Appropriate Defenses to Damage Actions for Discrimination Under Sections 1981 and 1982
Judicial expansion of the scope of civil rights legislation has raised a number of questions concerning the liabilities, defenses, and remedies involved.¹ In creating rights alone, the statutes left these elements to be fashioned by the courts. Yet, although defenses to actions brought under section 1983 of title 42 of the United States Code² have been explicated thoroughly by the courts,³ the issue of defenses under sections 1981⁴ has been more recent.


The Supreme Court has held that sections 1981, 1982 and 1983 of Title 42 of the United States Code, see notes 2, 4-5 infra, apply to corporations operating community recreational facilities. Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). Some lower courts have gone even further. In McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), cert. granted, 44 U.S.L.W. 3270 (U.S. Nov. 11, 1975) (No. 75-62), section 1981 was held applicable to private schools, and in Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975), the court held that section 1981 granted a cause of action to white plaintiffs who were the subject of racial discrimination.

² That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other 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.

42 U.S.C. § 1983 (1970). All textual references to statutory provisions will be to 42 U.S.C. unless otherwise noted.


⁴ That section 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
and 1982 has been given little consideration. The establishment and ascendency of compensatory damages as an appropriate remedy in discrimination cases coupled with the increased popularity of sections 1981 and 1982 as vehicles for antidiscriminatory litigation makes a thorough examination of the question of proper defenses imperative. This Note will focus on the general problem of defenses in discrimination cases. An introduction to the problem is provided by Tillman v. Wheaton-Haven Recreation Association, in which the defense of due diligence was raised by corporate officers in an action for damages for discriminatory acts of the corporation. With Tillman as a starting point, conceptual frameworks upon which liability under civil rights statutes can be grounded will be developed. These constructs will form a basis for discussion of defenses, considered primarily in light of the remedies afforded under each theory.

**AN INTRODUCTION OF THE PROBLEM OF DEFENSES:**

**TILLMAN v. WHEATON-HAVEN RECREATION ASSOCIATION, INC.**

The issue of defenses to section 1981 and 1982 actions was discussed extensively for the first time at the appellate level in Tillman v. Whea-
ton-Haven Recreation Association\(^9\) (Tillman II); the discussion of liability and defenses in that opinion initially must be viewed against the factual and legal background of Tillman II.

A. Factual Background of Tillman II

Wheaton-Haven Recreation Association was a nonprofit corporation operating a swimming pool for use by the members of the association and their guests.\(^{10}\) The operation was financed by fees and dues paid by the members; no one could be admitted unless he or she was a member or the guest of a member, and the size of the membership was limited. Persons residing within three-quarters of a mile of the pool were given a preferential place on the waiting list if the membership was full. Persons residing beyond that limit could not apply for membership except upon the recommendation of a member, and were not given a preference on the waiting list. Further, a preferred member-resident could return his membership to the association and then confer upon a purchaser of his property a first option on that membership.

In 1968, a black who had purchased from a nonmember a home within the three-quarter mile radius inquired about membership in the then all-white pool. Subsequently, the association voted down a resolution that would have permitted membership of blacks. Further, the board of directors passed a resolution effectively precluding the admission of black guests,\(^{11}\) a policy later reaffirmed by a resolution of the entire member-

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9. Id., rev'g 367 F. Supp. 860 (D. Md. 1973). This litigation will be referred to hereinafter as Tillman II to distinguish it from an earlier series of identically styled cases concerning the applicability of sections 1981 and 1982. See notes 23-24 infra & accompanying text.

Defenses involving various immunities have been noted cursorily in several decisions dismissing claims based on section 1981. See, e.g., Penn v. Schlesinger, 490 F.2d 700 (5th Cir. 1973) (section 1981 does not constitute a waiver of sovereign immunity), rev'd on other grounds on rehearing, 497 F.2d 970 (5th Cir. 1974) (per curiam); Arunga v. Weldon, 469 F.2d 675 (9th Cir. 1972) (municipal corporation not a “person” for purposes of section 1981); Rhodes v. Meyer, 334 F.2d 709 (8th Cir. 1964) (traditional judicial and derivative quasi-judicial immunity applies to section 1981); Howard v. Rolufs, 338 F. Supp. 697 (E.D. Mo. 1972) (state prosecuting attorney acting in vire is immune to section 1981 claim); Winterhalter v. Three Rivers Motors Co., 312 F. Supp. 962 (W.D. Pa. 1970) (traditional judicial and derivative quasi-judicial immunity applies to section 1981).


11. This resolution, limiting guests to relatives of members, was passed the day after a couple who were members in good standing brought a black guest to the pool. It was
In 1969, the black who was denied membership, a couple who unsuccessfully sought to bring a black guest to the pool, and the black guest, instituted a suit against the association and its officers, seeking damages and injunctive relief under sections 1981, 1982, and Title II of the Civil Rights Act of 1964.

B. Legal Background of Tillman II

At the time of the exclusionary measures adopted by the association, the Supreme Court had handed down only one decision dealing with the issue of private racial discrimination under sections 1981 and 1982. That case was Jones v. Alfred H. Mayer Co.; a careful look at its holding and implications is important as it was the only extant guideline for the association’s actions. The Court held that section 1982 barred all racial discrimination, private as well as public, in the sale or rental of real property, but stated explicitly that it did not “deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling.” From the standpoint of the association, a provider of services and facilities, Jones fairly could be dismissed as inapposite. The Jones reasoning, however, that section 1982 applies to private discrimination, did support an argument by analogy that section 1981, which bars discrimination in the making and enforcing of contracts, likewise applies to private discrimination. Nonetheless, any determination of the scope of section 1981 had to account for the exemption of private clubs from the operation of the Civil Rights Act of 1964. A strong argument could be made that the exemption applied to earlier civil rights legislation, such as section 1981, as well, and that the association fell

admitted that one reason for the adoption of this policy was to prohibit black guests. Id. at 434.

12. Id.
15. Id. at 413. See note 5 supra for text of section 1982.
16. See note 4 supra for text.
17. 42 U.S.C. § 2000a(e) (1970). That section provides: "The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public."

18. Decisions rendered subsequent to the commencement of Tillman I have held section 1981 subject to the section 2000a(e) exception, see Tillman v. Wheaton-Haven Recreation Ass’n, 451 F.2d 1211, 1214-15 (4th Cir. 1971); Solomon v. Miami Woman’s Club, 359 F. Supp. 41, 44 (S.D. Fla. 1973); Sims v. Order of United Commercial Travelers of America, 343 F. Supp. 112, 113-14 (D. Mass. 1972), but the Supreme Court consistently has declined to reach this issue, finding instead that the establishments
within the meaning of a private club under section 2000a(e). Thus at the time of the *Tillman* suit, there was no precedent supporting the applicability of section 1982, there was a fair implication in *Jones* that the section did not apply to the *Tillman* facts, and there were factors militating against the pertinence of section 1981.

Given the unsettled character of the law with regard to Wheaton-Haven Association’s situation, the action of the board of directors prior to the institution of the suit was significant. On two separate occasions directors sought advice of counsel before refusing to admit blacks as before it were not in fact private, see *Tillman* v. Wheaton-Haven Recreation Ass’n, 410 U.S. 431, 438-39 (1973); *Sullivan* v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969).


19. The factors that would make a club “private” were not delineated clearly at the time of the Wheaton-Haven Association’s discriminatory actions, but a sound prima facie case could have been made in light of two later Supreme Court decisions, *Moose Lodge No. 197 v. Irvis*, 407 U.S. 163 (1972), and *Daniel v. Paul*, 395 U.S. 298 (1969). *Moose Lodge* found a club that conducted its activities on private property, was privately funded, and admitted only members and guests to its property, to be private at least within the ordinary meaning of that term, 407 U.S. at 171. The club in *Daniel* required only a nominal fee for membership cards routinely granted to whites and denied to blacks. The Court determined this to be a mere subterfuge, and held the club to be a public accommodation. 395 U.S. at 302-08. The Wheaton-Haven Association system clearly was more similar to the *Moose Lodge* situation than to *Daniel*. For discussions of what constitutes a private club see Note, *The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judicial Confusion*, 44 N.Y.U. L. Rev. 1112 (1969); Note, *Public Accommodations Laws and the Private Club*, 54 Geo. L.J. 915 (1966); Comment, *Public Accommodations: What is a Private Club?*, 30 Mont. L. Rev. 47 (1968); *Private Groups*, supra note 18 at 1442.

20. After the filing of the *Tillman* I suit in the district court, the legal background was changed somewhat by the Supreme Court’s decision in *Sullivan* v. Little Hunting Park, Inc., 396 U.S. 229 (1969). Little Hunting Park, Inc. was a corporation operating a community park and playground for residents of the surrounding area. A membership share entitled the persons in the immediate family of the shareholder to use the park and playground. Shareholders were entitled to assign shares to tenants subject to board approval. The board refused to approve an assignment by Sullivan to a black tenant. The Court found the corporation not to be a private club, and found the shareholding arrangement to be a right inherent in the lease, making section 1982 applicable. Finally, the Court held compensatory damages appropriate. *Tillman* could be distinguished factually from *Sullivan*, however, in that the membership in *Tillman* was not an assignable interest, was limited numerically as well as geographically, and was subject to a fairly complex admission procedure.
members or guests. Further, the ratification of the exclusionary policies by an overwhelming vote of the general membership established the directors’ decision as representative of the corporate body.

The history of the Tillman litigation is not complex. In an unreported opinion the district court granted summary judgment for the defendants. The Court of Appeals for the Fourth Circuit affirmed, holding that the private club exemption of section 2000a(e) controlled sections 1981 and 1982, that the association was a private club, and that acquisition of membership was not incident to the sale or lease of property, thus making section 1982 inapplicable in any event. The Supreme Court reversed, finding that the benefits afforded by the association were incident to the property rights involved and that the association was not a private club for purposes of section 2000a(e). This series of cases establishing the unlawfulness of the Association's discrimination constituted Tillman I; the litigation following remand for determination of damages constituted Tillman II, in which the district court awarded compensatory damages against the corporation but not against the directors individually. Reversing, the Court of Appeals for the Fourth Circuit held the directors individually liable, and found their due diligence in seeking to comply with the law an invalid defense.

The potential impact of Tillman II hardly can be overemphasized in light of the rapidly changing nature of civil rights law, and the consequent difficulty in determining when one is in violation of the law. For example, in McCrary v. Runyon, decided on the same day as Tillman II, the Court of Appeals for the Fourth Circuit held that section 1981 prohibited private schools from denying admission to qualified black applicants solely on the basis of race, overturning years of custom in an

22. Id.
23. 451 F.2d 1211 (4th Cir. 1971).
25. 367 F. Supp. 860, 866 (D. Md. 1973). The court also initially refused to award punitive damages or attorney's fees. Id. at 864, 866. Later, in an unreported order, it did allow fees for ACLU staff lawyers, but declined to award fees for other volunteer lawyers. Tillman v. Wheaton-Haven Recreation Ass'n, 317 F.2d 1141 (4th Cir. 1975) (Boreman, J., dissenting).
26. 317 F.2d 1141 (4th Cir. 1975). The appellate court further disagreed with the lower decision on the question of attorney's fees. Id. at 1147. See note 25 supra.
27. 515 F.2d 1082 (4th Cir. 1975), cert. granted, 44 U.S.L.W. 3270 (U.S. Nov. 11, 1975) (No. 75-62).
area in which it was assumed that discrimination was permissible.\textsuperscript{28} And in \textit{Hollander v. Sears, Roebuck \& Co.}\textsuperscript{29} a white plaintiff was held to have a cause of action under section 1981 against an employer who discriminated against white applicants in an effort to recruit blacks. These cases raise the possibility of extraordinary potential liability. Because defendants now are subject to liability for damages arising from causes of action nonexistent only two years ago, the importance of an examination of the basis of liability under sections 1981 and 1982 is apparent.

\textit{Tillman II} additionally invoked a body of case law developing liabilities and defenses under section 1983\textsuperscript{30} in situations not generally involving racial discrimination.\textsuperscript{31} The rationale behind the \textit{Tillman} extension and modification of this body of case law to fit section 1981 and 1982 actions,\textsuperscript{32} and the impact of this approach, also must be discussed.

**Three Approaches to Liability Under Civil Rights Statutes Providing No Remedies or Defenses**

Because the Reconstruction civil rights statutes (sections 1981-1983) specify neither remedies nor defenses, courts have resorted to at least three different approaches to define the scope of liability under these statutes. One approach is based upon the underlying purpose of the acts as evidenced by legislative history,\textsuperscript{33} and as elucidated by the Supreme


\textsuperscript{29} 392 F. Supp. 90 (D. Conn. 1975).

\textsuperscript{30} For text, see note 2 supra.


\textsuperscript{32} 517 F.2d at 1143-44.

\textsuperscript{33} A detailed discussion of the legislative history of the Civil Rights Act of 1871 as
Another approach has been to use tort law as a construct upon which to predicate principles of liability. Finally, courts have subjected the issue of liability to considerations of public policy. These approaches have not been delineated clearly, and often overlap in the decisions rendered in this area; for the purposes of this discussion, they will be treated separately.

A. The Underlying Purpose Approach

The legislative history of sections 1981 and 1982, apart from later explication by the Supreme Court, offers no support for the proposition that compensatory relief was anticipated as an appropriate means of redress. These sections were enacted to protect the rights of "person and property" by furnishing means for their vindication, and "to secure freedom to all persons within the United States . . ." Injunctive relief would have served these purposes. Although the punitive nature of the Reconstruction legislation was recognized, no deterrent device such
as a provision for the recovery of damages was advocated. Yet, in *Sulli-
van v. Little Hunting Park, Inc.*, the Supreme Court held that com-
pensatory damages may be sought in an action brought under section
1981. This broad construction of section 1981 similarly should allow
broad defenses when such relief is at issue. Consistent with this view
and the recognition that Reconstruction legislation was directed toward
eradicating flagrant disregard for the rights of the freedman, it is dou-
bleful that a good faith, diligent, though misconceived, attempt to comply
with the law should be held invalid as a defense to an action seeking
compensatory relief brought under sections 1981, 1982, or 1983. In *Till-
or subject him to any punishment in consequence of his color or race will expose him-
sell to fine and imprisonment, I think such acts will soon cease." *Id.* at 475.

40. 396 U.S. 229 (1968).

41. *Id.* at 238-40. A number of earlier Supreme Court cases have established that compensatory damages are appropriate when federal rights are violated. See, e.g., *Bell v. Hood*, 327 U.S. 678, 684 (1946) (courts will adjust remedies to grant necessary relief when federally protected rights have been invaded); *Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 569 (1930) (absence of a statutory penalty is not controlling on the enforceability of the right); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916) (disregard of statute is wrongful act; the right to recover
damages by one thereby injured is implied).

42. J. TENBROEK, *EQUAL UNDER LAW* 179-81 (1965). See also W. BROCK, *AN AMER-
ICAN CRISIS* 124 (1963); J. MCPHERSON, *THE STRUGGLE FOR EQUALITY* 332 (1964); K. STAMPP, *THE ERA OF RECONSTRUCTION* 75 (1965). During the debate on the 1866 civil rights bill it was noted that:

> The Legislature of Louisiana has passed an act by which... any freedman
> who makes a contract under it is perfectly at the control and will of the
> man with whom he makes the contract. If that man is a bad man, at the
> end of the year the freedman will not receive a farthing for his years
> labor. He can trump up charges to cheat and defraud the laborer.


43. The scope of allowable defenses to a claim for damages was not raised in *Sulli-
van*. Supreme Court decisions upon which the allowance of damages in *Sulli-
van* was based are no more helpful. *Bell v. Hood*, 327 U.S. 678 (1946) involved an alleged violation of fourth and fifth amendment rights, and did no more than establish the general
proposition that compensatory damages might be appropriate.

> Where federally protected rights have been invaded, it has been the rule
> from the beginning that courts will be alert to adjust their remedies so as
> to grant the necessary relief. And it is also well settled that where legal
> rights have been invaded, and a federal statute provides for a general right
> to sue for such invasion, federal courts may use any available remedy to make
> good the wrong done.

327 U.S. at 684 (footnotes omitted). The Court did not indicate that such relief was
required in all cases in which a showing of injury was made.

*Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916), noted that "[a] disregard of the
command of the statute is a wrongful act, and where it results in damage to one of
man II, however, the court construed Supreme Court decisions as establishing that an action brought for "discrimination is fundamentally for the redress of a tort . . ." and held that since the law is directed at the consequences of discrimination, good faith is not a defense to the fact of violation.

The court cited Griggs v. Duke Power Co., for the rule that good faith is not a defense to a discrimination suit. In that case, Duke Power Co. made a high school diploma or a satisfactory performance on standardized intelligence tests prerequisites to certain positions. The lower courts found no intent to discriminate and held that the presence or absence of such intent was controlling on the question of violation. The Supreme Court reversed on the theory that the statute (Title VII of the Civil Rights Act of 1964) was concerned with discriminatory consequences and that intent was irrelevant to the issue of violation.

Although Griggs does not control the result of Tillman II because it speaks to a different statute, Griggs also does not control on the issue the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . ." 241 U.S. at 39. Rigsby, then, speaks to the "disregard" of a statute, which suggests that ignorant or intentional violation of a statute, if accompanied by diligent efforts to comply with the statute, are not violative of the statute. Thus, when there is a legitimate question as to the scope of the statute, the implication of a right to compensatory damages is not compelled.

44. 517 F.2d at 1143. See notes 60-63 infra & accompanying text.
45. 517 F.2d at 1143. The court further noted that the 1866 act applied to those who were unaware of its scope, as well as to those who knowingly violated it. Id.
47. 401 U.S. at 428.
48. Id. at 432.
49. Indeed, it would seem that section 1983 is more relevant to an interpretation of sections 1981 and 1982 than Title VII, because historically it is more closely connected. (Sections 1981 and 1982 originally were enacted as part of the Civil Rights Act of 1866, and section 1981 was reenacted as part of the Civil Rights Act of 1870. Section 1983 is part of the Civil Rights Act of 1871, which was derived from the Civil Rights Act of 1866.) And notably, good faith on the part of the defendants has been held to be relevant in section 1983 cases. For example, in Beauregard v. Wingard, 230 F. Supp. 167 (S.D. Cal. 1964), the complainant alleged that the defendants, police officers, had arrested and imprisoned him in violation of his rights under the fourteenth amendment and under section 1983. The court held that motive was relevant, that it "should and [did] bear heavily in cases under Section 1983 . . . ." Id. at 183. In reaching its decision, the court found support in the language of a number of cases interpreting section 1983, e.g., United States v. Classic, 313 U.S. 299, 326 (1941) (misuse of power by a "wrong-doer" as action taken "under color of" state law); Monroe v. Pape, 365 U.S. 167, 172 (1961) (section 1983 directed against "abuse" of position). Absent some clear indication from Congress or the Supreme Court that concepts developed under the Civil Rights Act of 1964 and section 1983 are to be applied to sections 1981 and 1982, it cannot
of defenses to actions for damages under sections 1981 and 1982 because damages were not sought in that case. Although good faith and proper intent do not obviate the justification for injunctive relief, it does not follow that they are irrelevant to the rationale underlying compensatory damages. Furthermore, the language in *Griggs* is consistent with the restriction of allowable remedies to injunctive relief only. *Griggs* states the purpose of Title VII to be the removal of barriers creating discriminatory preferences in employment.\textsuperscript{50} Damages are not necessary to effect this purpose; the affording of injunctive relief is sufficient.

Further, in finding discrimination unlawful regardless of intent,\textsuperscript{51} the Court in *Griggs* addressed itself exclusively to the context of employment discrimination. In the social milieu, not all discrimination is prohibited.\textsuperscript{69} Thus, *Griggs* does not preclude necessarily the consideration of intent in this context when a bona fide belief in the lawful nature of the discrimination is professed.

In addition to its reliance upon *Griggs*, the court in *Tillman II* relied upon *Cooper v. Aaron*\textsuperscript{58} and *Jones v. Alfred H. Mayer Co.*\textsuperscript{64} in determining that good faith could not be a defense to a discrimination suit. Neither of these cases seems entirely appropriate, however. *Cooper* involved an application by the Little Rock, Arkansas, School Board to the federal district court to suspend the implementation of its approved desegregation plan because of anticipated violence and disruption such as had occurred during the previous year. The Supreme Court ordered reinstatement of the plan. Accepting "without reservation" the good faith of the school board,\textsuperscript{65} the Court nonetheless found the disruption to have been the result of state governmental interference, and concluded that this fact compelled the rejection of the board's position.\textsuperscript{66} Whether the board's good faith would have been sufficient to have warranted the suspension of desegregation absent other state interference was left open. In *Jones*, the scope of section 1982 was extended to priv

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\textsuperscript{50.} 401 U.S. at 429-31.
\textsuperscript{51.} Id. at 432.
\textsuperscript{53.} 358 U.S. 1 (1958).
\textsuperscript{54.} 392 U.S. 409 (1968). See notes 14-20 supra & accompanying text.
\textsuperscript{55.} 358 U.S. at 14-15.
\textsuperscript{56.} Id. at 15.
ate sales and rentals of property, but neither defenses nor damages were treated.  

Griggs, Cooper, and Jones, though relevant to the question of good faith defenses to discrimination actions generally, do not establish that intent is not a factor when compensatory damages are sought. The purpose of the civil rights acts as defined by the Supreme Court clearly is to eradicate discrimination in matters within their scope regardless of whether there was, or could have been, an intent to violate the law. But this objective could be accomplished by injunctive relief alone when there is a good faith attempt to comply with the law. Because the Supreme Court has not passed on the issue of intent with regard to compensatory damages, the question must be considered still unresolved.

B. The Common Law Approach

The development of a theory of remedies and defenses under sections 1981 and 1982 must be derived, to some extent, from common law concepts, for reliance on legislative history and the face of these sections yields minimal results. In developing this statutory theory of remedies and defenses, tort law in particular appears useful. As noted by Justice Douglas in Monroe v. Pape: "Section 1979 [now section 1983] should be read against the background of tort liability . . . ."

57. Because Jones decided for the first time that section 1982 covered private action, it reasonably could be inferred that the Court did not recognize a good faith defense. The issue was not raised by defendants, however. The Court expressly sanctioned injunctive relief, but declined to pass upon the propriety of compensatory damages in section 1982 cases. 392 U.S. at 414 & n.14.

58. This principle is supported in the legislative history of Title II of the Civil Rights Act of 1964, indicating that the overriding purpose of Title II is "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." H.R. REP. No. 914, 88th Cong., 1st Sess. 18 (1963).

59. Resort to common law is authorized statutorily by 42 U.S.C. § 1988 (1970), which provides that when the laws of the United States "are deficient in the provisions necessary to furnish suitable remedies . . . the common law . . . shall be extended to and govern the [district] courts in the trial and disposition of the cause . . . ."

60. 365 U.S. 167 (1961).

61. Id. at 187. This statement has affected significantly the theory governing actions brought for violations of civil rights acts. See Nahmod, supra note 3 at 6. Although there is still some disagreement as to the extent to which tort concepts should govern section 1983 actions, cf. Nahmod, supra note 3 at 11-12, it apparently is settled that courts must look to tort law for the appropriate basis of liability and remedies in those actions. See, e.g., Pierson v. Ray, 386 U.S. 547, 556-57 (1967); McCray v. Maryland, 456 F.2d 1, 4-6 (4th Cir. 1972).
In the case of *Loether*, the Court stated that a damage action under a statute forbidding racial discrimination (Title VIII of the Civil Rights Act of 1968) sounds basically in tort.

This Note posits two theories by which principles of tort law may be utilized in the disposition of civil rights actions. Under the "control theory," a statutory civil rights action often is deemed to have the same elements as an analogous common law tort, and consequently also is deemed to share the same defenses and remedies. Under the "guidelines theory," common law tort precepts, together with federal policy, are considered by the court in determining applicable remedies and defenses.


Application of the control theory is illustrated by *Whirl v. Kern*, in which the court, confronting an action under section 1983, implied that because the elements of that action were synonymous with the elements of the tort of false imprisonment, defenses to the common law tort were controlling on the statutory action. Although it appears that such "background torts" as false imprisonment are found more easily in actions brought under section 1983 than in actions brought under sections 1981 and 1982, the importance of identifying the background tort when the control theory is implemented is illustrated by a comparison of *Pierson v. Ray*, 386 U.S. 547 (1967), with *Whirl v. Kern*, 407 F.2d 781 (1969), both of which were brought under section 1983. In *Pierson* an action was brought against police officers for false arrest and for violation of section 1983. The Court held that the defense of good faith, available to police officers at common law in an action for false arrest, also was available to them in an action under section 1983. 386 U.S. at 557. The plaintiff in *Whirl* sued for damages for false imprisonment and for violation of section 1983. The court found *Pierson* inapposite (since it involved false arrest rather than false imprisonment) and held that though a good faith defense existed at common law to the tort of false arrest, no such defense existed to false imprisonment. 407 F.2d at 792.

63. Id. at 195.
65. 407 F.2d 781 (5th Cir. 1969).
66. See note 2 supra.
67. Id. at 790-92; see *Nahmod*, supra note 3, at 14-15. The importance of identifying the background tort when the control theory is implemented is illustrated by a comparison of *Pierson v. Ray*, 386 U.S. 547 (1967), with *Whirl v. Kern*, 407 F.2d 781 (1969), both of which were brought under section 1983. In *Pierson* an action was brought against police officers for false arrest and for violation of section 1983. The Court held that the defense of good faith, available to police officers at common law in an action for false arrest, also was available to them in an action under section 1983. 386 U.S. at 557. The plaintiff in *Whirl* sued for damages for false imprisonment and for violation of section 1983. The court found *Pierson* inapposite (since it involved false arrest rather than false imprisonment) and held that though a good faith defense existed at common law to the tort of false arrest, no such defense existed to false imprisonment. 407 F.2d at 792.
tions 1981 or 1982, there are nevertheless a number of potentially useful background torts that may be considered during disposition of a suit brought under either of the latter two sections. Such torts include: interference with prospective advantage, racial discrimination as a tort of insult and indignity, the common law tort of an innkeeper's refusal of lodging to a traveler, a prima facie tort, and intentional infliction of mental distress. Although at first glance these appear to be particularly useful background torts, a closer analysis reveals problems.

(a) Interference with Prospective Advantage

Interference with prospective advantage initially appears to be an appropriate background tort for civil rights statutory actions because when one is not allowed to purchase property or make a contract for use of recreational facilities, he or she is being denied a prospective advantage. Two elements, however, limit the usefulness of this tort to control theory application.

First, the tort is generally restricted to commercial situations or interference with one's business; recovery, therefore, has been denied when the advantage sought was primarily social. There is no common law right to be admitted to membership in a voluntary association, nor will a court compel such an organization to admit a person who has not been elected according to its rules and bylaws. "The general rule is that there is no legal remedy for exclusion of such an individual from admission to the membership."

Pape, 365 U.S. 167 (1961), for instance, such torts as assault, battery, false imprisonment, intentional infliction of mental distress, and invasion of privacy probably could have been utilized as background torts. Nahmod, supra note 3 at 6.


71. Of course, if the advantage is not economic, the tort may not be applicable; see note 72 infra & accompanying text. When membership in a swimming pool is denied, the advantage may be one that involves only the pleasure and enjoyment of the recreational facility. In the Tillman situation, however, the right of first option when the membership was full would create an economic prospective advantage. It would be possible for a white who belonged to the pool to sell his house for a considerably higher price than a black who had been denied membership, because the white member could assure his purchaser the option for membership. See Tillman v. Wheaton-Haven Recreation Ass'n, Inc, 451 F.2d 1211, 1223 (4th Cir. 1971) (Butzner, J., dissenting), adopted in reversal, 410 U.S. 431, 437 (1973).

72. Prosser, The Law of Torts § 130, at 950 (4th ed. 1971). Exceptions to this rule include interference with expected gifts or legacies under a will. Id.

73. Mayer v. Journeymen Stone-Cutters' Ass'n, 47 N.J. Eq. 519, 20 A. 492 (Ch. 1890).

into a voluntary association, no matter how arbitrary or unjust the exclusion." 76 Of course there is a remedy under section 1981, unless the association falls within the private club exception. 76 But, because the tort of interference with prospective social advantage does not exist, when section 1981 is violated by the denial of membership to a black by an association organized for social purposes, common law principles cannot form a basis for determining defenses, liabilities, or remedies. 77

Second, an exclusively malevolent motive is generally a condition precedent to a finding of interference with prospective advantage; 78 therefore, if the defendant acts partially to protect a legitimate interest, a claim for interference with prospective advantage will be insufficient. 79 Technically, then, it would follow that a defendant who refused to admit blacks to his business establishment out of malice and spite and also because it would hurt his business could use the latter reason as a defense to damages. Because this rationale does not comport with application of the civil rights sections, the tort of interference with prospective advantage is not a proper background tort for utilization of the control theory. 80

77. Courts have been reluctant to extend the tort "to speculative prospects outside the field of business relations ..." 1 F. HARPER & F. JAMES, JR., THE LAW OF TORTS § 6.11, at 512 (1956). Interference with prospective advantage nonetheless can serve as a background tort under the control theory when there is a sufficient showing of business experience from which it is possible to estimate with some certainty the value of what has been lost and the likelihood of the plaintiff's having received that value but for the defendant's interference. PROSSER, supra note 72, § 130, at 950.
78. See PROSSER, supra note 72, § 130, at 953.
79. Dean Prosser reaches the conclusion that:
Most of the decisions have turned upon the defendant's motive or purpose. . . . [T]he defendant will be held liable if the reason underlying his interference is purely a malevolent one, and a desire to do harm to the plaintiff for its own sake. On the other hand, some element of ill will is seldom absent from intentional interference; and if the defendant has a legitimate interest to protect, the addition of a spite motive usually is not regarded as sufficient to result in liability.
Id. (footnotes omitted).
80. A final argument against the utility of interference with prospective advantage of perhaps less significance is that its common law application generally involves a third party's interference with the relationship between two other parties. See, e.g., Boggs v. Duncan-Schell Furniture Co., 163 Iowa 106, 143 N.W. 482 (1913) (malicious attempt to attract plaintiff's customers by price-cutting); Graham v. St. Charles St. R. Co., 47 La. Ann. 214, 16 So. 806 (1895) (threatening to fire employees if they traded at plaintiff's store); Willner v. Silverman, 109 Md. 341, 71 A. 962 (1909) (attempting to impede
Finally, with respect to an action against officers of a corporation for racial discrimination, the tort of interference with prospective advantage is inapplicable. The tort developed from the tort of interference with contract, and its elements closely parallel those of the earlier action. Significantly, directors and corporate officers generally are not liable to any third party who has contracted with the corporation for inducing the corporation to breach its contract with the third party. This principle applies even when the action includes a claim for damages for humiliation, embarrassment, loss of reputation, or loss of credit rating. Thus, it would follow that they are not liable for inducing their corporation to interfere with a third party's prospective advantage.

(b) Racial Discrimination as a Tort of Insult and Indignity

A nascent tort that can be characterized as one of insult and indignity resulting from racial discrimination has potential applicability under the control theory. In Rogers v. Loether, the Court of Appeals for the Seventh Circuit suggested that a basis for the emergence of such a tort could be found in the analysis of Professors Gregory and Kalven. Gregory and Kalven, however, do not assert that such a tort exists, but rather pose the question whether the act of racial discrimination may be

plaintiff's employment by blacklisting him with a trade association); Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909) (establishing a barber shop for the sole purpose of injuring plaintiff by enticing away his customers); Huskie v. Griffin, 75 N.H. 345, 74 A. 395 (1909) (former employer discouraging prospective employer from hiring plaintiff); Jersey City Printing Co. v. Cassidy, 63 N.J. Eq. 759, 53 A. 230 (Ch. 1902) (striking workers coercing prospective employees to refrain from taking employment with plaintiff); Erdman v. Mitchell, 207 Pa. 79, 56 A. 327 (1903) (members of unincorporated union attempting to deprive members of plaintiff incorporated union of work on same job by means of strikes and threats).

Violations of section 1981 or 1982 commonly are instances of one party refusing to contract with another, except in the corporate context when a black seeks to make a contract with a corporation and a third party, the corporate director, interferes. This latter situation is discussed at note 82 infra & accompanying text.

81. See Prosser, supra note 72, § 130, at 949; Basak, Principles of Liability for Interference with Trade, Profession or Calling (pts. 1-3), 27 L.Q. Rev. 290, 399 (1911), 28 L.Q. Rev. 52 (1912).


83. See, e.g., Wampler v. Palmerton, 250 Ore. 65, 439 P.2d 601 (1968) (no liability if officers act in good faith to advance interest of corporation).


regarded as an independent "dignitary" tort. Confronting a similar question with respect to sex discrimination, the Court of Appeals for the Fourth Circuit stated in *Esliner v. Thomas* that "[a] federal cause of action based on sex-discrimination has no deep roots; rather, it emerges from recent enlightened approaches to what constitutes equal protection of the laws under the fourteenth amendment." The present status of racial discrimination probably will be treated similarly, for case law has not yet recognized such discrimination to be an independent tort. It would seem, though, that racial discrimination at least may be considered a component of some other tort, such as intentional infliction of mental distress. In summary, however, application of the control theory with respect to the "dignitary" tort of racial discrimination must await future recognition that such a tort exists.

(c) The Innkeeper’s Tort

In *Rogers v. Loether*, a third possibility suggested for a proper background tort was that of an innkeeper’s refusing lodging to a traveler. Such a tort clearly would be appropriate for violations of sections 1981 and 1982 when a black is refused food, lodging, or transportation by a common carrier. The common law rationale and origin of the innkeeper’s tort, however, do not justify its expansion. The tort was limited

86. "The question we wish to pose . . . is whether under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort." GREGORY & KALVEN, supra note 85, at 961.

87. 476 F.2d 225 (4th Cir. 1973).

88. Id. at 229.

89. The Restatement of Torts has taken the position that, with certain exceptions, intentionally or unintentionally harming another by refusing to enter into a business relation with him is not actionable. RESTATEMENT OF Torts § 762 (1939). Refusal based on racial discrimination presumably would fall within this rule.

Racial discrimination as a tort might be developed from the tort of wrongful deprivation of the right to vote, see RESTATEMENT OF TORTS § 865 (1939), a tort that has arisen often from instances of racial discrimination. See, e.g., Louisiana v. United States, 380 U.S. 145 (1965). In this context it should be noted that a mistake of fact or law is a valid defense. RESTATEMENT OF TORTS § 865, comment a (1939). But it is clear that the essence of the action remains the deprivation of the right, not the discrimination per se.

90. 467 F.2d 1110 (7th Cir. 1972), aff’d sub nom., Curtis v. Loether, 415 U.S. 189 (1974).

91. Id. at 1117.

92. See generally Thomas v. Pick Hotels Corp., 224 F.2d 664 (10th Cir. 1955).

strictly to public callings or to circumstances in which the defendant refused to provide an essential service over which he had a monopoly. To expand the tort beyond “common callings” or essential services controlled by monopolies would strip the tort of an essential limitation engendered by its rationale. This position is supported by the Restatement of Torts and by case law. Thus, the utility of the innkeeper’s tort as a background tort for purposes of sections 1981 and 1982 is extremely limited.

(d) The Prima Facie Tort Doctrine

The prima facie tort doctrine can be traced to the English case of Mogul Steamship Co. v. McGregor, Gou & Co., in which it was stated: “now intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person’s property or trade, is actionable if done without just cause.

94. The singular context that impelled the development of the innkeeper’s tort illustrates the narrowness of its applicability.

The innkeeper is in a common calling under severe penalty if he does not serve all that apply, while the ordinary shopkeeper is in a private calling free to refuse to sell if he is so minded. The surrounding circumstances must again explain the origin of this unusual law. When the weary traveller reaches the wayside inn in the gathering dusk, if the host turn him away what shall he do? Go on to the next inn? It is miles away, and the roads are infested with robbers. The traveller would be at the mercy of the innkeeper, who might practise upon him any extortion, for the guest would submit to anything almost, rather than be put out into the night. Truly a special law is required to meet this situation, for the traveller is so in the hands of the innkeeper that only an affirmative law can protect him. But the case of a customer in a town is altogether different. There are shops in plenty and he has time to choose. If he is charged an exorbitant price by one shopkeeper, all that he need do is leave that shop and go on to the next. No special law is required to meet this situation . . . .

Wyman, The Law of the Public Callings as a Solution of the Trust Problem, 17 Harv. L. Rev. 156, 159 (1904).

95. Restatement of Torts § 866, comment a (1939). The comment indicates that this tort applies only to public utilities, which are under a common law duty to furnish reasonable facilities to all who apply. It further states that whether a similar rule applies to places of amusement or other public places depends entirely upon statutes and their interpretations.

96. See, e.g., Brown v. J. H. Bell Co., 146 Iowa 89, 123 N.W. 231 (1909). This case involved a statute that forbade racial discrimination not only in inns, but also in restaurants, barbershops, bathhouses, theaters, and other places of amusement. The court noted that there was no such offense at common law and that the liabilities and remedies were creatures of statute. Id. at —, 123 N.W. at 233.

The doctrine was introduced and developed in the United States by Mr. Justice Holmes; in Aikens v. Wisconsin Holmes stated that, "prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape." The breadth of the pronouncements from which the doctrine evolved and its use when the plaintiff's cause of action did not fit traditional tort categories makes the prima facie tort potentially suitable as a background tort to every violation of section 1981 or 1982.

Notably, the intent element of the prima facie tort, as formulated in Mogul Steamship, entailed merely intent to do the act complained of, rather than intent to cause damage. Moreover, though there is strong authority for the view that a prima facie tort now requires a malicious intent, this view is not accepted universally, and in looking to common law roots, a court basing liability on the prima facie tort doctrine could find that wrongful or malicious intent is not necessary.

The prima facie tort doctrine as a background tort, however, is inconsistent with the rationale underlying the control theory — that common law concepts should control liabilities and remedies under sections 1981 and 1982. To make out a prima facie tort, the harm inflicted must be un-

98. 23 Q.B.D. at 613. See generally Forkosch, An Analysis of the "Prima Facie Tort" Cause of Action, 42 CORNELL L.Q. 465, (1957); Note, The Prima Facie Tort Doctrine, 52 COLUM. L. REV. 503 (1952) [hereinafter cited as Prima Facie Tort].

99. Prima Facie Tort, supra note 98, at 504.

100. 195 U.S. 194 (1904). Other cases in which Holmes discussed the prima facie tort doctrine are: Moran v. Dunphy, 177 Mass. 485, 59 N.E. 125 (1901); Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900) (dissenting opinion); Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896) (dissenting opinion).

101. 195 U.S. at 204 (1904).

102. Prima Facie Tort, supra note 98, at 512.

103. See id. at 505.


105. Prima Facie Tort, supra note 98, at 507.
justifiable, and "(w)hat amounts to legal justification or excuse depends upon 'principles of policy.'" 106 This element, then, turns not upon common law precedents, but upon considerations of public policy. 107 It has been suggested that this characteristic of the doctrine is its greatest contribution, making liability dependent on a recognition of the relevant social and private interests. 108 As previously noted, however, the analysis undertaken in this discussion assumes that the common law approach and the public policy approach are separate and distinct. 109 The essential role of public policy in the prima facie tort doctrine makes it inapposite to the common law approach. But the fact that the doctrine appears to comprehend section 1981 and 1982 violations so well, indicates the strength of the policy approach as an analytical foundation.

(e) Intentional Infliction of Mental Distress

A final tort that has played a significant role in racial discrimination cases is intentional infliction of mental distress. 110 This tort requires either an intent to inflict mental distress, or if there is no actual intent, substantial certainty that such distress will result from the defendant's action. 111 Arguably, it is reasonable to presume that actual intent to inflict mental distress exists when one discriminates on the basis of race, as mental distress is an ordinary result of discrimination. Other elements of the tort, however, will not be present in many section 1981 and 1982 violations. The conduct must be extreme and outrageous, and the distress caused must be very serious and severe. 112 Although racial discrimi-
nation cases have relaxed the traditionally rigid adherences to these elements,\footnote{See Massachusetts Comm'n Against Discrim. v. Franzaroli, 357 Mass. 112, 256 N.E.2d 311 (1970), noted in Note, Torts-Mental Distress Damages for Racial Discrimination, 49 N.C.L. Rev. 221, 228 (1970). A discussion of discrimination cases allowing recovery when something less than the common law standards was shown may be found in Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, ---, 265 A.2d 404, 414-15 (1970).} it seems apparent that a polite letter falsely informing a black that there are no vacancies in a swimming pool association still would fail to meet such a relaxed application of the tort.\footnote{It has been noted that \[T]he requirements for recovery for intentional infliction of mental distress are quite rigid. . . . The conduct causing the injury must be such as a reasonable man would consider "outrageous." It is doubtful that a single covert act of discrimination unaccompanied by aggravating conduct would be sufficient to meet the "outrageous" or the "severe emotional harm" test. Note, Torts-Mental Distress Damages for Racial Discrimination, 49 N.C.L. Rev. 221, 224 (1970) (footnotes omitted). Further, racial discrimination usually "is conduct that does not arouse the spirit to the extent of a headache, upset stomach, fainting spell or other physical result of either momentary or lasting duration." Duda, Damages for Mental Suffering in Discrimination Cases, 15 Clev.-Mar. L. Rev. 1, 10 (1966).}

Moreover, with respect to racial discrimination cases, a relaxed application of the mental distress tort would fail to result in a successful application of the control doctrine for two reasons. First, the apparently less egregious conduct and distress required might be deemed a difference in kind but not of degree, creating a related, yet fundamentally different tort than that of intentional infliction of mental distress. This new tort would be one of insult and indignity resulting from racial discrimination, which consequently could not control liabilities and defenses under sections 1981 and 1982 because it has no common law roots. Second, if a new tort is deemed not to exist, the resultant tort would be intentional infliction of mental distress, with common law standards modified to meet the exigencies of racial discrimination. As under the prima facie tort doctrine, this would place liability on a public policy footing.


If, as some courts have maintained, liabilities and defenses under sections 1981 and 1982 are to be controlled by common law tort concepts, there must be some background torts that will apply generally to the factual situations upon which actions brought under those statutes are based. The foregoing examination has demonstrated that torts deeply
rooted in the common law rarely are sufficiently comparable to racial
discrimination to warrant imposing their elements of liability and de-
fenses upon statutory actions. It is submitted that Justice Douglas's re-
mark that statutory violations must be read against a common law tort
background does not require courts to make tort concepts controlling on
sections 1981 and 1982. Such an approach entails either the distortion
beyond recognition of established tort doctrines, or the creation of new
torts, which defeats the underlying purpose of the common law control
theory. The use of common law tort concepts as guidelines for the de-
termination of liabilities and defenses under sections 1981 and 1982, in
light of the public policy considerations involved, is a more valid ap-
proach. There are three areas of general tort law in which guidelines for
section 1981 and 1982 actions might be sought. Violations of those sec-
tions often will involve issues of intent, mistakes of law, and fault.

(a) Intent

Stating that the defendants acted voluntarily and intentionally, the
court in Tillman II noted that such action ordinarily is sufficient to sup-
port tort liability when the interests of another are invaded in a manner
not sanctioned by the law.115 Tort liability, noted the court, is based not
on an intent to violate the applicable statute, but rather, on an intent to
discriminate in a manner forbidden by the statute, whether or not the
defendant knows that such discrimination is unlawful. Although this is
the predominant concept of intent in tort law, it is not exclusive. For
example, as previously noted, interference with prospective advantage
requires not only intent to do the act that injures the plaintiff, but also
a malicious intent to do it for the sole purpose of injuring the plaintiff.116
The same is true of the torts of deceit and malicious prosecution.117 Thus,
the proper concept of intent for section 1981 and 1982 violations need
not be that adopted by Tillman II, and if malicious intent is required
before recovery for damages is allowed, a good faith effort to comply
with the law should be a valid defense to such relief.118

115. 517 F.2d at 1143, citing Prosser, supra note 72, § 8.
116. See note 78 supra & accompanying text.
118. Stated the court in Tillman II: "Only when wrongful intent is an element of a
tort can a director who acted innocently escape liability." 517 F.2d at 1144. The court
was acting on the theory that tort law should control sections 1981 and 1982: the
difficulties inherent in that doctrine have been discussed. But if the concept of malicious
intent as it appears in tort law is a proper guideline to govern sections 1981 and 1982,
the court's observation would require a different result than that reached.
(b) Mistake of Law

The general rule that mistake of law is no defense to a tort action is based primarily on the rationale that, as between two innocent parties, the one causing the injury should bear the loss. A mistake is privileged, however, when necessity dictates that the defendant act quickly to protect a known right. This limitation suggests that one primary purpose of the general rule is to encourage the exercise of care when there is time to ascertain the true situation. The exercise of due diligence subserves this rationale because it necessarily involves a careful examination of the relevant circumstances. Due diligence in attempting to ascertain the law therefore should be allowed as a defense.

Consequently, a mistake of law defense is a viable alternative in section 1981 and 1982 actions. Moreover, with respect to such actions, due diligence generally is provable, as in Tillman II, in which there was reliance upon counsel and a demonstrable difficulty in determining the scope of the statute. The ease with which due diligence may be determined in civil rights actions also quells the traditional objection to the due diligence defense, born from ancient trespass cases, that such diligence is difficult to prove. Thus, it cannot be said that the general tort rule with respect to mistake of law need be applied to section 1981 and 1982 violations.

119. See Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141, 1143 (4th Cir. 1975), citing Prosser, supra note 72, §§ 8, 17.

120. Prosser, supra note 72, at 99. For a critical analysis of this rationale, see Whittier, Mistake in the Law of Torts, 15 Harv. L. Rev. 335 (1902). It is not clear whether a non-negligent mistake exonerates one of civil liability. See Smith, Tort and Absolute Liability—Suggested Changes in Classification, 30 Harv. L. Rev. 319, 327 (1917).

The rule governing mistake of law as a defense developed from cases of trespass to land. See O. Holmes, The Common Law 96-100 (1881). An argument has been made that “these particular cases do not decide whether mistakes on other subjects do, or do not, constitute a defense to actions for damage to property or to the person.” Smith, supra, at 327. One author, noting the established status of the doctrine, calls it “an anomaly” and seeks to restrict its application since “in many cases of injuries to the person . . . the principle is not applied.” Whittier, supra, at 346-47. The rule has not been applied invariably in cases involving property rights. See Sovran v. Yoran, 16 Ore. 269, 20 P. 100 (1888) (defendant, mistaken as to the legal meaning of “lost” property, excused from liability in trover).

121. Prosser, supra note 72, § 17, at 100.


123. See Holmes, supra note 120, at 99.
(c) Lack of Fault

A third common law approach involves the element of moral fault or culpability as a requisite to liability in tort law. The dissent in Tillman II found the lack of such fault to be determinative of the directors’ liability,\textsuperscript{124} but fault as it has developed in tort law does not provide a firm basis for that position. The dissent relied on Taylor v. City of Cincinnati,\textsuperscript{125} a case involving strict liability,\textsuperscript{126} to support its proposition that culpability is a prerequisite to tort liability. Taylor suggested four categories of actions incurring tort liability:

1. Culpable and intentional acts resulting in harm;
2. acts involving culpable and unlawful conduct causing unintentional harm;
3. nonculpable acts or conduct resulting in accidental harm for which, because of the hazards involved, the law imposes strict or absolute liability notwithstanding the absence of fault; and
4. culpable acts of inadvertance involving unreasonable risks of harm.\textsuperscript{127}

The second type of act correlates most closely with the Tillman II situation, and liability premised on this analysis turns on the definition of "culpable conduct."

Apparently assuming that this term meant moral guilt, the dissent in Tillman II concluded that no liability could be imposed upon the directors, but fault or culpability in tort law generally has meant the violation of some legal standard of conduct without regard for the innocent intent of the actor.\textsuperscript{128} If sections 1981 and 1982 (as judicially interpreted) comport with this standard, the acts of the directors in Tillman I did constitute "culpable conduct." Arguably, however, until the Supreme Court's decision in Tillman I, no legal standard existed that the directors reasonably could have been charged with violating. Thus, the result in Tillman II can be read only as an imposition of strict liability upon the directors, an extension of that doctrine not justifiable in light of its narrow rationale.\textsuperscript{129} Therefore, if fault or culpability in the tort sense is to

\textsuperscript{124} 517 F.2d at 1150.
\textsuperscript{125} 143 Ohio St. 426, 55 N.E.2d 724 (1944).
\textsuperscript{126} It should be noted that illegal discrimination does not reflect strict liability concepts because the act of discrimination itself is wrongful: liability is not imposed solely on the basis of any harmful consequences. Cf. Prosser, supra note 72, § 75, at 494-95.
\textsuperscript{127} 143 Ohio St. at --, 55 N.E.2d at 727.
\textsuperscript{128} See Prosser, supra note 72, § 75, at 493.
\textsuperscript{129} Strict liability usually has been limited to situations involving substantial risk of
be used as a basis for tort liability under sections 1981 and 1982, it should require the existence of an ascertainable standard of conduct before such liability can be imposed.\textsuperscript{130}

C. The Public Policy Approach

Public policy is a concept that, though not subject to precise definition,\textsuperscript{131} should be accorded a significant role in determining defenses to damage actions under sections 1981 and 1982.\textsuperscript{132} There are several considerations that are relevant to defenses generally, and to defenses of corporate directors in particular.

First, an element of unfairness exists in requiring a defendant to pay damages for violating a law that he could not have known he was viola-

\textsuperscript{130} This position is consistent with decisions under section 1983 that make good faith coupled with reasonable grounds to believe that one is acting within the law sufficient to preclude liability for damages. Pierson v. Ray, 386 U.S. 547, 557 (1967); Eslinger v. Thomas, 476 F.2d 225, 229 (4th Cir. 1973).

Another common law concept worthy of comment involves the due diligence defense as it is utilized in the corporate context. The directors in Tillman II argued that because they had exercised due diligence in attempting to ascertain whether the racial policy they enacted was illegal, common law principles of corporate law entitled them to raise a due diligence defense. 517 F.2d at 1143. The majority rejected this position by holding that since the due diligence defense is derived from negligence law, id. at 1144, it could not be used by directors who intentionally committed torts against third persons. Id. See Comment, Trends in Corporate Director Liability, 17 S.D.L. Rev. 468, 470-71 (1972). In a stockholders' derivative suit, the defendant directors may use a due diligence defense when they have attempted to ascertain the law but, as a result of misapplication, commit an intentional act which causes injury to the corporation. See Spirt v. Bechtel, 232 F.2d 241, 246-47 (2d Cir. 1956) and Gilbert v. Burnside, 216 N.Y.S.2d 430, 13 A.D.2d 982 (App. Div. 1961) aff'd, 11 N.Y.2d 960, 183 N.E.2d 235, 229 N.Y.S.2d 10 (1962), cited in Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141, 1150 (1975) (Boreman, J., dissenting).

\textsuperscript{131} see, e.g., First Trust & Sav. Bank v. Powers, 393 Ill. 97, 102, 65 N.E.2d 377, 380 (1946). Justice Holmes, dissenting in Vegelahn v. Gunter, 167 Mass. 92, 44 N.E. 1077 (1896), stated that "[p]ropositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof." Id. at 106, 44 N.E. at 1080.

\textsuperscript{132} Invocation of public policy is appropriate when there are legitimate conflicting interests. But see O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill.2d 436, 155 N.E.2d 545 (1958). Public policy has been used in conjunction with the background-tort control theory in examination of defenses to section 1983 actions. See, e.g., Whirl v. Kern, 407 F.2d 781, 790-92 (5th Cir. 1969). The court in Tillman II noted that the due diligence defense raised to the section 1981 and 1982 action was not warranted by precedent or policy, 517 F.2d at 1145-46, but no policy considerations in support of this assertion were discussed.
In the *Tillman* litigation, this unfairness proceeded from the imposition of liability upon corporate directors based upon a reading of the law that had been rejected by both the district court and the court of appeals before being accepted by the Supreme Court. Case law recognizing that state officers should not be charged with a duty to anticipate shifts in constitutional doctrine raises serious questions as to the propriety of holding corporate directors to a standard of legal acumen exceeding that of the federal judiciary, and making them answerable in damages if they fail to meet that standard.

Second, the establishment of stringent standards that expose conscientious corporate directors to substantial liability may make it extremely difficult for corporations to induce highly qualified people to serve in that capacity. This effect would negate the generally accepted public policy favoring the installation of competent outsiders on the boards of both commercial and noncommercial organizations.

Third, because a person wronged should be compensated, and an innocent party should not be subjected to liability, there would appear to be a ready balance struck in the corporate context by imposing liability for damages upon the corporation alone. No compelling interest in extending liability to innocent directors exists in these cases because the injured plaintiffs are compensated fully, and injunctive relief is sufficient to insure compliance with the law by the directors.

Finally, there is a certain inequity in the disparate treatment that under the *Tillman II* rationale would be accorded public officials as opposed to private corporate officers; public officials who violate civil rights sta-
DISCRIMINATION DEFENSES

STATUTES MAY AVOID THEMSELVES OF A GOOD FAITH DEFENSE TO AVOID LIABILITY FOR DAMAGES. A COMPARISON OF THE POTENTIAL LIABILITY TO WHICH DIRECTORS OF PUBLIC AND PRIVATE SCHOOLS MAINTAINING AFFIRMATIVE ACTION PROGRAMS ARE EXPOSED ILLUSTRATES THE ARBITRARY NATURE OF THE DOCTRINE DENYING A GOOD FAITH DEFENSE IN THE PRIVATE SECTOR. IF THE AFFIRMATIVE ACTION PROGRAM OF THE PUBLIC SCHOOL IS DETERMINED TO BE UNLAWFULLY DISCRIMINATORY UNDER SECTION 1981, THE DIRECTORS OF THE SCHOOL COULD RAISE A GOOD FAITH DEFENSE AND THEREBY BE IMMUNE FROM PERSONAL LIABILITY. UNDER THE TILMANN II RATIONALE, THE DIRECTORS OF THE PRIVATE INSTITUTION, CONFRONTED WITH A LIKE FINDING, WOULD BE COMPelled TO ANSWER INDIVIDUALLY IN DAMAGES. BOTH PUBLIC AND PRIVATE SCHOOLS SERVE FUNCTIONS SIMILARLY BENEFITTING THE PUBLIC. THE RATIONALE FOR IMMUNITY OF PUBLIC OFFICIALS — TO ALLOW DISCRETION IN THE PERFORMANCE OF DUTIES WITHOUT FEAR OF PERSONAL LIABILITY AND TO ENCOURAGE QUALIFIED INDIVIDUALS TO SERVE IN A PUBLIC CAPACITY — APPEARS EQUALLY APPLICABLE TO THE PRIVATE SCHOOL SITUATION. IT THEREFORE IS SUBMITTED THAT THE RESULT OF TILMANN II IS REJECTED BY PERSUASIVE POLICY CONSIDERATIONS.

CONCLUSION

The crucial question presented in actions brought under sections 1981 and 1982 is not whether there are absolute defenses to violations of those statutes, but whether there should be defenses to claims for damages. This problem has been approached in terms of the legislative history and judicial interpretations of civil rights legislation, the tort concepts that have been read into discrimination actions, and the public policy considerations underlying damages as an appropriate remedy for violation of civil rights statutes. Each approach has produced factors that should enter into any decision to award damages for discrimination. Courts should be aware that the civil rights acts, though directed at the consequences of discrimination, do not contemplate damages as invariably necessary to the effectuation of that purpose. Further, though discrimination suits do have some of the characteristics of tort actions, a blind adherence to tort doctrine is an unworkable and arbitrary method of


establishing the nature of discrimination actions. Finally, several policy considerations support a conservative approach to awarding damages when the law is unclear. Specifically, when corporate directors have acted in good faith and with due diligence, it is suggested that the award of damages against the corporation is sufficient; by holding, in *Tillman II*, that the directors of the corporation were individually liable, the Court of Appeals for the Fourth Circuit did not balance properly the factors underlying the rationale of civil rights legislation.