights. Thus, to be cognizable under § 1985(c), a conspiracy against the exercise of first amendment rights (or other rights applicable to the states through the Due Process Clause of the fourteenth amendment) must involve state officials or an attempt "to influence the activity of the state." *Id.* at 3357. The Court in *Scott* also ostensibly declined to further clarify *Griffin's* requirement of class-based, invidiously discriminatory animus, but held that the requirement was not met where the conspiracy was motivated by "economic or commercial animus." *Id.* at 3360. While the Court in *Scott* did hold that § 1985(c) does not itself protect fourteenth amendment rights from wholly private interference, it did not indicate that Congress does not have the power to protect fourteenth amendment rights against private interference under the fifth section of that amendment. *Id.* at 3357-58. See *supra* note 124.

¹⁸⁶ See *supra* text accompanying notes 124-29.

¹⁸⁷ *Griffin*, 403 U.S. at 104; see *supra* notes 124, 185.

in *Griffin*,¹⁸⁸ the number of suits brought under it by racial minorities and others has greatly increased.¹⁸⁹ Because section 1985(c) was designed to provide a remedy for private violence and intimidation by the Ku Klux Klan in the Reconstruction Era, it is well-suited to redressing the private racially motivated violence that has continued into the 1980's.¹⁹⁰

In *Adams v. Kilgore*,¹⁹¹ a civil suit based on the assault of a black man and his white wife in Alabama, the plaintiffs sought damages and injunctive relief. The complaint alleged causes of action based on, *inter alia*, section 1985(c), and the thirteenth amendment.¹⁹² With regard to the section 1985(c) cause of action, the plaintiffs alleged that the four defendants had conspired, and overtly acted, to deprive them of the equal protection of the laws and of equal privileges and immunities under the laws, by acting out of a racial animus "against blacks, and against all blacks and whites who desire to live [together] free of segregation."¹⁹³

The constitutional bases for the application of section 1985(c) to the private attack on the married couple were the plaintiffs' thirteenth amendment right to be free from the badges and incidents of slavery, and the freedom of interstate travel.¹⁹⁴ The district court sustained the section 1985(c) cause of action, and a jury awarded the plaintiffs \$5000

¹⁸⁸ See *supra* note 183.

¹⁸⁹ See generally Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402 (1979); Note, *Protection of Religious Group Members Under 42 U.S.C. § 1985(c)*, 39 WASH. & LEE L. REV. 555, 555 n.3 (1982).

¹⁹⁰ The statute is well-suited to this end because of its broad language, and because the goals and methods of the Klan and other violent extremist groups are essentially the same as they were during the Reconstruction Era.

¹⁹¹ Complaint, No. 81P 224-M (N.D. Ala. Feb. 13, 1981). This civil case arose from the same events described in *United States v. Kilgore*, No. 81C 27-M, (N.D. Ala. Feb. 6, 1981). See *supra* notes 130-37 and accompanying text.

¹⁹² Among the other causes of action was one based on 42 U.S.C. § 1986 (1976), which provides in part:

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 so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented

The statute is derived from § 6 of the 1871 Civil Rights Act, ch. 22, § 6, 17 Stat. 15 (1871). The statute creates an inherent second cause of action against every conspirator, as each necessarily knows of the acts "to be committed," and could prevent their occurrence by, for example, contacting the police.

¹⁹³ *Adams*, complaint at 5. The object of the conspiracy was to threaten and physically attack the plaintiffs so as to force them to leave the area. *Id.* at 4, 5.

¹⁹⁴ *Id.* at 4-6.

in compensatory damages.¹⁹⁵

Perhaps the best example of the power of these Reconstruction Era civil rights statutes to combat the violence and intimidation of racist groups can be found in a case arising from a recent confrontation on the Texas Gulf Coast. In *Vietnamese Fisherman's Association v. Knights of the Ku Klux Klan* (I),¹⁹⁶ American fishermen, alarmed by a growing influx of refugee Vietnamese fishermen, asked the Knights of the Ku Klux Klan for assistance.¹⁹⁷ The Klan held a rally in support of the American fishermen, at which the Grand Dragon of the Texas Klan, and leader of its "Texas Emergency Reserve" paramilitary wing, demonstrated how to burn a boat. He also offered to train interested American fishermen in his military camps.¹⁹⁸ Soon after, several armed and robed Klansmen went on a "boat ride," brandishing their weapons and intimidating the Vietnamese fishermen.¹⁹⁹ Numerous other acts of intimidation occurred, including threatening phone calls, personal harassment, and the burning of Vietnamese boats.²⁰⁰

The plaintiff class of Vietnamese fishermen sought to enjoin the defendants from engaging in acts of violence or intimidation, relying on, *inter alia*,²⁰¹ 42 U.S.C. §§ 1981,²⁰² 1985(c), and 1986,²⁰³ the thirteenth and fourteenth amendments, and a Texas statute forbidding the formation of private armies.²⁰⁴ The district court held that the plaintiffs had demonstrated a substantial likelihood of prevailing on the merits under 42 U.S.C. §§ 1981, 1985(c), and 1986, and on other claims.²⁰⁵ Having thus found that the circumstances warranted injunctive relief, the court

¹⁹⁵ Telephone interview with John Furman, Research Director of the Southern Poverty Law Center, Montgomery, Alabama (Mar. 8, 1983).

¹⁹⁶ 518 F. Supp. 993 (S.D. Tex. 1981).

¹⁹⁷ *Id.* at 1001.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1002.

²⁰⁰ *See id.* at 1001-06.

²⁰¹ The plaintiffs also alleged claims under 42 U.S.C. § 1982 (1976); the Sherman Act, 15 U.S.C. §§ 1, 15, 21, and 26 (1982); the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962 and 1964 (1982); and the common law torts of assault, trespass to personal property, intentional infliction of emotional distress, and intentional interference with contractual relations. 518 F. Supp. at 999-1000.

²⁰² 42 U.S.C. § 1981 (1976) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The statute is derived from § 1 of the 1866 Civil Rights Act, 1 ch. 31, 14 Stat. 27 (1866).

²⁰³ For text of § 1986, see *supra* note 192.

²⁰⁴ 518 F. Supp. at 999-1000.

²⁰⁵ *Id.* at 1016. The court also sustained the claims made under the Sherman Act, 15 U.S.C. § 1, and the common law tort of tortious interference with contractual relations. *Id.*

granted a preliminary injunction against the defendant Ku Klux Klan, enjoining it from interfering with or intimidating the plaintiff class of Vietnamese fishermen.²⁰⁶

To establish a violation of section 1985(c), the plaintiffs had to prove that the defendants conspired to deprive them of the equal protection of the laws.²⁰⁷ Under the Fifth Circuit interpretation of *Griffin v. Breckenridge*,²⁰⁸ this required a finding that the "actions of the defendants' conspiracy . . . demonstrate a violation of some law, independent of [section 1985(c)]."²⁰⁹ Relying on the defendants' violation of section 1981,²¹⁰ an independent law, the plaintiffs demonstrated a substantial likelihood of success as to the claimed violation of section 1985(c).²¹¹

In *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan* (II),²¹² the plaintiff Vietnamese fishermen obtained an injunction against all Klan paramilitary operations in Texas. The defendant Knights of the Ku Klux Klan had been operating four paramilitary training camps in the state under the name of the "Texas Emergency

²⁰⁶ *Id.* at 1016-17.

²⁰⁷ The court proceeded under the "equal protection of the laws" provision, and not the "equal privileges and immunities" clause of the statute, *id.* at 1006, noting Fifth Circuit authority for the proposition that the latter clause did not apply to aliens. *See United States v. Biloxi Municipal School District*, 219 F. Supp. 691, *aff'd*, 326 F.2d 237 (5th Cir. 1963).

²⁰⁸ 403 U.S. 88 (1971); *see supra* notes 183-88 and accompanying text.

²⁰⁹ *Id.* at 1006. The necessity of proving this "fifth element" to sustain a cause of action under 42 U.S.C. § 1985(c) is an innovation introduced by the Fifth Circuit in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc). The addition of this element limits the newly expanded scope of § 1985(c) established in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), discussed *supra* notes 183-85 and accompanying text. For criticism of the Fifth Circuit's approach, see Case Comment, *Private Conspiracies to Violate Civil Rights: McLellan v. Mississippi Power & Light Co.*, 90 HARV. L. REV. 1721, 1729 (1977) (the Fifth Circuit's approach is criticized as "an insensitive attempt to contain the statute which overreaches the purpose of such a limitation and inhibits the statute's protection of important individual rights").

²¹⁰ Section 1981 protects the right of all persons to make and enforce contracts. *See supra* note 202. The defendants' threatening activities had interfered with the ability of the Vietnamese fishermen to make and enforce contracts with dock owners. 518 F. Supp. at 1008.

²¹¹ 518 F. Supp. at 1016. Having demonstrated that the defendants had violated § 1985(c), the plaintiffs were then able to show that the defendants also violated § 1986 by failing to prevent the intimidation that violated § 1985(c). *See supra* note 192 for the text of § 1986, which grants a private right of action against anyone who, having the power or authority to do so, knowingly fails to prevent the commission of an act that violates § 1985.

The preliminary injunction against the Klan, issued six hours before the start of the Galveston shrimping season, brought peace to the Kemah-Seabrook area. However, the district court refused to enjoin the Klan's paramilitary camps in Texas without opportunity for a full hearing. *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan* (II), 543 F. Supp. 198, 202 (S.D. Tex. 1982).

²¹² 543 F. Supp. 198 (S.D. Tex. 1982). An interesting facet of the *Vietnamese Fishermen's* cases was that the presiding district court judge, Gabrielle McDonald, is black. She denied the defendants' motion requesting that she disqualify herself from hearing the case. 518 F. Supp. 1017 (S.D. Tex. 1981).

Reserve."²¹³ Trainees at the camps dressed in military uniforms, and learned to ambush, counter-ambush, and perform reconnaissance patrol missions.²¹⁴ Weapons-use was taught extensively, with emphasis on automatic and semi-automatic weapons.²¹⁵ The "Texas Emergency Reserve" was directly involved in Klan intimidation of the Vietnamese fishermen.²¹⁶

The plaintiff class presented two grounds for an injunction against the Klan's military activities: (1) "to remedy fully the profound deprivation by defendants of plaintiffs' constitutional rights,"²¹⁷ and (2) to enforce article 5780, section 6, of Texas Revised Civil Statutes Annotated,²¹⁸ which prohibits the formation of private armies.²¹⁹ The court issued a permanent injunction against the Klan's military activities on the first ground, relying on the findings of the preliminary hearing that had established the defendants' violation of plaintiffs' rights under 42 U.S.C. §§ 1981, 1985(c), and 1986.²²⁰ The court held further that issuance of the injunction did not violate the defendants' rights of free speech and association,²²¹ nor their second amendment right to bear arms.²²²

²¹³ 543 F. Supp. 198, 203-04 (S.D. Tex. 1982).

²¹⁴ *Id.* at 203.

²¹⁵ *Id.* at 204. Training in biological and chemical warfare, including the use of gas masks, was available, along with rifle practice and sniper avoidance training.

²¹⁶ *Id.* at 206. For example, the "Texas Emergency Reserve" participated directly in the March 1981 "boat ride." *Id.*

²¹⁷ *Id.* at 202.

²¹⁸ TEX. REV. CIV. STAT. ANN. art. 5780, § 6 (Vernon Supp. 1982) provides in part:

No body of men, other than the regularly organized State Military Forces of this state and the troops of the United States, shall associate themselves together as a military company or organization or parade in public with firearms in any city, or town of this state

²¹⁹ The State of Texas had joined as a party, also requesting an injunction against Klan military operations in Texas. The court held that the State of Texas was properly before the court and could intervene to enforce the state statute. *Vietnamese Fisherman's* (II), 543 F. Supp. at 213.

²²⁰ *Id.* at 207, 211. The court ruled that the Texas anti-paramilitary statute was also an adequate ground for the issuance of the injunction, holding that it completely prohibited the formation of private armies, such as the "Texas Emergency Reserve." *Id.* at 198, 218. The court held that the plaintiff class of Vietnamese fishermen had standing to enforce the Texas statute, *id.* at 212, and ruled that the statute was constitutional, relying on *Presser v. Illinois*, 116 U.S. 252 (1886), in which the Supreme Court had upheld a similar statute as constitutional. *Id.* at 216.

²²¹ *Id.* at 208. The court quoted *Presser*, 116 U.S. at 267 (1886): "Military operation and military drill and parade under arms are subjects especially under control of the government of every country. They cannot be claimed as a right independent of law." 543 F. Supp. at 209. The court also held that an injunction would be a minimal restriction on defendants' right to free expression: "defendants remain free to express their views by means other than the threat of military force."

²²² *Id.* at 210. Quoting from the second amendment, the court ruled that it "prohibits only such infringement on the bearing of weapons as would interfere with 'the preservation or

The court's finding that the injunction could be granted solely on the basis of the defendants' deprivation of the plaintiffs' civil rights, without resort to the state statute prohibiting private armies, is especially important. Although twenty-four other states have anti-paramilitary laws,²²³ Klan paramilitary training is already occurring in states that do not have such laws.²²⁴ The court stated that equitable principles dictated that an injunction issue against the "Texas Emergency Reserve" because "it is the [Texas Emergency Reserve] which enables the Knights of the Ku Klux Klan and those who conspire with them, to perpetuate their threats of intimidation and violence toward the plaintiff class and provide[s] the wherewithal to carry out those threats."²²⁵ As the court noted, the Klan paramilitary phenomenon is a nationwide problem.²²⁶ When private military organizations seek to interfere by force with the civil rights of minority citizens, such inherently dangerous activities must be enjoined.²²⁷

The civil remedy provided by section 1985(c) has been invoked recently to protect the first amendment right of minorities to engage in demonstrations or protest marches. *Southern Christian Leadership Conference v. The Invisible Empire, Knights of the Ku Klux Klan*²²⁸ is a class action lawsuit currently being brought on behalf of all Alabama blacks that seeks to recover \$43 million in damages from the nation's largest Klan organization and to enjoin it from interfering with the federally protected rights of the class.²²⁹ The case is based on terrorist activities carried out against blacks in Decatur, Alabama that culminated in a violent attack on peaceful protesters in May 1979.²³⁰ The plaintiffs as-

efficiency of a well regulated militia,' organized by the State." *Id.* The State of Texas, then, in the absence of federal preemption, was the sole judge of the proper means to maintain its militia and it had by statute prohibited private armies. *See supra* notes 218-19.

²²³ *See supra* note 22.

²²⁴ *See supra* notes 6-8 and accompanying text.

²²⁵ *Vietnamese Fishermen's* (II), 543 F. Supp. at 210-11.

²²⁶ *Id.* Relying on *Vietnamese Fishermen's* (II) and an Alabama statute similar to the Texas statute invoked here, Klanwatch attorneys have recently succeeded in obtaining an injunction against Klan paramilitary activity in Alabama. *Paramilitary Unit of KKK is Banned by Judge*, POVERTY L. REP., Feb. 1984, at 1.

²²⁷ The concern of the *Vietnamese Fishermen's* (II) court for the threat presented by such Klan activities is clear from its conclusion:

The existence of Klan sponsored military organizations which train people in the use of violence presents a new and more serious threat to individuals' civil rights. Regardless of whether it is called defense training or survival courses, it is clear to this Court that the proliferation of military/paramilitary organizations can only serve to sow the seeds of future domestic violence and tragedy.

543 F. Supp. at 219.

²²⁸ Amended complaint, No. 80-HM-1449-S (N.D. Ala. Oct. 19, 1983).

²²⁹ *Southern Christian Leadership Conference*, amended complaint at 2, 8.

²³⁰ The People's Association of Decatur, a civil rights and equal opportunity organization of blacks in the Decatur area, began a series of lawful marches and rallies to protest the arrest

sert causes of action based on sections 1981, 1985(c), and 1986, together with claims based directly on constitutional provisions and tort claims.²³¹

Adams and Vietnamese Fishermen's are excellent illustrations of the broad preventive and compensatory powers of the Reconstruction Era civil rights acts. Wider recognition and employment of these civil remedies is needed to help curb outbreaks of racial violence. A movement in this direction has begun, but it must be strengthened if these civil statutes are to provide a credible deterrent to racial violence and intimidation.²³² One long-ignored alternative is for the Department of Justice to bring broad-based injunctive suits against the violent activities of groups motivated by racial and religious hatred. This technique was developed in the 1960's to combat the Ku Klux Klan's intense resistance to the civil

and conviction of a mentally retarded black man for the alleged rape of three white women in 1978. The scope of the protests was gradually broadened to other grievances, including unequal treatment in education, law enforcement, housing, and employment. The Klan began a sporadic series of cross-burnings and rallies, gun parades, and violent attacks that continued until May 1979. On May 26, the anniversary of the arrest, about 100 Klansmen armed with guns, clubs, and iron pipes broke through a line of forty police officers and attacked the peaceful marchers, seriously injuring several police officers and marchers. *Id.* at 7-11.

²³¹ If the plaintiffs prove the allegations in the complaint, they should succeed on the § 1985(c) and § 1986 claims. All the elements of a § 1985(c) claim are present, including a racially motivated purpose to deprive the plaintiffs of the equal protection of the laws by interfering with their peaceful exercise of first amendment rights of free expression and association. *See supra* notes 183-88 and accompanying text. The United States Supreme Court has held, however, that § 1985(c) does not apply to wholly private conspiracies against first amendment rights because they depend on the operation of the fourteenth amendment, which is a limitation on state, not private action. *United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 103 S. Ct. 3352 (1983); *see also* *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976); *Bellamy v. Mason's Stores*, 508 F.2d 504 (4th Cir. 1974); Note, *Civil Rights—State Action Is a Requirement for the Application of Section 1985(3) to First Amendment Rights*, 54 N.C.L. REV. 677 (1976).

Nevertheless, the § 1985(c) claim in this case is probably still sound because here the Klansmen interfered with and injured state officers to prevent them from securing the plaintiffs' rights to equal protection of the laws. This is precisely the sort of private interference with fourteenth amendment rights that Congress sought to prevent by enacting § 2 of the 1871 Civil Rights Act, the original source of § 1985(c). *See* Comment, *supra* note 189. *Compare Scott*, 103 S. Ct. at 3357 (§ 1985(c) is violated where "the aim of the conspiracy is to influence the activity of the state").

²³² *See generally Increasing Violence*, *supra* note 1, at 25 (statement of Arthur Kinoy). The tragic occurrences described at the outset of this Comment have given rise to federal civil litigation. *See supra* text accompanying notes 1-3. *Waller v. Batkovich*, No. 80-605G (D.N.C. filed Nov. 3, 1980), is a civil suit arising out of the Greensboro, North Carolina killings. Named defendants include the Klansmen and Nazis acquitted in the state criminal trial, as well as the Department of Justice and local officials, who are accused of complicity in the killings. *See Klan Must Pay Victims*, POVERTY L. REP., Mar./Apr. 1982, at 11. The women wounded in Chattanooga, Tennessee have received a federal court jury award of \$535,000 in damages against the Klansmen who shot them but were acquitted in the state prosecution. *Crumsey v. Justice Knights of the Ku Klux Klan*, No. 1-8-287 (E.D. Tenn. Mar. 1, 1982); *see Klan Must Pay Victims*, *supra*, at 9.

rights movement but has not been used since.²³³ It should be employed in the future whenever serious racial or religious violence becomes a continuing problem in local areas.

IV. CONCLUSION

Local, state, and federal governments must respond forcefully to the rising wave of extremist group violence against minorities. While government should protect the constitutional rights of extremist group members, it should also move quickly to protect the lives and civil rights of those threatened with violence because of their race or religion. The federal civil rights acts provide adequate remedies to supplement deficient state legal systems, but are inadequately enforced by the Department of Justice and by the public. The security of the basic rights of citizens depends on more vigorous enforcement of these federal remedies, together with strong efforts to improve public awareness and education on civil rights issues.

GREGORY L. PADGETT

²³³ There are only two reported cases of injunctive suits brought by the Department of Justice to combat racial violence: *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965) (three-judge court), and *United States v. United States Klans, Knights of Ku Klux Klan, Inc.*, 194 F. Supp. 897 (M.D. Ala. 1961).

In *Original Knights*, the Justice Department sued for an injunction to protect blacks in Washington Parish, Louisiana, who were seeking to assert their civil rights under the 1964 Civil Rights Act (public accommodations and equal employment opportunity) and the 1965 Voting Rights Act, 42 U.S.C. § 1971, 1973 to 1973bb-1 (1976) (registration and voting). Finding that the Klan relied on intimidation, economic coercion, and physical violence to "frustrate the national policy expressed in civil rights legislation," the court enjoined the organization from assaulting, threatening, harassing, or otherwise interfering with local Negro citizens in the exercise of their civil rights under the Civil Rights Acts. 250 F. Supp. at 334-35.

In *United States Klans*, the court enjoined several Alabama Klans from interfering with the interstate travel of civil rights workers, by harassing, threatening, or assaulting them, and by injuring the property and workers of bus companies carrying passengers in interstate commerce. The court also enjoined the activities of several local officials who had assisted the Klansmen, or who had refused to enforce local law, thereby denying equal protection. 194 F. Supp. at 902-03.