AN ANTI-CONSPIRACY THEORY: HOW ANTITRUST LAW IS ERODING THE CONSTITUTIONAL RIGHTS PROTECTION SET FORTH IN § 1985(3) AND § 1983

INTRODUCTION

In October of 1868,[1] Benjamin F. Randolph, a Black state senator in South Carolina, was shot dead by three white men as he was stepping off the train.[2] Though the assassination occurred in broad daylight with multiple witnesses, no one ever faced charges for the murder. D. Wyatt Aiken, a former Confederate colonel, was arrested in relation to the assassination,[3] but he was quickly released.[4] Aiken responded to his arrest by publishing a letter in the local paper alleging that his detention was felonious and harkened back to an "old regime" under which he could have successfully contested such a display of state authority.[5] In 1870, Congressional hearings uncovered the testimony of a man who claimed to have participated in the assassination of Randolph as part of his activities with a club headed by Aiken that was dedicated to "kill[ing] out [sic] the leaders of the Republican party and driv[ing] them out of the state."[6] That club was the now-infamous Ku Klux Klan ("the Klan"),[7] and the assassination of Randolph was only one instance of a pattern[8] of increasing violence in the post-Civil War American South.

Although the Klan was not uniform in its actions or goals, its widespread use of terror tactics and infiltration of law enforcement agencies allowed the Klan to pose a serious threat to the order and stability of Southern states.[9] To combat this rising violence by white supremacists in the post-Civil War

1. A.V. Huff, Jr., Political Assassination in South Carolina, Address Before the 70th Annual Meeting of the University South Caroliniana Society (Apr. 29, 2006), *in* UNIVERSITY SOUTH CAROLINIANA SOCIETY, 2007 REPORT OF GIFTS 3 (2007).

2. J. MICHAEL MARTINEZ, CARPETBAGGERS, CAVALRY, AND THE KU KLUX KLAN 25 (2007).

3. *Arrest of Colonel D. Wyatt Aiken*, DAILY PHOENIX (Columbia, S.C.), Nov. 10, 1868, at 2.

4. *Release of Colonel Aiken*, DAILY PHOENIX (Columbia, S.C.), Nov. 15, 1868, at 2.

5. *The New Regime. Sharp Letter from Colonel D. Wyatt Aiken Denouncing the Late Arbitrary Arrest*, CHARLESTON DAILY NEWS, Nov. 19, 1868, at 1.

6. RICHARD ZUCZEK, STATE OF REBELLION: RECONSTRUCTION IN SOUTH CAROLINA 54, 57–58 (1996).

7. *Id.* at 54.

8. *E.g.*, *A Radical Shot*, DAILY PHOENIX (Columbia, S.C.), Nov. 10, 1868, at 2. On the same day that the newspaper announced the arrest of Colonel Aiken, reports were published that another Black representative was shot, though he survived the resulting shoulder wound. *Id.*

9. *See* MARTINEZ, *supra* note 2, at 25.

South, the Forty-Second Congress passed the Civil Rights Act of 1871.[10] This Act, now codified in part at 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3), gave victims of discrimination a private cause of action for the deprivation of their constitutional rights.[11] Though the Civil Rights Act of 1871 was intended to encompass a broad range of discriminatory behavior, legislators expressed a particular concern for conspiracies enacted by members of law enforcement against minority populations.[12] The Civil Rights Act and the causes of action it created were largely ignored by the lower courts until the Supreme Court's decision in *Griffin v. Breckenridge*[13] revived the Act as a source of civil rights litigation.[14] Since this decision, provisions of the Civil Rights Act of 1871 have become central mechanisms for litigating and enforcing civil rights.[15]

However, within a decade of the *Griffin* ruling, conspiracy claims under the Civil Rights Act were again under threat—this time by the spread of an antitrust doctrine called the intracorporate conspiracy doctrine (ICD).[16] This doctrine arises from the notion that, under the law, the corporation is a singular and unified person; as such, different representatives of a corporation cannot conspire with each other, just as a natural person could not conspire with themselves.[17] The ICD effectively eliminates civil conspiracy liability when: (1) the conspirators share the same employer and (2) are operating within the scope of their employment.[18] The ICD was first applied to conspiracy claims under only one portion of the Civil Rights Act

10. Catherine E. Smith, *(Un)masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act*, 11 VA. J. SOC. POL'Y & L. 129, 130 (2004).

11. Eric A. Harrington, *Judicial Misuse of History and § 1983: Toward a Purpose-Based Approach*, 85 TEX. L. REV. 999, 1019 (2007); Lynn Adelman, *The Erosion of Civil Rights and What to Do About It*, 2018 WIS. L. REV. 1, 3 (2018).

12. Paul J. Gardner, *Private Enforcement of Constitutional Guarantees in the Ku Klux Act of 1871*, 2 CONST. STUD. 81, 87–89 (2016).

13. 403 U.S. 88 (1971).

14. Allen Page, *The Problems with Alleging Federal Government Conspiracies Under 42 U.S.C. § 1985(3)*, 68 EMORY L.J. 563, 570 (2019). *Griffin v. Breckenridge* reversed an earlier Supreme Court holding that limited § 1985(3) claims to only those perpetrated under the color of law. *Griffin* expanded the reach of § 1985(3) claims to encompass the actions of private actors, while also lowering the barrier for pleading, as plaintiffs no longer had to demonstrate that the conspiracy occurred under the color of law. *Id.* at 570–71. Though some of the actions discussed in this Note would have been possible before *Griffin*, the ruling in *Griffin* remains a landmark case because of the way it primed the Civil Rights Act of 1871 to become a primary source of civil rights litigation. *See also* Geoff Lundeen Carter, *Agreements Within Government Entities and Conspiracies Under § 1985(3)—A New Exception to the Intracorporate Conspiracy Doctrine?*, 63 U. CHI. L. REV. 1139, 1144–45 (1996); Smith, *supra* note 10, at 142–44.

15. Adelman, *supra* note 11, at 3 (describing the important and wide-reaching application of § 1983, the modern codification of one section of the Civil Rights Act of 1871).

16. Page, *supra* note 14, at 581–84.

17. *Id.* at 579.

18. J.S. Nelson, *The Intracorporate Conspiracy Trap*, 36 CARDOZO L. REV. 969, 976–77 (2015).

of 1871.[19] Because the Act provided an alternative means of relief, there was little practical effect.[20] Now, courts are beginning to expand the doctrine to encompass the remaining section of the Act, leaving plaintiffs with no alternative avenue to pursue conspiracy claims concerning civil rights.[21] As an effect of the expansion of the ICD, many police officers are immune from civil conspiracy charges while on the job, as their co-conspirators tend to be other officers with the same municipal employer.[22]

At a moment when police brutality, extremist violence, and white supremacy have come to dominate the headlines,[23] the time has never been more ripe to consider the history and modern-day application of the ICD to civil rights claims and to advocate for the abolishment of the doctrine in such a context. After this introduction in Part I, Part II will present the applicable provisions of the Civil Rights Act of 1871 and provide a definition of the ICD. Part III will look at the history of those concepts and at their original purposes. Part IV will trace the interactions of the ICD and the Civil Rights Act of 1871 and where they stand today. Part V will advocate for the abolishment of the ICD in the civil rights context. Part VI will propose two methods of abolishing the doctrine. The first of these methods imagines a legislative solution, while the second employs the courts. Part VII will consist of concluding remarks.

I. BACKGROUND

This Note looks at the interplay of several different legal concepts. For the sake of clarity, definitions of these concepts will be provided in this section.

19. Smith, *supra* note 10, at 146 (describing the first application of the intracorporate conspiracy theory to any section of the Civil Rights Act of 1871).

20. *See, e.g.*, Faulk v. City of St. Louis, No. 4:18-cv-308-JCH, 2021 WL 37989, at *6 (E.D. Mo. Jan. 5, 2021), *appeal docketed*, No. 21-1116 (8th Cir. Jan. 15, 2021) (demonstrating a plaintiff who alleged a conspiracy claim under § 1983 after the Eighth Circuit held that the intracorporate conspiracy doctrine barred claims against law enforcement under § 1985(3)).

21. *See, e.g.,* Jackson v. City of Cleveland, 925 F.3d 793 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020).

22. *See* Page, *supra* note 14, at 591.

23. *See, e.g.*, *On the Scene: Week 1 of the Trial of Derek Chauvin*, N.Y. TIMES (Apr. 3, 2021), https://www.nytimes.com/2021/04/02/us/on-the-scene-week-1-of-the-trial-of-derek-chauvin.html [https://perma.cc/GG5L-YXTH]. The New York Times, like other outlets, provided extensive coverage of the trial of former officer Derek Chauvin. Mr. Chauvin was convicted of the murder of George Floyd. Mr. Floyd's death, which occurred during his arrest by Minneapolis police, has become a rallying cry for police reform.

A. Section 1985(3) and Section 1983

The two sections of the Civil Rights Act of 1871 currently codified as 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3) are distinguishable, but they share a common history and purpose.[24] Their treatment by the courts is inextricably linked, and decisions applied to one section of the Act would likely be applied to the other. Due to this historic and continuing entanglement, the definition and history of both sections will be presented and discussed, despite the fact that this Note will focus on the importance of preserving conspiracy causes of action under § 1983.

Section 1983 is broader and creates a civil action for violations of constitutional rights by state actors. Section 1983 is often used in civil rights cases concerning topics from free speech to prisoner rights to police brutality.[25] However, the state actor requirement is a key limitation of §1983 and the primary distinction between § 1983 and § 1985(3).[26] The text of § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[27]

By comparison, § 1985(3) deals specifically with conspiracies to deprive another of civil rights.[28] Though less famous than the related § 1983, §

24. *See* Smith, *supra* note 10, at 130–31; *see also* Harrington, *supra* note 11, at 1000–01 (describing the codification of § 1983); *see also* Page, *supra* note 14, at 569–70 (describing the codification of § 1985(3)).

25. Adelman, *supra* note 11, at 3 (noting that remedies for "claims for excessive force, unlawful stop and frisk, unconstitutional conditions of confinement, wrongful convictions. [sic] and many other constitutional deprivations" are available under § 1983).

26. *Compare* § 1983, *with* § 1985(3).

27. § 1983.

28. *See* Jackson v. City of Cleveland, 925 F.3d 793, 819 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020) ("§ 1985 is in its essence a conspiracy statute." (quoting Kinkus v. Vill. of Yorkville, 476 F. Supp. 2d 829 (S.D. Ohio 2007), *rev'd*, 89 F. App'x 86 (6th Cir. 2008))).

1985(3) remains a valuable tool within civil rights litigation. Importantly, courts have interpreted § 1985(3) to apply to private actors,[29] meaning that it is not subject to the same state action limitation as § 1983. The text of § 1985(3) reads in part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person . . . 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.[30]

Though § 1983 does not specifically mention conspiracies, it can be used similarly to § 1985(3) by combining a claim under the statute with a claim for civil conspiracy.[31] As explained by the Sixth Circuit:

> A civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in the damage.[32]

When the unlawful act is a violation of § 1983, the two legal concepts combine to form a claim for conspiracy to violate constitutional rights;[33] this is essentially the same claim established by § 1985(3).

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29. Griffin v. Breckenridge, 403 U.S. 88, 101 (1971).

30. § 1985(3).

31. *See, e.g.*, *Jackson*, 925 F.3d at 793 (demonstrating a plaintiff who alleged a conspiracy claim under § 1983).

32. Lyles v. Hughes, 83 F. Supp. 3d 315, 324 (D.D.C. 2015), *aff'd in part*, No. 15-5106, 2015 WL 9007382 (D.C. Cir. Oct. 30, 2015).

33. *See, e.g.*, Harrison v. Prince William Cty. Police Dep't, 640 F. Supp. 2d 688 (E.D. Va. 2009) (demonstrating plaintiff alleging conspiracy to violate civil rights in violation of § 1983).

A. The Intracorporate Conspiracy Doctrine (ICD)

As described above, a conspiracy requires the agreement of multiple parties.[34] However, because corporate personhood imagines the corporation as a single individual, "a corporate entity cannot conspire with itself because employees of a corporation are considered part of the corporate entity."[35] This idea is called the intracorporate conspiracy doctrine and it prohibits liability for a conspiracy when the conspirators are acting within the scope of their employment and all share the same employer.[36]

The ICD is grounded in two legal fictions: (1) that the corporation is a legal "person" and (2) that corporations enjoy legal unity.[37] Legal unity is the concept that the corporation and its agents are one entity that always act toward a common goal.[38] Though the ICD originated in antitrust law, it has slowly been applied to more and more areas of the law.[39] At present, the doctrine has been adopted in criminal law, torts, and civil rights cases in some circuits.[40]

II. HISTORY OF THE CIVIL RIGHTS ACT OF 1871 AND THE ICD

After the Union won the American Civil War and abolished slavery, the Southern states began to fear that the end of slavery would also bring the end to white hegemony.[41] In order to protect their political power and wealth, white Southerners began a campaign of violence against non-white citizens aimed at creating sufficient terror in order to maintain the status quo.[42] One of the most notorious and enduring consequences of this campaign of violence was the creation of the Klan.[43] The Klan was responsible for much of the worst violence against non-white citizens during the post-Civil War period, including a campaign of lynching against Black men.[44] Though Klan activities were clearly illegal, they were often privately supported by those in positions of power, such as law enforcement officers

34. *Lyles*, 83 F. Supp. 3d at 324.
35. Nelson, *supra* note 18, at 976 (quoting 16 AM. JUR. 2D *Conspiracy* § 56 (2014)).
36. *Id.* at 976–77.
37. *Id.* at 978–79.
38. *Id.*
39. *Id.* at 985.
40. *See id.* ("[T]he intracorporate conspiracy doctrine has now been approved by large numbers of states in contexts from civil rights to economic frauds and other conspiracies.").
41. Gardner, *supra* note 12, at 89 (describing efforts by Southern democrats to "maintain white supremacy").
42. S. POVERTY L. CTR.: THE KLANWATCH PROJECT, KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE 7–8 (6th ed. 2011), https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf [https://perma.cc/D77M-TDDZ].
43. *See id.* at 9.
44. *See id.* at 14.

and businessmen, and so the Klan flourished in many parts of the South with little resistance from government officials.[45]

The failure to control white violence in the South began to undermine social stability and the recently ratified Fourteenth Amendment.[46] By the end of the 1860s, the Klan had founded chapters in every Southern state.[47] During this period, the Klan acted with striking disregard for the potential legal consequences. For example, in South Carolina, Klansmen publicly assassinated two state senators, one near his home and another in front of the county courthouse, as part of their campaign of terrorism.[48] Furthermore, the Klan's reign of terror threatened not only the lives of many Americans, but also the civil process itself.[49] The Klan actively attempted to undermine voting efforts in order to ensure that as few Republicans as possible could access the polls.[50] Once elected, Republicans were frequent targets of Klan assassination, regardless of race.[51] As President Grant remarked, the Klan was dedicated "by force and terror, to deprive colored citizens of the right to bear arms and of the right of a free ballot, to suppress the schools in which colored children were taught, and to reduce the colored people to a condition closely allied to that of slavery."[52]

In an effort to save the Fourteenth Amendment and Southern stability, the Forty-Second Congress proposed the Civil Rights Act of 1871.[53] Among other measures, the Civil Rights Act of 1871 gave individuals a civil right of action for violations of constitutional rights.[54] Southern politicians immediately disliked the Act, as it extended federal law further into what they considered to be state realms.[55] Southerners also disliked the fact that federal, and not state, courts would be able to control the proceedings.[56] This

45. Gardner, *supra* note 12, at 87–88.
46. MARTINEZ, *supra* note 2, at 25.
47. *Id.* at 3, 23.
48. *Id.* at 25.
49. *Id.* at 24.
50. *Id.*
51. *Id.* at 25.
52. *Id.*
53. Smith, *supra* note 10, at 130; Gardner, *supra* note 12, at 83.
54. *See* Gardner, *supra* note 12, at 83 ("Of a different mold from other private enforcement statutes in this early period, the Ku Klux Act was more radical in its objectives. Rather than extending presently existing and well-defined rights to private litigants, the 1871 Act grappled with the enforcement of the Civil War Amendments in states of the former Confederacy where freed slaves were aggressively terrorized by the Ku Klux Klan, often with the encouragement and complicity of local authorities.").
55. *See id.* at 88–89.
56. *Id.* As Representative Beck stated,

> Scarcely less frightful or less fatal to liberty are the provisions of the first and second sections, which undertake to transfer to the Federal courts all mere questions of personal difficulty or personal rights between citizens of the same State [. . .] Enact these provisions, and local State

allocation of power to the federal system was strategic by the Act's supporters.[57] By removing cases from the state system, the Act lowered the ability of local departments—some of which were infiltrated by the Klan—to rig the jury and avoid the convictions of bad actors.[58]

Though criminal codes already forbade most of the violence of the Klan and other white supremacist organizations, supporters of the Act recognized the need for a private cause of action.[59] Senator John Pool, a Republican from North Carolina, argued that the private enforcement of antidiscrimination law was necessary because the public system was embroiled in a widespread strategy to deny non-white Americans access to justice.[60] He said when commenting on the lack of enforcement for anti-lynching laws:

> It requires not only judges, but sheriffs and jurors, to secure punishment in the courts. It is shown in the testimony reported by the majority of the committee that in several of the counties the sheriffs and the deputy sheriffs are members of the Ku Klux organization. The juries in North Carolina are not selected at the will of the sheriffs, as was intimated. If they were, the juries in the Ku Klux counties, where the sheriffs belong to the order, would be unanimously Ku Klux in all probability.[61]

This commentary reveals two important factors motivating the creation of the Civil Rights Act of 1871: (1) that law enforcement could be infiltrated by bad actors, and (2) that those bad actors were likely to conspire amongst themselves.

Despite the high hopes for the Act, it remained largely unutilized until the mid-twentieth century, when two Supreme Court decisions made explicit the broad reach of sections 1983 and 1985(3).[62] The first of these opinions, *Monroe v. Pape*, was issued in 1961 and concerned the

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> government is at an end . . . . The smallest modicum of common sense would seem to me sufficient to enable any member to see the insane folly of conferring such jurisdiction on the Federal courts, even if the power to do so existed. With only one Federal court in some of our largest States, how could justice be administered, often five hundred miles from the venue, "without sale, denial, or delay?" What conqueror even, either in ancient or modern times, ever destroyed the local tribunals and laws of their provinces?
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> *Id.* at 88.

57. *See id.* at 84–85.

58. *See id.*

59. *Id.* at 83–84 (noting that the lack of public prosecutions created a need for "private prosecution correcting for the absence of state action").

60. *Id.* at 87–88.

61. *Id.* at 87.

62. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971); Monroe v. Pape, 365 U.S. 167 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

interpretation of the phrase "under color of law" found in § 1983.[63] Prior litigation under § 1983 had focused primarily on unconstitutional polices which had been explicitly embraced by the government, such as discriminatory voting practices.[64] The question remained as to whether the actions of "renegade officials" were under the color of law, despite the fact that their behavior contravened official policy.[65] The Court found that renegade behavior was under the color of law, and thus opened the door for many of the § 1983 claims we see today, such as those for police misconduct and prisoner mistreatment.[66]

A decade later, the Court similarly clarified the scope of § 1985(3). In *Griffin v. Breckenridge*,[67] the Court held that private actors were liable to suit under § 1985(3).[68] By eliminating the state action requirement for one portion of the Ku Klux Klan Act, the Court reduced the redundancy of some sections and created a distinct cause of action under § 1985(3).[69] In combination, these decisions created much of the atmosphere of civil rights litigation that we recognize today. Though further jurisprudence on the extent of municipal liability under the Act has been inconsistent,[70] the Civil Rights Act of 1871 remains one of the central sources of civil rights litigation today and continues to be of deep relevance.[71]

Concurrently, the ICD began to develop in the realm of antitrust law. In 1890, Congress passed the Sherman Act,[72] a major piece of antitrust legislation.[73] Like all antitrust legislation, the Sherman Act sought to increase competition in the market.[74] However, the statute declined to define

63. Monroe v. Pape, 365 U.S. 167 (1961).

64. Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape*, and the Frontiers Beyond*, 60 Nw. U. L. REV. 277, 282–83 (1965).

65. *See* Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape, 78 UMKC L. REV. 889, 917 (2010).

66. Shapo, *supra* note 64, at 278.

67. 403 U.S. 88 (1971).

68. *See* Smith, *supra* note 10, at 166 n.198 ("In *Griffin*, the Supreme Court in rejecting the limitation to only state action, stated: '[i]ndeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of all deprivation of "equal protection of the laws" and "equal privileges and immunities under the laws," whatever their source.'") (internal citations omitted).

69. *See* Susan C. Malpass, *Civil Rights—State Action is a Requirement for the Application of Section 1985(3) to First Amendment Rights*, 54 N.C. L. REV. 677, 679 (1976).

70. *See* Harrington, *supra* note 11, at 1001–02. The Supreme Court originally decided that municipalities could be liable under a respondeat superior theory before reversing that jurisdiction seventeen years later. Other, similar uncertainties about the extent to which government entities are liable to citizens are common in civil rights jurisprudence.

71. *See* Adelman, *supra* note 11, at 3.

72. 15 U.S.C. §§ 1–38.

73. *See* Smith, *supra* note 10, at 152.

74. Carter, *supra* note 14, at 1163; Smith, *supra* note 10, at 152. However, beyond its role in increasing competition, the exact policies advanced by the Sherman Act were not clearly explained and

any of its terms, instead leaving this task to the courts.[75] In one substantive provision, the Sherman Act prohibited "every contract, combination . . . or conspiracy in restraint of trade or commerce."[76]

In the 1952 case, *Nelson Radio & Supply Co. v. Motorola*,[77] the Fifth Circuit was presented with a situation in which the alleged conspiracy in violation of the Sherman Act was entirely internal to one company.[78] As Smith reports, "Nelson Radio . . . allege[ed] that Motorola's president, sales managers, and officers conspired to restrain trade in violation of § 1 of the Sherman Act."[79] The Fifth Circuit, not wanting to penalize the normal strategizing common to the internal operations of large corporations, interpreted the Sherman Act to require a conspiracy involving two or more separate entities.[80] Because only one corporation was involved in the case at issue, and therefore only one entity, there was no conspiracy.[81]

The *Nelson* court held that: "[a] corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation."[82] This decision became the foundation of the ICD, which bans all claims for conspiracy against the employees of the same company.[83] While courts were historically reluctant

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the courts have struggled to find statutory purpose in applying the Sherman Act. *See generally* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

75. Smith, *supra* note 10, at 152 (remarking that federal courts were left to "incorporate the common law rules of antitrust into their decisions, or to develop new interpretations under the Sherman Act as economic, technological, and political policies changed over time").

76. Smith, *supra* note 10, at 153 (quoting 15 U.S.C. § 1). The distinction between reasonable and unreasonable restraints on trade was left to the discretion of the judicial system. "Although every business agreement has the potential to restrain trade, only agreements that unreasonably restrain trade violate this section. The distinction between a reasonable and an unreasonable restraint is decided by an analysis under the 'rule of reason.'" *Id.* (quoting Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 723 (1988)).

77. 200 F.2d 911 (5th Cir. 1952).

78. Smith, *supra* note 10, at 154.

79. *Id.*

80. *See id.* at 154–57; Page *supra* note 14, at 581. Though the decision in *Nelson Radio & Supply Co.* gave scant details justifying how the ruling protected competition under the Sherman Act, the Supreme Court expanded on that case's reasoning in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). *See* Smith, *supra* note 10, at 158 ("A single firm aggressively competing in the marketplace may leave the impression that it is restraining trade as it 'capture[s] unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result.' But this is the type of competition the Sherman Act was designed to foster, not squelch.").

81. Smith, *supra* note 10, at 154–57.

> The court announced the doctrine by drawing upon two 'basic' premises of agency and conspiracy law: First, any act by the agent within the scope of business was imputed to the corporation. Second, the corporation, as a single legal 'person,' could not conspire by itself. Taking the two together, the court concluded that agents of the corporation could not be said to conspire because they would be acting as a single entity rather than as the 'two persons or entities' required for any conspiracy.

Page, *supra* note 14, at 581.

82. *Nelson*, 200 F.2d at 914.

83. *See* Smith, *supra* note 10, at 155 n.135.

to apply the ICD outside of the antitrust realm, this reluctance began to erode near the end of the twentieth century.[84]

III. THE INTERSECTION OF THE ICD AND CIVIL RIGHTS

Just one year after *Griffin* revived the Civil Rights Act of 1871 as a cause of action, the Seventh Circuit applied the ICD to a civil rights claim under the Act.[85] In *Dombrowski v. Dowling*,[86] a white attorney sued a building manager, alleging that the manager refused to rent him space because a substantial number of the attorney's clients were non-white.[87] The district court ruled in the attorney's favor on the § 1985(3) conspiracy claim, but the circuit court reversed on appeal.[88] The circuit court explained that, because all of the alleged conspirators were part of the same business entity, only one legal entity existed, and a conspiracy was therefore impossible.[89]

Nevertheless, other courts remained hesitant to expand the ICD beyond the antitrust context.[90] For example, in 1978, the Third Circuit declined to apply the ICD to civil rights claims, holding that "concerted action[s] by officers and employees of a corporation, with the object of violating a federal statute, can be the basis of a § 1985(3) complaint."[91] Other courts were similarly hesitant to extend the ICD to criminal law or tort law.[92]

This reluctance to expand the doctrine was ultimately short lived.[93] In 1984, the Supreme Court decided *Copperweld Corp. v. Independence Tube*

84. Nelson, *supra* note 18, at 979 ("Historic resistance to application of the intracorporate conspiracy doctrine outside of antitrust cases is best articulated by Justice Harlan's concurrence in the 1962 case of *United States v. Wise.* Justice Harlan wrote that 'the fiction of corporate entity . . . had never been applied as a shield against criminal prosecutions.'") (quoting 370 U.S. 405, 417 (1962)).

85. Page, *supra* note 14, at 581.

86. 459 F.2d 190 (7th Cir. 1972).

87. Smith, *supra* note 10, at 146.

88. *Id.*

89. *See id.* The court "held that the 'two or more persons' requirement was not met because the defendants were a single corporation and its employees." *Id.* (quoting 459 F.2d 190, 196 (7th Cir. 1972)).

90. Page, *supra* note 14, at 583 (detailing the Third Circuit's rejection of the intracorporate conspiracy doctrine in civil rights cases).

91. Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1258 (1978), *vacated on other grounds*, 422 U.S. 366 (1979).

92. *See, e.g.*, United States v. Hartley, 678 F.2d 961, 968 (11th Cir. 1982) (declining to apply the intracorporate conspiracy doctrine to the criminal context and coining the delightful term "octopus intracorporate doctrine" to describe its expansion), *abrogated by* United States v. Goldin Indus., 219 F.3d 1268 (11th Cir. 2000) (en banc).

93. For a recent, dramatic example of the expansion of the ICD in the state courts, see *Commonwealth v. Lynn*, 83 A.3d 434 (Pa. Super. Ct. 2013), *appeal granted in part*, 91 A.3d 1233 (Pa. 2014) (per curiam). The case concerns the prosecution of a Roman Catholic priest who never personally abused children, but who covered up for the crimes of others to aid his employer. The defendant transferred priests with histories of abuse to other locations to avoid detection of their crimes. Because Pennsylvania had adopted the ICD, the prosecution was unable to pursue conspiracy charges, as the

Corp.,[94] which expanded the ICD to protect a parent enterprise allegedly conspiring with a wholly owned subsidiary.[95] The lower courts took this idea and ran with it, inspiring a battle over the extent of the doctrine that raged for most of the 1990s.[96] After deciding *Dombrowski v. Dowling*,[97] "[t]he Seventh Circuit subsequently reaffirmed its decision that the [ICD] is applicable in actions brought under Section 1985 in *Travis v. Gary Community Mental Health Center, Inc*.," which was decided in 1990.[98] From that point, "the majority of the circuit courts . . . followed the Seventh Circuit's lead."[99] The Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have all held that the ICD bars claims under § 1985(3).[100] The Eleventh Circuit was the last to adopt the doctrine and abandoned its former resistance in 2000.[101]

Today, only a minority of circuits—the First and Third—have rejected the ICD in civil rights claims.[102] But, as a practical matter, barring claims under § 1985(3) did relatively little to change the landscape of civil rights litigation, as plaintiffs could simply allege the same cause of action as a civil conspiracy to violate § 1983.[103] In response, defendants began to argue that the ICD should ban conspiracy claims under both sections of the Civil Rights Act of 1871.[104] Some courts have agreed with this argument and held that the ICD bans both § 1985(3) claims and claims for civil conspiracy to violate § 1983.[105] By foreclosing conspiracy claims under both § 1985(3) and § 1983, courts have effectively prohibited plaintiffs from bringing claims against law enforcement for any conspiracy to violate civil rights.

The Supreme Court had the opportunity to clarify the applicability of the ICD to civil rights claims in the 2017 case *Ziglar v. Abbasi*.[106] However,

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priest and all of his fellow conspirators were employed by the Catholic Church. *See* Nelson, *supra* note 18, at 988–91.

94. 467 U.S. 752 (1984).

95. Nelson, *supra* note 18, at 980–81.

96. *Id.* at 979–80.

97. 459 F.2d 190 (7th Cir. 1972).

98. Douglas G. Smith, *The Intracorporate Conspiracy Doctrine and 42 U.S.C. § 1985(3): The Original Intent*, 90 NW. U. L. REV. 1125, 1149–50 (1996).

99. *Id.* at 1151.

100. Barry Horwitz, *A Fresh Look at a Stale Doctrine: How Public Policy and the Tenets of Piercing the Corporate Veil Dictate the Inapplicability of the Intracorporate Conspiracy Doctrine to the Civil Rights Arena*, 3 NW. J. L. & SOC. POL'Y 131, 142 (2008).

101. Nelson, *supra* note 18, at 983.

102. Horwitz, *supra* note 100, at 142.

103. *See, e.g.*, Faulk v. City of St. Louis, No. 4:18-cv-308-JCH, 2021 WL 37989, at *6 (E.D. Mo. Jan. 5, 2021), *appeal docketed*, No. 21-1116 (8th Cir. Jan. 15, 2021) (exemplifying a claim which was brought under § 1983 after the Eighth Circuit held that the intracorporate conspiracy doctrine barred claims against law enforcement under § 1985(3)).

104. *See, e.g.*, Grider v. City of Auburn, 618 F.3d 1240 (11th Cir. 2010); *see also* Jackson v. City of Cleveland, 925 F.3d 793 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020).

105. *See, e.g.*, *Grider*, 618 F.3d at 1240; *see also Jackson*, 925 F.3d at 793.

106. 137 S. Ct. 1843 (2017).

instead of deciding the claim on the merits, the court avoided the question by granting qualified immunity.[107] Qualified immunity is a doctrine applicable in cases against government officials. Because many civil rights claims are filed against law enforcement, the doctrine is a frequent subject of litigation under § 1983.[108] Qualified immunity states that an officer incurs civil liability only if: (1) there was a constitutional violation and (2) the violation was clearly established by law.[109] Courts are free to analyze these factors in any order they please, and failure to meet one prong will require dismissal of the case.[110] Many courts only address the second prong—that the violation was not clearly established—and then dismiss the claim.[111] This system creates stagnation in the law;[112] courts are not incentivized to create new case law about what rises to the level of a constitutional violation because they can simply dispose of cases based on the "clearly established" prong.[113] In fact, dismissal of qualified immunity cases on the "clearly established" prong is encouraged in many ways by the court system; it decreases the chance that a district-level decision will be overturned by the circuit court, since the circuit court will never be forced to weigh in on the substantive question of whether a constitutional violation exists.[114]

In the case of conspiracy claims, courts can look to the unsettled nature of the ICD, decide that the law governing the violation is unclear, and then dismiss the claim on qualified immunity grounds (based on the "clearly established" prong) without ever taking the opportunity to develop the legal question of whether application of the ICD to civil rights claims is appropriate. This is exactly what happened in *Ziglar v. Abbasi*.[115] When confronted with the question of whether plaintiffs could allege a conspiracy to violate their civil rights by government officials in the wake of the September 11, 2001 attacks, the Court declined to analyze the applicability of the ICD to civil rights claims.[116] Instead, the Court found that the law in the area of the ICD was unsettled and granted qualified immunity.[117] In so

107. *Id.* at 1869.

108. *See* Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense:* Hope*'s Legacy, Neither Clear Nor Established*, 29 AM. J. TRIAL ADVOC. 563, 565–68 (2006).

109. *Id.* at 571.

110. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 236 (2009); *see also* Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 141 (2009).

111. *See* Beermann, *supra* note 110, at 141.

112. *Id.*

113. *Id.*

114. *See* Joseph L. Smith, *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court*, 27 JUST. SYS. J. 28, 31 (2006) (remarking on the way that judicial aversion to reversal may affect judges' decision making).

115. 137 S. Ct. 1843 (2017).

116. *Id.* at 1867–68.

117. *Id.*

holding, the Supreme Court guaranteed that the circuit split would continue for the foreseeable future.[118]

In the few cases in which circuits have ruled on the applicability of the doctrine following *Ziglar*, they have expanded the ICD. Take, for example, *Jackson v. City of Cleveland*.[119] The case arose from the wrongful convictions of three African-American men for murder which occurred in Cleveland on May 19, 1975.[120] The conviction of all three men rested on the testimony of then twelve-year-old Edward Vernon, who was told by a friend that the men were guilty of the crime and who was coerced by police into acting as an eyewitness.[121] Forty years later, after all three men had spent considerable time in jail and on death row, Vernon recanted his testimony, and the men were exonerated.[122]

Following their exoneration, the wrongfully convicted men filed suit against the City of Cleveland, charging, in part, that law enforcement officers conspired to violate their civil rights under § 1983 through wrongful conviction.[123] In support of their conspiracy claims, they introduced the fact that officers in Cleveland were known to habitually manipulate or withhold evidence from the prosecution in order to obtain a conviction.[124] The Sixth Circuit acknowledged this behavior and held that there was enough evidence that "a reasonable jury could find that [the officers] planned to draft a false statement . . . and that they committed an overt act in furtherance of that plan," thus satisfying the elements of conspiracy.[125] However, the court affirmed the lower court's dismissal of the conspiracy claim by holding that the ICD applied to claims under § 1983.[126] The court explained this decision by stating that the doctrine already applied to § 1985(3) claims in the Sixth Circuit, and that there were no sufficient grounds to distinguish the two sections.[127] In its examination of the history

118. *See* Kelly Rader, *Circuit Splits Project*, https://campuspress.yale.edu/kellyrader/circuit-splits-project/ [https://perma.cc/Z3XD-7EZH] (noting that, while circuit splits can resolve on their own, resolution without the Supreme Court appears to be a lengthy process that can sometimes persist indefinitely); *see also* Page, *supra* note 14, at 580 (explaining that "[t]he Supreme Court has repeatedly declined to rule on the substance of the doctrine" which has resulted in a "split in authority" that "has persisted for some forty years").

119. 925 F.3d 793 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020).

120. *Id.* at 802–03.

121. *Id.* at 802–04. When Vernon told police that he knew who committed the crime, they took him to the police station without a guardian and asked him to select who he saw commit the crime from a lineup. *Id.* at 804. Because Vernon had not actually seen the crime take place, he declined to do so. *Id.* The police then issued a series of threats and insults until Vernon agreed to identify the men. *Id.* He did and this testimony resulted in the men's conviction. *Id.* at 804–05.

122. *Id.* at 805.

123. *Id.* at 805, 813.

124. *Id.* at 803.

125. *Id.* at 803, 817.

126. *Id.* at 818.

127. *Id.* at 818–20.

of the ICD, the court stated that the doctrine "was recognized in antitrust and civil rights cases," but declined to examine its purpose or origin.[128] The court similarly declined to consider legislative or judicial intent for the Civil Rights Act of 1879.[129] The Sixth Circuit's adoption of the ICD without analyzing the history of either the ICD or the legislation it abridges is emblematic of a troubling pattern in which courts examine the ICD only at the surface level before adopting it.[130] Thus far, only the Eleventh and Sixth Circuits have held that the ICD bars claims under § 1983.[131] However, an appeal pending in the Eighth Circuit will soon determine the fate of the doctrine in yet another jurisdiction.[132]

IV. WHY THE APPLICATION OF THE INTRACORPORATE CONSPIRACY DOCTRINE TO CIVIL RIGHTS CLAIMS IS INAPPROPRIATE

A. The Importance of Conspiracy Liability

For a demonstration of the harmful impact of the ICD in the context of civil rights, consider the following situation:

> Bad Actor (BA) is a local policeman affiliated with white supremacist movements. He subtly alludes to his beliefs while at work and has gone as far as to distribute hateful literature to several colleagues who demonstrated an interest. A few of his coworkers have expressed agreement with his viewpoints. One day BA and a group of sympathetic policemen decide to meet while out on patrol. As they are speaking, BA conceives a plan to "rough up" young people of color, arresting them without probable cause and using unjustified force. Six officers, including BA, agree to the plan. BA fires up the crowd with a passionate speech. However, when an opportunity to execute the plan arises, only five officers take part. BA is busy buying coffee at the time and is, therefore, unable to take part in the plan.

If the young people in the above situation were to take legal action against the officers under § 1983, BA would not be liable under the majority

128. *Id.* at 818.

129. *See id.* at 817–20.

130. *See, e.g.*, Grider v. City of Auburn, 618 F.3d 1240, 1263 (11th Cir. 2010) (applying the ICD with minimal analysis).

131. *Id.*; Jackson v. City of Cleveland, 925 F.3d 793, 818 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020) ("We are aware of only one circuit, the Eleventh, that has squarely addressed the issue and has determined that the intracorporate conspiracy doctrine applies in § 1983 actions as in § 1985 actions.").

132. Faulk v. City of St. Louis, No. 4:18-cv-308-JCH, 2021 WL 37989, at *6 (E.D. Mo. Jan. 5, 2021), *appeal docketed*, No. 21-1116 (8th Cir. Jan. 15, 2021).

rule, as only a conspiracy claim would implicate him. Other common forms of liability simply do not apply. For example, because BA did not actively take part in the underlying offense, he cannot be implicated under § 1983 alone.[133] Additionally, because he was not a supervisor to the liable parties, he is also not liable under a supervisor theory.[134] So long as at least one party is found liable, the plaintiffs will still be able to recover, as the injury to the plaintiff, not the number of defendants, determines damages in tort cases.[135] However, BA would not be held accountable for his actions. Though some may argue that the plaintiff's restitution is more important than the liability of any one individual, recent events have brought into stark focus the importance of public accountability in matters of conspiracy and of civil rights.

B. A Recent Red Flag

On January 6, 2021, a coalition of far-right political dissidents, conspiracy theorists, and white supremacists stormed the United States Capitol in Washington, D.C. in an attempt to prevent Congress from certifying the election of President Joe Biden.[136] Due to insufficient security forces, the coalition was able to enter the Capitol, leading to confrontations with law enforcement, the evacuation of lawmakers from the building, and the death of five people, including one law enforcement officer.[137] The

133. *See* Tahfs v. Proctor, 316 F.3d 584, 590 (6th Cir. 2003) ("A § 1983 claim must satisfy two elements: 1) the deprivation of a right secured by the Constitution or laws of the United States and 2) *the deprivation was caused by a person acting under color of state law*." (quoting Ellison v. Garbarino, 48 F.3d 192, 194 (6th Cir. 1995))) (emphasis added).

134. B.J.G. *ex rel.* McCray v. St. Charles Cty. Sheriff, No. 4:08-cv-1178-CDP, 2010 WL 1838414 (E.D. Mo. May 6, 2010), *aff'd*, 400 F. App'x 127 (8th Cir. 2010). "Generally, under section 1983, a supervisor cannot be held liable for the actions of his employee. However, a supervisor may be held liable under section 1983 for the unconstitutional conduct of his subordinates in four situations: (1) if the supervisor directly participated in the constitutional violation; (2) if the supervisor failed or refused to intervene when a constitutional violation took place in his presence; (3) if the supervisor's failure to train or supervise the employee caused the constitutional violation; or (4) if the supervisor created a policy or custom under which the constitutional violation occurred." *Id.*

135. *See* RESTATEMENT (SECOND) OF TORTS § 901 (AM. L. INST. 1979) (explaining that damages are allocated in order: "(a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help").

136. *See* Matthew Rosenberg & Ainara Tiefenthäler, *Decoding the Far-Right Symbols at the Capitol Riot*, N.Y. TIMES (Jan. 13, 2021), https://www.nytimes.com/2021/01/13/video/extremist-signs-symbols-capitol-riot.html [https://perma.cc/T929-S9Q3]; Ted Barrett, Manu Raju & Peter Nickeas, *US Capitol Secured, 4 Dead after Rioters Stormed the Halls of Congress to Block Biden's Win*, CNN (Jan. 7, 2021, 3:33 AM), https://www.cnn.com/2021/01/06/politics/us-capitol-lockdown/index.html [https://perma.cc/B8BV-7CC4].

137. Colleen Long, Lolita Baldor, Michael Balsamo & Nomaan Merchant, *Capitol Police Rejected Offers of Federal Help to Quell Mob*, ASSOCIATED PRESS (Jan. 7, 2021), https://apnews.com/article/capitol-police-reject-federal-help-9c39a4ddef0ab60a48828a07e4d03380 [https://perma.cc/6JTW-2DV3]; Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y.

shocking and violent Capitol riot opened a dialogue about the danger of conspiracies, particularly conspiracies among members of law enforcement.[138] Since moving to arrest the rioters, the FBI has found that numerous participants in the riots were themselves members of law enforcement.[139] That they were able to do such extensive damage in their free time—both to property and to the ideological foundations of our democracy—should raise serious concerns about what renegade actors could do on the job, especially if they knew they could be shielded from liability on the job by doctrines like the ICD and qualified immunity. Furthermore, former President Trump's role in inspiring the rioters shows the danger of ringleaders who encourage dangerous behavior, even if they do not participate in that behavior themselves.[140] Given the widespread media attention the riots have brought to conspiracy charges, now is the perfect time to influence both public and judicial opinion on the ICD and to push back against the argument that indirect actors do not deserve liability.

TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html [https://perma.cc/8KZB-WG23].

138. *Cf.* Alice Speri, *DOJ is Considering Charging Capitol Rioters with Seditious Conspiracy, Felony Murder*, INTERCEPT (Jan. 14, 2021, 3:24 PM), https://theintercept.com/2021/01/14/capitol-riot-fbi-federal-charges/ [https://perma.cc/U79L-B4BK]; s*ee also* Leah Donnella, *How the Storming of the Capitol Was—And Wasn't—About Police*, NPR (Jan. 7, 2021, 5:43 PM), https://www.npr.org/sections/codeswitch/2021/01/07/613802462/how-the-storming-of-the-capitol-was-and-wasnt-about-police [https://perma.cc/5TKA-2XCR].

139. Bart Jansen, *'A Nightmare Scenario': Extremists in Police Ranks Spark Growing Concern After Capitol Riot*, USA TODAY (Mar. 22, 2021, 9:04 PM), https://www.usatoday.com/in-depth/news/politics/elections/2021/03/21/police-charged-capitol-riot-reignite-concerns-racism-extremism/4738348001/ [https://perma.cc/W3EQ-Q7FL]. Beyond law enforcement officers, many other public servants were found to have participated in the riots. Forty-three of the 324 people arrested in connection with the riot have been identified as "current or former first responders or military veterans." *Id.*

140. *Cf.* Charlie Savage, *Incitement to Riot? What Trump Told Supporters Before Mob Stormed Capitol*, N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/2021/01/10/us/trump-speech-riot.html [https://perma.cc/FW2A-FW2U]. Former President Donald Trump was impeached for his role in encouraging the rioters but was acquitted when the Senate failed to reach a two-third majority necessary for a conviction. Nicholas Fandos, *Trump Acquitted of Inciting Insurrection Even as Bipartisan Majority Votes 'Guilty'*, N.Y. TIMES (Feb. 13, 2021), https://www.nytimes.com/2021/02/13/us/politics/trump-impeachment.html?action=click&module=RelatedLinks&pgtype=Article [https://perma.cc/9JBR-TXNZ]. Many still believe the former president to be morally, or perhaps legally, responsible for the violence. After voting not to convict, Senate Minority Leader Mitch McConnell condemned Trump, stating that, "[t]here's no question – none – that President Trump is practically and morally responsible for provoking the events of the day." Carle Hulse & Nicholas Fandos, *McConnell, Denouncing Trump After Voting to Acquit, Says His Hands Were Tied*, N.Y. TIMES (Feb. 17, 2021), https://www.nytimes.com/2021/02/13/us/mcconnell-trump-impeachment-acquittal.html [https://perma.cc/59DM-KX4M]. Some commentators have further speculated that the former president could still face criminal liability for his actions, though the likelihood that prosecutors will file charges appears slight. Charlie Savage, *Does Trump Face Legal Jeopardy for His Incendiary Speech Before the Riot?*, N.Y. TIMES (Jan. 11, 2021), https://www.nytimes.com/2021/01/11/us/politics/donald-trump-crime.html [https://perma.cc/89YK-ENCJ].

This change is supported by both the public policy concerns and the legal questions which surround the ICD.

C. Public Policy Considerations

Though few people would contest the assertion that law enforcement should respect the rights of the people they serve and protect, some would argue that liability for law enforcement through private causes of action is unnecessary to protect these rights and to combat the actions of people like Bad Actor.[141] However, alternative means of deterrence have proven ineffective, and malicious conspiracies must have consequences. Therefore, the ICD must not be applied to § 1983 claims.[142]

Outside of civil remedies under § 1983, the two key means of regulating police conduct are internal police review[143] and criminal prosecution.[144] Neither is sufficient to protect the rights of the people. Police departments are slow or unwilling to investigate and reprimand their own officers.[145] Additionally, police unions make substantive punishment almost impossible in some states.[146] Given that the police are unwilling to do the job of self-monitoring, the burden of overseeing law enforcement falls to prosecutors within the criminal justice system. However, even assuming that one is operating in a jurisdiction which has not extended the ICD to the criminal law, prosecution of law enforcement suffers both from a high evidentiary threshold and a lack of enthusiasm from prosecutors.[147] Instead of using the lower preponderance of the evidence standard applicable to civil claims, prosecutors must prove beyond a reasonable doubt that the police misconduct violated the law.[148] Not only is this work difficult, but many prosecutors are also hesitant to take on the police, who provide

141. *See supra* Part IV.

142. Many of these policy arguments could also be used to demonstrate the inappropriateness of applying the ICD to § 1985(3). However, as these arguments have already been explored in the § 1985(3) contexts by other scholars, this section will focus specifically on § 1983. Policy concerns are particularly relevant in the context of § 1983, as it focuses solely on government actors whose mission is to benefit the public, unlike § 1985(3), which encompasses private parties. For examples of arguments surrounding § 1985(3), see Smith, *supra* note 10; Page, *supra* note 14; Nelson, *supra* note 18.

143. *See* Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 141–42 (2017).

144. *See generally* John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789.

145. *See generally* Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839 (2019) (describing the uneven and arbitrary nature of police brutality).

146. Bies, *supra* note 143, at 139–44 (detailing the ability of police unions to manipulate and undermine the democratic process).

147. Jacobi, *supra* note 144, at 803–04.

148. *Compare* Crawford-El v. Britton, 523 U.S. 574, 594–96 (1998) (finding that a constitutional tort claim need not adduce "clear and convincing" evidence of malicious intent) *with* United States v. Smith, 573 F.3d 639, 649 (8th Cir. 2009) (describing jury instruction for a criminal case which included the words "beyond a reasonable doubt.").

prosecutors with the evidence needed to try cases and who frequently serve as witnesses for the state.[149] As a consequence of the inadequacy of both internal review and criminal prosecution, civil remedies remain necessary in punishing police misconduct. Many civil rights claims involve police behavior which is sufficiently harmful to lead to civil liability, but not so egregious as to lead to criminal liability.[150]

In comparison to these inadequate remedies, civil remedies provide three central benefits: (1) public accountability;[151] (2) financial disincentives for individuals and their employers;[152] and (3) a representation of community values.[153]

The first consideration which favors elimination of the ICD in the context of § 1983 claims is public accountability. By including all conspirators within the scope of who can be liable, the courts allow the public to keep track of which officers supported the violations of civil rights, as well as the actual violators. Police disciplinary records are notoriously difficult to obtain,[154] so allowing for liability within the courts will create a public record of police misbehavior. This transparency will help police accountability advocates gather data about which officers are repeatedly involved in claims. Armed with data, these advocates will be better positioned to push back against police unions and to argue for making police misconduct records available to the public.[155]

Next, ensuring liability for all conspirators disincentivizes conspiratorial behavior at the level of the individual or the municipality, depending on local financial structures. In a minority of jurisdictions, officers are financially liable for their own misconduct with the municipality bearing no responsibility;[156] in these circumstances, the threat of an adverse judgment will disincentivize individuals from violating the civil rights of citizens, as it would quickly become financially untenable. In the majority of

149. *Cf.* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1464–72 (2016).

150. For an (in)famous example of whether the same behavior can constitute civil but not criminal liability, see B. Drummond Ayres, Jr., *Civil Jury Finds Simpson Liable in Pair of Killings*, N.Y. TIMES (Feb. 5, 1997), https://www.nytimes.com/1997/02/05/us/civil-jury-finds-simpson-liable-in-pair-of-killings.html [https://perma.cc/7GXD-Q8UG].

151. *See infra* notes 154–155 and accompanying text.

152. *See infra* notes 155–161 and accompanying text.

153. *See infra* note 162 and accompanying text.

154. *See generally* Bies, *supra* note 143.

155. *See supra* notes 144–146 (describing systemic problems with police unions, such as the unavailability of personnel records and the challenges unions pose to the democratic process).

156. Teressa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839, 840 (2017) (explaining that police officers are only personally responsible for civil rights damages in 0.41% of cases, according to a survey of the nation's forty-four largest jurisdictions).

jurisdictions, the incentive will accrue at the level of the municipality.[157] Though respondeat superior liability[158] does not apply to municipalities, many municipalities indemnify the officers they employ, which guarantees that the municipality ultimately bears the financial burden for police misconduct.[159] Protecting civil conspiracy liability will incentivize departments to discourage violations of civil rights and to fire employees who engage in conspiracies of these violations.[160] Without any type of financial disincentive, municipalities face significantly less pressure to terminate employees who conspire but do not take affirmative action in furtherance of the conspiracy. Additionally, by holding all conspirators liable for the plaintiff's injury, the plaintiff is more likely to successfully recover any awarded damages. Though damages are determined by the injury to the plaintiff and not by the number of defendants,[161] recognizing more liable parties increases the potential assets that the plaintiff could recover to satisfy a judgment.

Third, allowing for civil conspiracy liability will serve as a representation of values. Allowing for conspiracy claims is important because it is a social signifier that this type of behavior is not allowed and has consequences.[162] By applying a doctrine meant to regulate markets to the civil rights context, the Court implicitly equates the evils of monopolies and the evils of civil rights violations. Yet, the harm caused by discrimination and the violation of civil rights is not equivalent to the harm caused by a market monopoly, and the law should accord adequate weight to the protection of human dignity. Violations of civil rights by law enforcement are even more egregious, as law enforcement is meant to protect the most vulnerable among society. Holding government officials

157. *Id.*

158. 1 JOEL W. MOHRMAN & ROBERT J. CALDWELL, HANDLING BUSINESS TORT CASES § 3:2 ("Under the doctrine of respondeat superior, the employee's torts are imputed to the employer. There is no requirement that the employer be at fault or even have any knowledge of the employee's tortious behavior.").

159. Ravenell et al., *supra* note 156, at 840.

160. *But see Incentivizing Better Policing*, NYU LAW: POLICING PROJECT (Feb. 18, 2016), https://www.policingproject.org/news-main/2017/9/21/incentivizing-better-policing [https://perma.cc/T2KS-JXK9] (arguing that increasing liability for departments will have be combined with other financial reorganization measures, as not all police departments pay to settle cases from their own budget, and successfully changing behavior based on liability is supported only anecdotally).

161. *See* RESTATEMENT (SECOND) OF TORTS § 901 (AM. L. INST. 1979) (explaining that damages are allocated in order: "(a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help").

162. Gary B. Melton & Michael J. Saks, *The Law as an Instrument of Socialization and Social Structure*, *in* THE LAW AS A BEHAVIORAL INSTRUMENT 235, 252 (Gary B. Melton ed., 1986) ("The law functions . . . as a symbolic representation of the ideals of the state, and it purports to teach the citizenry these principles . . .").

liable for the harm they create shows that no one is above the law and that our society demands a minimum level of decency from our public servants.

D. Statutory Purpose and Conflicting Interests

Furthermore, the legal justification for applying the ICD to civil rights claims is untenable, as the ICD and § 1983 have conflicting purposes.[163] Section 1983 was designed to combat discrimination and, more specifically, to create consequences for the organized suppression of civil rights, such as that perpetuated by the Klan.[164] Though § 1983 does not specifically name conspiracies in the way that § 1985(3) does, its legislative history and application in the courts demonstrate that it was intended to combat conspiratorial activity and that it succeeds in that goal.[165] Unlike the ICD in antitrust law, § 1983 only targets activity that cannot be required as part of any legal employment[166] and which should be actively discouraged by employers.

The ICD, by contrast, was a judge-made doctrine designed to account for an oversight in the Sherman Act.[167] The doctrine primarily has economic goals within the antitrust context, attempting to ensure market competition.[168] At least at the time of its origin, the ICD in the antitrust context protected activity which would rightfully be encouraged or required by employers, such as the development of a sales strategy across multiple departments.[169]

By applying the ICD to the civil rights context, courts are taking a doctrine meant to protect normal workplace activity and extending it to immunize discriminatory conduct in the workplace from liability. Not only does this subvert the statutory purpose of Section 1983, but it also misinterprets the original goals of the ICD. This subversion of statutory purpose is particularly egregious because the ICD is a judge-made doctrine,

163. Other commentators have similarly and rightfully observed that § 1985(3) and the ICD have conflicting purposes. *See, e.g.*, Smith, *supra* note 10, at 148. Given that § 1983 has a substantially similar purpose, as discussed *supra* Part I, one can reasonably analogize this § 1985(3) analysis to § 1983.

164. Gardner, *supra* note 12, at 84 (stating that the Civil Rights Act of 1871 resulted from "non-enforcement . . . by the Southern states").

165. *Id.* at 88.

166. § 1983 provides a cause of action specifically for unlawful conduct, which is defined by the statute as the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Cf. infra* notes 167-169 and accompanying text (analyzing purpose of the ICD).

167. *See* Nelson, *supra* note 18, at 978 (remarking on the intracorporate conspiracy doctrine's place alongside other common law doctrines governing "what constitutes a single legal entity"); Smith, *supra* note 10, at 152 (remarking on the need for courts to define the terms in the Sherman Act).

168. *See* Nelson, *supra* note 18, at 981.

169. *See* Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952).

which means that the court is replacing the legislature's judgment with its own.

Though the subversion of legislative purpose may be excusable when that purpose is no longer relevant, ample evidence exists that the evils the Civil Rights Act of 1871 sought to cure—white supremacist terrorism—are still present in American society. For example, reports show that 940 hate groups still exist across the nation.[170] High profile events, such as the above-described riot at the Capitol and the infamous "Unite the Right" rally in Charlottesville, Virginia, have led to numerous deaths[171] and have demonstrated the pervasiveness of white-supremacist extremist views in American society. Furthermore, civilians are not the sole source of white supremacist violence. The killing of George Floyd by Minneapolis police officers on May 25, 2020, further exemplifies the ever-present threat that law enforcement poses to people of color in the United States.[172] White supremacist violence has become such a focal point of national crisis and anxiety that President Biden addressed it in his inaugural speech.[173]

The presence of white supremacists within law enforcement (arguably the chief concern of the Act) is also a continuing problem.[174] As the FBI reported in 2017,[175] white supremacy has posed a "persistent threat of lethal violence" that has resulted in more deaths than any other form of domestic terrorism; many of these white supremacists groups have "active links" to

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170. *Hate Map*, S. POVERTY L. CTR., https://www.splcenter.org/hate-map [https://perma.cc/LQ3M-HGGT]. The Southern Poverty Law Center tracked 940 hate groups across the United States in 2019. *Id.* Forty-seven of those groups were chapters of the Ku Klux Klan. *Id.* One hundred and fifty-five of those groups belonged to other sects of white nationalism. In total, the Southern Poverty Law Center has observed a fifty-five percent increase in white nationalist hate groups between 2017 and 2019. *Id.*

171. *See* Healy, *supra* note 137; Elisha Fieldstadt, *James Alex Fields, Driver in Deadly Car Attack at Charlottesville Rally, Sentenced to Life in Prison*, NBC (June 28, 2019, 12:36 PM), https://www.nbcnews.com/news/us-news/james-alex-fields-driver-deadly-car-attack-charlottesville-rally-sentenced-n1024436 [https://perma.cc/J56L-G5P7].

172. *See What to Know About George Floyd's Death*, N.Y. TIMES (Apr. 6, 2021), https://www.nytimes.com/article/george-floyd.html [https://perma.cc/2YK6-L4G6]; *see also* Jelani Cobb, *The Death of George Floyd, In Context*, NEW YORKER (May 28, 2020), https://www.newyorker.com/news/daily-comment/the-death-of-george-floyd-in-context [https://perma.cc/737X-EMT2].

173. "And now, a rise in political extremism, white supremacy, domestic terrorism that we must confront and we will defeat." President Joseph R. Biden, Jr., Inaugural Address (Jan. 20, 2021, 11:52 AM), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr/ [https://perma.cc/JL3N-SXQS].

174. Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. (Aug. 27, 2020), https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law [https://perma.cc/KA4F-QGSV].

175. *See* FED. BUREAU OF INVESTIGATION & U.S. DEP'T OF HOMELAND SEC., JOINT INTEL. BULL., WHITE SUPREMACIST EXTREMISM POSES PERSISTENT THREAT OF LETHAL VIOLENCE (May 10, 2017), https://www.documentcloud.org/documents/3924852-White-Supremacist-Extremism-JIB.html [https://perma.cc/3UYF-YNR7].

law enforcement.[176] Discrimination and racial profiling are even more common than formal affiliation with white supremacists organizations, as some officers have admitted to researchers that they use discriminatory tactics in their policing.[177] Until Americans can be confident that those charged with their protection are not conspiring to deprive them of their liberties, § 1983 must continue to protect against illicit conspiracy.

E. Legal Fictions and Quiet Absurdity

Another weakness of the ICD in the civil rights context is the large number of legal fictions employed to justify its applications. Though any one of these fictions may be brushed aside, when combined together, they strain credulity and create a quiet absurdity.

The legal fictions employed in applying the ICD to civil rights claims against law enforcement include: (1) corporate personhood, (2) corporate unity,[178] and (3) the equation of a municipality with the corporation. Corporate unity is a particularly difficult legal fiction to apply to municipalities, given that the normal forms of employee/employer liability, such as respondeat superior, do not apply to municipalities.[179] As mentioned above,[180] respondeat superior attributes the employee's actions to the employer, under the understanding that they are legally one entity.[181] However, by refusing to apply respondeat superior to municipalities,[182] the Supreme Court has implied that the actions of the municipality and of its employees are in fact severable. As such, the application of corporate unity in some municipal contexts but not in others creates inconsistency in the law.

Perhaps the most absurd result of all is that the ICD incentivizes malicious behavior on the job, as law enforcement officers and other municipal employees are given more protection from civil conspiracy charges on the job than off the job. For example, in the above Bad Actor

176. German, *supra* note 174; *see also* Anna North, *The Capitol Riot is a Reminder of the Links Between Police and White Supremacy*, VOX (Jan. 16, 2021, 3:30 PM), https://www.vox.com/2021/1/16/22233514/capitol-riot-rally-police-white-supremacy [https://perma.cc/3QWC-KHDX].

177. Tracey Maclin, *Cops and Cars: How the Automobile Drove Fourth Amendment Law*, 99 B.U. L. REV. 2317 (2019).

178. Nelson, *supra* note 18, at 978–79.

179. Ravenell & Brigandi, *supra* note 156, at 841.

180. *See supra* note 158.

181. MOHRMAN & CALDWELL, *supra* note 158, at § 3:2.

182. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978) (declining to recognize respondeat superior liability for municipalities).

hypothetical,[183] at least one member of the conspiracy would not be liable for a civil rights violation if he conducts the conspiracy while in the scope of his employment. But if the conspiracy happened while the officer was acting in his capacity as a private citizen, he would be liable. A bad actor with an understanding of the law would inspire his peers to commit civil rights violations while he and they are on the job, and then decline to participate himself. He would then be immune to liability for actions which he incites but does not directly commit himself. Though there has been debate about the prevalence of malicious conduct amongst law enforcement,[184] it is undeniable that it exists. To avoid the law implicitly promoting such conduct, the ICD should not be extended to § 1983.

V. PROPOSAL

Though the problem of the ICD may be complicated, the solutions are straightforward. Either judicial decisions or congressional action could put an end to the application of the ICD to civil rights cases.

A. Judicial Change

Because the ICD was made by judges, it could also be unmade by judges. Circuits upholding the minority opinion have already demonstrated that judges can decline to apply the ICD to civil rights cases.[185] If the minority opinion continues to prevail in at least some number of states, one of two things could happen. First, the circuit split could again make its way to the Supreme Court, as it did in *Ziglar v. Abbasi*.[186] The Justices will then have the opportunity to resolve the question of the ICD.[187] If the Justices were to resolve the issue, then that decision would be binding on all fifty states. This is an appealing solution, as it requires relatively few people to study the admittedly complicated concepts at play in this issue, and it would apply uniformly across the nation. The only challenge to this solution is getting a case in front of the Supreme Court. Thousands of cases are appealed to the

183. *See supra* Part V: The Importance of Conspiracy Liability.

184. *See, e.g.*, James Downie, *Time to Toss the 'Bad Apples' Excuse*, WASH. POST (May 31, 2020, 4:09 PM), https://www.washingtonpost.com/opinions/2020/05/31/time-toss-bad-apples-excuse/ [https://perma.cc/L57W-689D].

185. Page, *supra* note 14, at 563.

186. 137 S. Ct. 1843 (2017).

187. However, depending on the nature of the case, the Justices may again be able to dismiss the dispute without touching on the ICD. This is what happened in *Ziglar v. Abbasi*. *See* 137 S. Ct. at 1867–68; *see supra* notes 115–118 and accompanying text.

Supreme Court every term and very few are granted certiorari.[188] Additionally, the Court is not guaranteed to overturn the doctrine. Considering both the Court's past refusal to contemplate the issue[189] and the relatively conservative nature of the newly appointed Justices,[190] there is a significant chance that the ICD would continue to stand, as more conservative Justices have been historically reluctant to recognize other forms of police liability. However, given both the compelling reasons for overturning the doctrine and the relatively scant judicial record of the new justices,[191] hope remains that the Court would eliminate the doctrine's application to civil rights cases if confronted with the issue.

Even absent the Supreme Court's intervention, circuit judges could overturn the ICD or hold that the doctrine is inapplicable in civil rights cases. A minority of circuits have already taken this step,[192] and undecided states could easily join them when presented with an applicable case. Given the widespread and contentious debate over police tactics in response to the past year's protests in support of the Black Lives Matter Movement, many circuits will likely be able to find an applicable case.[193] If these circuits present a compelling enough rationale, circuits in the majority opinion could be convinced to change their position. Historic and purpose-based arguments could be useful here, as courts in many majority circuits have not fully considered such arguments in ruling on the ICD.[194] Though this solution would be more time intensive, as it would require persuading individual circuits, it would not require the high-profile use of the Supreme Court or education of the general public on the complexities of the topic.

188. *Supreme Court Procedures*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/3F2P-Q7X2].

189. *Ziglar*, 137 S. Ct. at 1843.

190. *Cf.* Mark Sherman, Kevin Freking & Matthew Daly, *Trump's Impact on Courts Likely to Last Long Beyond His Term*, ASSOCIATED PRESS (Dec. 26, 2020), https://apnews.com/article/joe-biden-donald-trump-mitch-mcconnell-elections-judiciary-d5807340e86d05fbc78ed50fb43c1c46 [https://perma.cc/Q4SF-6GUJ].

191. *See, e.g.*, *With Scant Record, Supreme Court Nominee Brett Kavanaugh Elusive on Abortion*, PBS (Aug. 3, 2018, 9:15 AM), https://www.pbs.org/newshour/politics/with-scant-record-supreme-court-nominee-brett-kavanaugh-elusive-on-abortion [https://perma.cc/HST5-SL46] (commenting on Justice Brent Kavanaugh's limited record on abortion as an example of one issue on which the public knows little about a justice's views).

192. Horwitz, *supra* note 100, at 142.

193. *See, e.g.*, Baude v. City of St. Louis, 476 F. Supp. 3d 900 (E.D. Mo. 2020), *appeal docketed*, No. 20-2864 (8th Cir. Sep. 8, 2020) (demonstrating case discussing the ICD which arose from an alleged violation of rights at a protest).

194. *See, e.g.*, Jackson v. City of Cleveland, 925 F.3d 793 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020).

B. Federal Legislation

Alternatively, the ICD could be ruled inapplicable by congressional action. Because the ICD is a federal doctrine and because it does not derive from the Constitution, it could be amended by a congressional act. Given that the national conversation has turned to topics such as police brutality, white supremacy, and conspiracy liability,[195] now is an ideal time for Congress to address the ICD. This issue could generate bipartisan support, as it does not already have entrenched supporters or dissidents on either side of the aisle. The recent start of the Biden administration may further incentivize action, as the administration has proven eager to pass bipartisan initiatives.[196] This solution would be highly beneficial because it would apply across all fifty states. However, for Congressmen to take notice of the issue and to effectively act to remedy it, activists and lobbyists would need to become more educated on the ICD.

Though educating politicians and the public about the ICD may seem daunting due to the complexity of the issue and general lack of knowledge on the subject, the rise of infotainment[197] has demonstrated that the general public is interested in learning about complicated but important topics. Creating accessible and informative sources about the issue may help to create public interest and understanding in the topic. An educated public could, in turn, both educate their representatives and pressure them to take action on the issue.

CONCLUSION

The history of the application of the ICD to the Civil Rights Act of 1871 is a long and complicated one. Created in the turbulent and divisive aftermath of the Civil War, the Act sought to provide an avenue for justice against civil rights violations.[198] Instead of relying on the whims of law enforcement and prosecutors, the Act empowers individuals to seek their own justice and vindicate their own grievances.[199] Section 1983 has been a touchstone of civil rights litigation over the past century[200] and continues to

195. *See supra* note 138.

196. *Cf.* Susan Milligan, *Biden Opens Bipartisan Dialogue with Republicans on Coronavirus Relief*, U.S. NEWS (Feb. 1, 2021), https://www.usnews.com/news/politics/articles/2021-02-01/biden-opens-bipartisan-dialogue-with-republicans-on-coronavirus-relief [https://perma.cc/VS2H-2SGA].

197. *E.g.*, Alissa Wilkinson, *5 Years In, HBO's Last Week Tonight is a Lot More than "Just Comedy"*, VOX (Feb. 17, 2019, 1:38 PM), https://www.vox.com/culture/2019/2/14/18213228/last-week-tonight-john-oliver-hbo-season-six [https://perma.cc/6X7Q-T6MJ].

198. Gardner, *supra* note 12, at 83.

199. *Id.* at 83–84.

200. Adelman, *supra* note 11, at 3.

play a consequential role in modern civil rights movements.[201] The ICD, by comparison, has been a relatively niche and quiet doctrine borne out of an oversight in the Sherman Act[202]—a creation of legislative oversight and judicial ingenuity. Both § 1983 and the ICD reflect the context in which they were developed, and both have a rightful place in the legal landscape.

However, by limiting the scope of § 1983 through application of the ICD, the Courts have replaced the logic of equity with that of business and have threated a key component of the Civil Rights Act. Conspiracy liability has always been at the center of the Civil Rights Act[203]—and for good reason. As current events underscore, conspiracies can be dangerous.[204] That danger is made exponentially more threatening when it is exacerbated by those who act with the force and authority of the law.[205] In order to support public policy measures such as public accountability, financial consequences, and representation of values, the ICD should not be applied to § 1983. Furthermore, the legal analysis of the interaction of the ICD and § 1983 demonstrates they are incompatible.

To ensure that the victims of anti-civil rights conspiracies have recourse to justice, the ICD must not be applied in those cases. Repealing its application to civil rights cases could come either through legislative or judicial means. Though either solution would likely require the work of dedicated activists, the time and the tone of the national conversation has never been more favorable. Overturning the ICD in civil rights cases will be just one step in a long line of reforms necessary to achieve equity in this country and hold law enforcement accountable for violations of civil rights. But it is an easy, sensible, and important step toward the right side of history.

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201. *See* Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 3 UTAH L. REV. 639 (2018).

202. *See* Nelson, *supra* note 18, at 978.

203. *See* Gardner, *supra* note 12.

204. *See supra* notes 136–140 and accompanying text.

205. *See supra* note 172.

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