
THE ANTI-KLAN ACT IN THE TWENTY-FIRST CENTURY

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Racial terrorism by organized hate groups and “lone wolf” vigilantes presents a growing societal danger. Increasingly, the planning and recruitment for such plots occur through online communications channels. This Essay sheds new light upon how little-known federal civil rights statutes originally enacted following the Civil War can be applied to the use of online platforms in planning and discussing racially motivated attacks. The Ku Klux Klan Act of 1871 gave rise to 42 U.S.C. §§ 1985 and 1986, still in effect today. Section 1985 provides a federal civil cause of action against persons who conspire to deprive a person of federally protected civil rights. Section 1986, which is the focus of this Essay, provides a cause of action against persons who are aware of a § 1985 conspiracy yet fail to act to prevent it from being carried into action.

This Essay first reviews the background, text, and legislative history of §§ 1985 and 1986. The Essay next draws upon sociological research illuminating the nature of the contemporary white-supremacist movement and the manner in which white supremacists utilize online communications platforms, which make it difficult for outsiders to become aware of and to disrupt conspiracies before they come to fruition. This Essay then discusses how § 1986 can be used as a tool to incentivize insiders and bystanders who are part of online networks where such plots are discussed to report and disrupt them before they manifest, drawing upon the law and psychology literature regarding bystander motivations and behavior. Finally, the Essay discusses potential First Amendment compelled speech challenges to § 1986 suits. This Essay concludes that § 1986 can and should be utilized more widely to combat white-supremacist terrorism.

INTRODUCTION

The resurgence of violent extremism is at a critical inflection point.¹ In particular, racialized violence both by organized groups and by individuals presents a serious and growing threat.² Such groups and

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¹ See *U.S. White Supremacist Propaganda Remained at Historic Levels in 2021, With 27 Percent Rise in Antisemitic Messaging*, ANTI-DEFAMATION LEAGUE (May 3, 2022), <https://www.adl.org/resources/reports/us-white-supremacist-propaganda-2021> [<https://perma.cc/D6SU-6VS3>] (“White supremacist propaganda, which allows extremist groups to disseminate hateful messages and gain attention with little risk of public exposure, has been on the rise for several years.”).

² See, e.g., Eileen Sullivan & Katie Benner, *Top Law Enforcement Officials Say the Biggest Domestic Terror Threat Comes from White Supremacists.*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/05/12/us/politics/domestic-terror-white-supremacists.html> [<https://perma.cc/SWM6-2TBS>] (quoting Attorney General Merrick Garland’s testimony to the Senate Appropriations Committee that “the greatest domestic threat facing the United States [is] ‘racially or ethnically motivated violent extremists[,] . . . [s]pecifically those who advocate for the superiority of the white race’”); Sarah N. Lynch, *U.S. Justice Department Forming Unit to Counter Domestic Terrorism*, REUTERS (Jan. 11, 2022, 12:36 PM), <https://www.reuters.com/legal/government/us-justice-department-forming-unit-counter-domestic-terrorism-2022-01-11> [<https://perma.cc/AK2N-HVPJ>] (quoting Assistant Attorney General Matthew Olsen, who noted that the Department of Justice created a new domestic counterterrorism unit due to “an elevated threat from domestic violent extremists — that is, individuals in the United States who seek to commit violent criminal acts in

individuals have increasingly utilized online channels of communication to organize and to prepare for action.³ Radicalized groups are often largely opaque and impenetrable to outsiders due to their closed networks, group solidarity,⁴ and coded language or symbology.⁵ Moreover, law enforcement officials generally cannot engage in preemptive surveillance or interception of online communications based solely upon extremist ideology.⁶ Knowledge of the threats posed by such groups therefore often does not come in sufficient time to prevent attacks or to

furtherance of domestic social or political goals” — and that “[w]e have seen a growing threat from those who are motivated by racial animus, as well as those who ascribe to extremist anti-government and anti-authority ideologies”). Among many other horrific recent incidents, the racially motivated attack on African Americans in Buffalo, New York, reinforces the reality of this elevated threat level. See, e.g., Jesse McKinley & Glenn Thrush, *Buffalo Shooting Suspect Is Charged with Federal Hate Crimes*, N.Y. TIMES (June 15, 2022), <https://www.nytimes.com/2022/06/15/nyregion/buffalo-shooting-hate-crime-charges.html> [<https://perma.cc/827P-Y2S6>].

³ Expert Report of Kathleen Blee & Peter Simi at 10, *Sines v. Kessler*, No. 17-cv-00072 (W.D. Va. Jan. 9, 2023) [hereinafter *Charlottesville Trial Expert Report*] (“The [white-supremacist movement] was among the first social movements to take full advantage of the possibilities of the Internet as a communication and networking tool. New technologies of social media and Internet platforms allowed white supremacists a level of anonymity that facilitated their ability to recruit and communicate among members and interested individuals while evading detection.” (footnote omitted)). This report was filed in the civil suit arising from the “Unite the Right” rally in Charlottesville, Virginia, in 2017. *Id.* at 2.

⁴ *Id.* at 6–7 (contending that white-supremacist groups, as groups shaped around a shared cultural identity, have “[e]xpected behaviors, values and norms [that] are expressed in ‘cultural scripts’ whose meaning is accessible only to insiders . . . [which] create[s] boundaries between those in the group and those on the outside of the group” (footnotes omitted)).

⁵ *Id.* at 11 (“[T]he [white-supremacist movement] circulates and relies upon . . . ‘double-speak’ . . . a method of conveying white supremacist beliefs and intentions to those within the [white-supremacist] culture while sending an innocuous meaning to outsiders. It is a communication style that relies on deception and often the use of euphemistic words designed to sidestep a more candid mention of a harsh or distasteful reality. It relies on the audience’s ability to interpret the meaning of a message in multiple ways, drawing on both their cognitive abilities and the understandings that are specific to the culture and subcultures in which they are embedded.”).

⁶ As the Brennan Center has noted:

Social media monitoring [by the government] may violate the First or Fourteenth Amendments. It is well established that public [social media] posts receive constitutional protection: as the investigations guide of the Federal Bureau of Investigation recognizes, “[o]nline information, even if publicly available, may still be protected by the First Amendment.” Surveillance is clearly unconstitutional when a person is specifically targeted for the exercise of constitutional rights protected by the First Amendment (speech, expression, association, religious practice) or on the basis of a characteristic protected by the Fourteenth Amendment (including race, ethnicity, and religion).

Rachel Levinson-Waldman, Harsha Panduranga & Faiza Patel, *Social Media Surveillance by the U.S. Government*, BRENNAN CTR. FOR JUST. (Jan. 7, 2022) (third alteration in original), <https://www.brennancenter.org/our-work/research-reports/social-media-surveillance-us-government> [<https://perma.cc/U9DM-FG7H>].

disrupt recruitment and radicalization.⁷ Insiders, then, are the persons most likely to have sufficient advance knowledge of groups and individuals who are preparing to cross the line from radical ideology to terrorist action, even if these insiders do not themselves intend to engage in such action.⁸ Insiders, however, generally share the ideology of the radicalized groups and individuals, or at least have sufficient affinity for them as to be unlikely to report or disrupt their plots absent strong countervailing incentives.⁹

A wide array of legal tools can and should be brought to bear in the current fight against racial terrorism. One such set of tools derives from an earlier era of racial terror: the fight after slavery against white mobs, individual vigilantes, and terrorist organizations such as the Ku Klux Klan. Several civil rights statutes enacted in the wake of the Civil War pursuant to Congress's powers under the Reconstruction Amendments — that is, the Thirteenth, Fourteenth, and Fifteenth Amendments — aimed specifically to deter and punish those who sought to use private violence as an alternate means of enforcing white supremacy and Black subjugation once chattel slavery had been abolished and racially subordinating laws had been rendered illegal in law (if not always in fact).

This Essay focuses upon two such federal statutes originally enacted as part of the Ku Klux Klan Act of 1871¹⁰: 42 U.S.C. §§ 1985 and 1986. Section 1985 provides a federal civil cause of action against those who conspire to deprive a person of federally protected civil rights;¹¹ § 1986 provides a cause of action against those who are aware of such a

⁷ See Michael German & Harsha Panduranga, *How to Combat White Supremacist Violence? Avoid Flawed Post-9/11 Counterterrorism Tactics*, BRENNAN CTR. FOR JUST. (Sept. 1, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-combat-white-supremacist-violence-avoid-flawed-post-911> [<https://perma.cc/H6KJ-Z42J>] (“The FBI’s inadequate response to far-right violence results from a lack of will, not a lack of legal authority. The FBI has used its domestic terrorism authorities aggressively to target and harass environmentalists and animal rights activists, despite the fact that these groups have not committed a single fatal attack. Yet the FBI doesn’t even track the number of murders committed by white supremacists each year, much less consistently investigate these crimes as domestic terrorism.”).

⁸ See NAT’L SEC. COUNCIL, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM 9 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf> [<https://perma.cc/PK7U-WQBM>] (“Domestic terrorists have — particularly in recent years — often been lone actors or small groups of informally aligned individuals who mobilize to violence with little or no clear organizational structure or direction. These individuals often consume material deliberately disseminated to recruit individuals to causes that attempt to provide a sense of belonging and fulfillment, however false that sense might be. Their ideologies can be fluid, evolving, and overlapping. . . . The often solitary and, at times, rapid nature of such mobilization to violence poses a particularly acute challenge to law enforcement and others seeking to prevent, disrupt, and deter domestic terrorism.”).

⁹ See Charlottesville Trial Expert Report, *supra* note 3, at 9 (“Lacking a central command structure, the [white-supremacist movement] is organized through a deliberately created common culture that sustains a shared ideology of beliefs and goals grounded in an extreme differentiation between in-groups (whites/white supremacists) and out-groups (nonwhites/enemies) and an emphasis on violence.”).

¹⁰ Ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985–1986).

¹¹ 42 U.S.C. § 1985.

conspiracy yet fail to act to prevent it from being carried into action.¹² The Reconstruction Congresses that debated and adopted these provisions were well aware that the preceding centuries of slavery, racial violence, and Black subjugation had been carried out through an interlocking web of governmental and private action. They therefore knew that fully realizing the civil rights promised by the Reconstruction Amendments would require a similarly robust system of public and private action. Just as the regime of American slavery, apartheid, and racial terror could not have been enforced through state action alone, neither would dismantling that regime be possible through state action alone.

This Essay builds upon Professor Linda Fisher's masterful article *Anatomy of an Affirmative Duty to Protect: 42 U.S.C. Section 1986*¹³ by (1) updating its findings for the digital age and (2) bringing to bear interdisciplinary insights from the fields of sociology and psychology to describe how § 1986 can be applied to bystanders who are aware of white-supremacist individuals' and groups' use of online platforms to plan and discuss their plots. Part I of this Essay reviews the history of slavery and of the Reconstruction Amendments, which were the background for the civil rights statutes enacted in the wake of the Civil War. Part II then explores those civil rights statutes, with a particular focus upon the purposes and history of §§ 1985 and 1986. Part III of this Essay, drawing upon sociological literature, discusses the nature of the contemporary white-supremacist movement and how the manner in which white supremacists utilize online-communications platforms makes it difficult for outsiders to become aware of and to disrupt conspiracies before they come to fruition, even while such plans are generally widely known by insiders within those online white-supremacist communities. Drawing upon psychological literature, Part III also discusses how § 1986 can be used as a tool to incentivize, through potential civil liability, insiders who are aware of white-supremacist plans and plots to report and disrupt them before they are carried into action. Part IV of this Essay briefly addresses potential First Amendment compelled speech challenges to § 1986 suits, to the extent that § 1986 requires disclosure of information by persons who are aware of white-supremacist plots. The Essay then concludes by arguing that § 1986, while not a complete solution to online radicalization and white-supremacist conspiracies, can and should be utilized much more broadly.

I. BACKGROUND

In order to understand the purposes and effects of the Reconstruction Amendments and the civil rights statutes enacted pursuant thereto, it is

¹² *Id.* § 1986.

¹³ Linda E. Fisher, *Anatomy of an Affirmative Duty to Protect: 42 U.S.C. Section 1986*, 56 WASH. & LEE L. REV. 461 (1999).

first necessary to understand the key aspects of the American slave system that the Reconstruction Congresses sought to eliminate and the legacies of slavery that these Congresses sought to remediate. As discussed below, the all-encompassing Slave Power¹⁴ distorted the American legal order in many ways, including by allowing — and indeed, often requiring — private actors to assist in the bondage and subjugation of their fellow human beings.

A. *The American Slavocracy*

When the slave trade was first established in British North America, it generally followed the then-prevailing system of indentures and forced labor for a defined (even if extremely lengthy) term.¹⁵ As white society's economic needs, social imperatives, and ideological bases evolved, however, the American slave system also changed from a system primarily about enforcing compelled labor to one primarily about enforcing white supremacy, which included but was not limited to compelling Black labor.¹⁶ American slavery developed into a system of race-based servitude, a status that was both perpetual and legally inheritable, and that carried with it various legal disabilities imposed upon enslaved persons (and also free Blacks, in many instances) and certain corresponding privileges conferred upon whites (even nonslaveholding whites).¹⁷ First through informal norms and later as formalized through the states' slave codes, enslaved persons were legally considered to be a form of property; and all Blacks, even if legally free, were subject to the same stigmatization as enslaved persons.¹⁸

¹⁴ See generally 1 HENRY WILSON, *HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA* (Boston, James R. Osgood & Co. 1872); Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765 (2011).

¹⁵ Paul Finkelman, *Slavery in the United States: Persons or Property?*, in THE LEGAL UNDERSTANDING OF SLAVERY 105, 107 (Jean Allain ed., 2012) (“The first Africans in Virginia were treated as indentured servants, held for a term of years, and then eligible for freedom.”).

¹⁶ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1717–18 (1993). Colonial enslavement of Native Americans both preceded and overlapped with the African slave trade. Indeed, during the period from 1492 and 1880, “between 2 and 5.5 million Native Americans were enslaved in the Americas in addition to 12.5 million African slaves.” *Colonial Enslavement of Native Americans Included Those Who Surrendered, Too*, BROWN UNIV. (Feb. 15, 2017) (quoting Professor Linford Fisher), <https://www.brown.edu/news/2017-02-15/enslavement> [<https://perma.cc/CMB9-TNUP>]. However, “when native peoples died off or suffered to the point of no longer being valuable to slavery’s insatiable machines, Africans served as effective, expendable substitutes.” Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 909–10 (2019).

¹⁷ William M. Carter, Jr., *The Abolition of Slavery in the United States: Historical Context and Its Contemporary Application*, in THE LEGAL UNDERSTANDING OF SLAVERY, *supra* note 15, at 178.

¹⁸ *Id.*

At the most general level, because American slavery was race based, all Blacks were legally and socially presumed to be subject to enslavement and its attendant legal disabilities unless they could affirmatively prove otherwise; conversely, no whites were considered to be subject to the same.¹⁹ More specifically, the status of “slave” carried a variety of concomitant legal consequences beyond one’s bondage and designation as a legally recognized form of property. Collectively, these slave-attendant aspects of subjugation were later characterized as the “badges and incidents of slavery”²⁰ — that is, the aspects of law and custom that enforced the subordinated status of enslaved persons and the lingering vestiges thereof that continued to enforce that subordination upon the newly freed slaves following the Civil War. As a few examples: enslaved Blacks — and free Blacks in most states — were generally denied “the rights to enforce contracts, sue, give evidence in court, inherit, and purchase, lease, hold, and convey real property.”²¹ They were also deprived of parental and familial rights;²² stripped of personal liberty;²³ denied the ability to receive formal education;²⁴ subjected to race-based

¹⁹ See, e.g., *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 141 (1806) (“In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom[;] but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to shew that he is a slave.”); see also KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 194 (1956) (“[I]n all the slave states (except Delaware) the presumption was that people with black skins were slaves unless they could prove that they were free.”).

²⁰ See *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (stating that the text and structure of the Thirteenth Amendment demonstrated that Congress was empowered to “pass all laws necessary and proper for abolishing all badges and incidents of slavery”).

²¹ ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 45 (2004) (citing CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Thayer)).

²² See generally Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299 (2006).

²³ See, e.g., *The Civil Rights Cases*, 109 U.S. at 22 (finding that one of the “inseparable incidents of the institution” of slavery was “restraint of [the slave’s] movements”); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 63 (2004) (“[U]nder South Carolina’s Slave Code, slaves were prohibited from leaving the plantation without a pass unless they were accompanied by some white person. Pennsylvania’s Slave Code similarly provided that any black person discovered more than ten miles from the master’s home without permission in writing should be apprehended and whipped and that the apprehending party would receive payment.” (footnote omitted) (citing A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 171, 287 (1978))).

²⁴ See William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1324 & n.34 (2007).

criminal penalties;²⁵ denied due process;²⁶ and deprived of civil liberties, including freedom of speech, assembly, and religion.²⁷

In addition to these state-enforced means of subjugating the Black population, enslaved and free Blacks also suffered deprivation of one of the most basic civil rights: the right to be free from violence inflicted by one's fellow citizens with impunity. Section B below explores the role of private action — specifically, violence by nonstate actors — in maintaining the system of enslavement and Black subjugation.

B. The Role of Private Violence in the American Regime of Racial Terror

Slaveholders and their white-supremacist allies utilized widespread private violence to dominate enslaved persons and free Blacks both prior to and following the Civil War.²⁸ In so doing, they were generally immune from legal consequences, whether for the master's brutalization of their personal slaves;²⁹ for individual whites' attacks upon Blacks for

²⁵ The slave codes explicitly made the defendant's race an element of various crimes. See, e.g., A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 977 (1992) (noting that in Virginia, for example, "[s]laves could receive the death penalty for at least sixty-eight offenses, whereas for whites the same conduct either was at most punishable by imprisonment or was not a crime at all").

²⁶ See, e.g., HIGGINBOTHAM, *supra* note 23, at 8 ("Many [slaveholders] feared that any judicial protection of the slave would trigger further challenges to the legitimacy of the dehumanized status of blacks and slaves."); Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209, 1209 (1993) (noting how the slave codes prohibited or severely constrained the testimony of slaves in cases involving whites).

²⁷ See generally William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065 (2021).

²⁸ For example, Representative James Wilson of Iowa, one of the primary architects of the Thirteenth Amendment, noted during the Thirteenth Amendment debates that "[l]egislatures, courts, [e]xecutives, almost every person holding political or social power and position in the southern States, were all arrayed on the side of slavery, and what they could not accomplish was turned over to the mob, which, without law . . . did its work with fearful accuracy and terrible exactness." CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864). In addition, a federally commissioned report following the end of the Civil War found that most of the South "desire[d] to preserve slavery in its original form as much and as long as possible"; that "the main agency employed for that purpose was force and intimidation"; and that "[i]n many instances[,] negroes who walked away from the plantations, or were found upon the roads, were shot or otherwise severely punished, which was calculated to produce the impression among those remaining with their masters that an attempt to escape from slavery would result in certain destruction." CARL SCHURZ, REPORT ON THE CONDITION OF THE SOUTH, S. EXEC. DOC. NO. 39-2, at 17 (1865).

²⁹ See, e.g., *United States v. Nelson*, 277 F.3d 164, 189 (2d Cir. 2002) (finding that "there is widespread agreement among scholars of slavery that slavery . . . centrally involve[d] the master's constant power to use private violence against the slave" without legal consequences for the master or remedies for the slave (citing ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 1-14 (1982))); Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1889 (2019) ("[T]he legal logic of slavery rested on the recognition that slave owners had a right to property in their slaves that the law would respect and enforce. In the daily practice of slavery on plantations across the South, this right was secured by owners' private force (violence or the threat of violence) with the backing of the public force of the state." (footnote omitted)).

perceived “impudence” toward them;³⁰ for seizures of Black persons simply conducting their daily activities without a “pass” from a white person;³¹ for white mobs’ attacks upon Blacks and abolitionists calling for the end of slavery;³² or, after the Civil War, for the Klan’s organized terror, which sought to drive Blacks back to a condition of de facto servitude and continued subordination to whites.

For purposes of this Essay, it is important to understand not only that the law of American slavery *allowed* whites who themselves owned slaves to use violence to dominate their own slaves, nor only that it also allowed nonslaveholding whites to do the same. Rather, as described below, the American legal system also often *required* or incentivized the affirmative assistance of nonslaveholding whites in maintaining the system of slavery and racial subjugation. Once the slave system and concomitant white dominance came under perceived threat by virtue of growing domestic slave populations, successful slave rebellions abroad, and an ascendant abolitionist movement, it knew no neutrals: the failure of whites to affirmatively support slavery was seen as nearly as much of a threat to the slave system as outright opposition to it.

³⁰ For example, the Slave Code of Mississippi provided, *inter alia*, that “[a]ny negro or mulatto [whether enslaved or free], for using abusive language . . . shall . . . receive such punishment as a justice of the peace may order, not exceeding 39 lashes.” J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077 app. at 1107 (1994) (quoting EXTRACTS FROM THE AMERICAN SLAVE CODE 34 (Salem, Ohio, The Anti-slavery Bugle c. 1840s)). On those occasions when legal consequences were visited upon nonslaveowners for their violence toward enslaved persons, it was generally to protect the master’s interest in the slave, not out of recognition of the enslaved person’s rights. *See, e.g.*, HIGGINBOTHAM, *supra* note 23, at 255 (noting that under Georgia’s Slave Code, for example, although beating an enslaved person without authorization was punishable by a fine, the owner was entitled to compensation and such assaults were criminal only when perpetrated without the master’s authorization, demonstrating that such provisions’ “determining factor was not the slave’s well-being, but solely whether an outsider was damaging the master’s economic interest in the slave”).

³¹ *See* Carter, *supra* note 23, at 63 (describing provisions of various states’ slave codes providing that slaves could not leave the plantation without a pass from their owner and that white individuals were licensed to beat and/or apprehend them in the absence of such a pass).

³² *See, e.g.*, Carter, *supra* note 27, at 1070 n.22 (“In the immediate aftermath of the Civil War, [the Reconstruction Congresses] were specifically concerned with rampant white mob violence against blacks and Unionists in the South following the end of the slave system. Indeed, the Report of the Joint Committee on Reconstruction ‘focused particularly on the lack of legal protection [against such violence] for blacks in the South. The majority of the injustices reported were examples of private violence and the failure of states to protect blacks and white unionists from this violence.’” (second alteration in original) (quoting Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1847 (2010))); Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-slavery America*, 54 ALA. L. REV. 483, 497 n.50 (2003) (“Abolitionists were intimidated, threatened, and beaten to near death when speaking in the North; in the South and Midwest, whether black or white, one could be killed for advocating the end of slavery.”); Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States — Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 178 (1951) (“Slavery has for many years defied the government and trampled upon the National Constitution, by kidnapping, imprisoning, mobbing, and murdering white citizens of the United States guilty of no offense except protesting against its terrible crimes.” (quoting CONG. GLOBE, 38th Cong., 2d Sess. 138 (1865) (statement of Rep. Ashley))).

The slave codes imposed severe punishment upon whites who aided slaves or who interfered with the system of white dominance.³³ The codes also often required or incentivized the assistance of whites in maintaining the slave regime; and slaveholders, by custom, often deputized nonslaveholding whites to aid in “policing” their slaves. In the late 1600s, for example, officials in Philadelphia authorized private white persons to “take up” any black person seen “gadding abroad,” meaning not in the presence of the slavemaster without his permission.³⁴ The Pennsylvania Slave Code later went further, providing that any Black person found more than ten miles from the master’s home without permission in writing should be apprehended and whipped and that the white person who apprehended them would receive payment.³⁵ Under South Carolina’s Slave Code, enslaved persons were prohibited from leaving the plantation unless they had a pass from the owner or were accompanied by some white person.³⁶ The Code further required “every white person to whip slaves found traveling in violation of the pass system, and authorized them to ‘beat, maim, or assault’ the slave or, indeed, to kill him if the slave refused to show his pass and could not be captured alive.”³⁷ If a white person did not comply, he faced a fine.³⁸

Moreover, the reliance on violence “as a tool of oppression” extended beyond “those who had profited directly from slavery.”³⁹ In fact, “[e]ven whites with no financial stake in slavery used violence to enforce the former slave owner’s perceived property rights,’ in order to preserve their own perceived status as ‘better than’ blacks.”⁴⁰ During slavery, poor and working-class whites who did not themselves own slaves nonetheless participated with apparent eagerness in conducting slave patrols on behalf of slaveowners. As Henry Bruce’s first-person slave narrative noted, for example, “[p]atrol duty” — that is, looking for slaves who were away from their masters’ premises without a pass — “was always performed by the poor whites, who took great pride in the whipping of a slave.”⁴¹ In sum, the slave system incentivized —

³³ See, e.g., STAMPP, *supra* note 19, at 211 (noting that the slave codes “were quite unmerciful toward whites who interfered with slave discipline”).

³⁴ HIGGINBOTHAM, *supra* note 23, at 276 (quoting SAMUEL W. PENNYPACKER, PENNSYLVANIA COLONIAL CASES 54 (Philadelphia, Rees Welsh & Co. 1892)).

³⁵ Carter, *supra* note 23, at 63.

³⁶ *Id.*

³⁷ *Id.* at 63 n.246 (emphasis added) (quoting HIGGINBOTHAM, *supra* note 23, at 171).

³⁸ *Id.*

³⁹ Carter, *supra* note 17, at 177, 192.

⁴⁰ *Id.* (quoting Darrell A.H. Miller, *White Cartels, The Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 *FORDHAM L. REV.* 999, 1028 (2008)).

⁴¹ Carter, *supra* note 27, at 1098 n.124 (quoting H.C. BRUCE, *THE NEW MAN: TWENTY-NINE YEARS A SLAVE. TWENTY-NINE YEARS A FREE MAN.* 96 (York, Pa., P. Anstadt & Sons 1895)). Bruce’s narrative also noted that, aside from routinely serving on slave patrols, poor whites more generally often sought to ingratiate themselves with the wealthy slaveholding class: “to please

tangibly, through financial incentives as described above; and intangibly, through the increased social capital associated with whiteness,⁴² even as the slave system undermined white laborers' direct economic interests⁴³ — and often required the active assistance of white individuals who themselves may have had no stake in nor necessarily even supported the slave system.

II. THE RECONSTRUCTION AMENDMENTS AND CIVIL RIGHTS STATUTES

A. *The Reconstruction Amendments' Goals*

The post-Civil War Reconstruction Amendments and associated civil rights statutes were enacted against the backdrop described above — that is, approximately 250 years of American history during which the system of human bondage and racial subordination was enforced by interlocking governmental and private action. The Reconstruction Amendments' Framers understood the state of freedom to be “much more than the absence of slavery. It was, like slavery, an evolving, enlarging matrix of both formal and customary relationships rather than a static catalog.”⁴⁴ Those Framers therefore intended the post-Civil War Constitution to enshrine certain specific rights — among them, freedom from slavery and involuntary servitude, equal protection, due process, and the right to participation in the political process without regard to race — and also to empower Congress more broadly “to act so as to obliterate the last vestiges of slavery in America,”⁴⁵ whenever

their masters[—]for such they were to these poor whites almost as much as to [Black] slaves[—]they told everything they had seen the slaves do' and often fabricated accounts of wrongdoing by the slaves.” *Id.* at 1097–98 (alterations in original) (quoting BRUCE, *supra*, at 29).

⁴² See generally Harris, *supra* note 16.

⁴³ The Thirteenth Amendment's Framers expressly discussed this issue. Representative Wilson, for example, stated during the Thirteenth Amendment debates that “the poor white man” had been “impoverished, debased, dishonored by the system that makes toil a badge of disgrace.” William M. Carter, Jr., *Class as Caste: The Thirteenth Amendment's Applicability to Class-Based Subordination*, 39 SEATTLE U. L. REV. 813, 821 n.31 (2016) (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864)). Representative Ebon Ingersoll of Illinois similarly argued during the Thirteenth Amendment debates that the amendment would also benefit “the seven millions of poor white people who live in the slave States but who have ever been deprived of the blessings of manhood by reason of . . . slavery” due to the unpaid labor pool that slavery provided, which both suppressed the wages of the white working class and made labor itself seem dishonorable because of its associations with Blackness. *Id.* (omission in original) (quoting CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864)). Despite these economic realities, white laborers could nonetheless enhance their social capital and perception of self-worth by aiding in the maintenance of race-based slavery, since reinforcing the color line meant that, whatever their economic status, working-class whites would remain above Blacks in the social and legal hierarchy. See Harris, *supra* note 16, at 1720–21.

⁴⁴ HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875*, at 391–92 (1982).

⁴⁵ CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864) (statement of Sen. Wilson).

and in whatever future form they might be found.⁴⁶ To that end, the Thirteenth, Fourteenth, and Fifteenth Amendments all included express enforcement clauses empowering Congress generally to enforce the substantive provisions therein without a more specific mandate, the first time such express clauses appeared in the Constitution.⁴⁷

B. *Post-Civil War Civil Rights Statutes*

Congress immediately began to exercise its powers under the enforcement clauses, enacting numerous civil rights statutes. This was due in part to Congress's desire to act quickly and affirmatively to cement the civil rights now guaranteed to Blacks by constitutional amendment, and in part to the necessity of responding to the former slave states' actions.

As to the first point: the Reconstruction Congresses were determined to carry the nation's "new birth of freedom"⁴⁸ into reality. As one Republican congressman explained:

I thought when I voted for the amendment to abolish slavery that I was aiding to give real freedom to the men who had so long been groaning in bondage. I did not suppose that I was offering them a mere paper guarantee. And when I voted for the second section of the [Thirteenth] amendment, I felt in my own mind certain that I had placed in the Constitution and given to Congress ability to protect and guaranty the rights which the first section gave them.⁴⁹

The Reconstruction Framers therefore believed that their duty would be incomplete unless and until they exercised their newly granted constitutional powers to secure the freedmen's rights in fact through implementing legislation.

In addition to seeking to remediate the legacies of slavery generally, the immediate imperative to enact legislation implementing the

⁴⁶ For example, Senator Lyman Trumbull of Illinois stated during the Thirteenth Amendment debates:

I have no doubt that under [the Thirteenth Amendment,] we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper . . .

CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

⁴⁷ U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

⁴⁸ President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

⁴⁹ CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Thayer). Senator Henry Wilson of Massachusetts similarly argued that the Thirteenth Amendment was intended to "obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it." CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

Reconstruction Amendments arose in response to the Southern Black Codes. Shortly after the end of the Civil War and the outlawing of slavery, the former slave states enacted Black Codes, a series of laws designed to return the freedmen to a condition of de facto slavery,⁵⁰ through various provisions:

The Black Codes . . . created separate categories of crimes for blacks and whites, restricted the ability of blacks to enter into enforceable legal relationships with other private parties, denied or limited the standing of persons of African descent before the courts as plaintiffs, victims, jurors, or witnesses, and barred them from participation in the democratic process, whether as voters or as officeholders.⁵¹

The Black Codes changed the Reconstruction Congresses' outlook from an expectation that "the nation would continue the positive task of enlarging freedom" to "a need to reply negatively to southern initiatives."⁵²

Congress first responded to the Black Codes, and Southern recalcitrance more generally, by enacting the Civil Rights Act of 1866.⁵³ The Act provided that all citizens, regardless of race:

shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.⁵⁴

Congress in short order subsequently adopted the Enforcement Acts of 1870⁵⁵ and 1871,⁵⁶ which, inter alia, provided a federal civil cause of action for civil rights violations committed by state actors and also authorized criminal penalties and civil remedies for conspiracies by private individuals to deprive a person of federally protected civil rights.⁵⁷

⁵⁰ See Balkin, *supra* note 32, at 1847 (stating that the Black Codes were "draconian laws passed after the abolition of slavery that stripped blacks of basic civil rights").

⁵¹ Carter, *supra* note 17, at 182. As just one specific example: Mississippi's Black Code provided that "[a]ll freedmen, free negroes and mulattoes . . . found . . . with no lawful employment or business, or found unlawfully assembling themselves together . . . shall be deemed vagrants," subject to fines, and leased out for labor to any person willing to pay the fine. Jason A. Gillmer, Note, *United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 538 (1995) (third omission in original) (quoting An Act to Amend the Vagrant Laws of the State, § 2, 1865 Miss. Laws 90, 90-91).

⁵² HYMAN & WIECEK, *supra* note 44, at 391.

⁵³ Ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.).

⁵⁴ *Id.* § 1, 14 Stat. at 27 (codified as amended at 42 U.S.C. §§ 1981(a), 1982).

⁵⁵ Enforcement Act, ch. 114, 16 Stat. 140 (1870).

⁵⁶ Enforcement Act, ch. 99, 16 Stat. 433 (1871); Enforcement Act (Ku Klux Klan Act of 1871), ch. 22, 17 Stat. 13.

⁵⁷ See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 205 (1970) (Brennan, J., concurring in part and dissenting in part) ("Stirred to action by the wholesale breakdown of protection of civil rights in the South, Congress carried to completion the creation of a comprehensive scheme of remedies — civil, criminal, and military — for the protection of constitutional rights from all major interference." (footnote omitted)).

These provisions are now codified at 42 U.S.C. §§ 1983, 1985, and 1986. Section C below describes the history and purposes of these provisions and how the courts have interpreted and applied them.

*C. Sections 1983, 1985, and 1986: History, Purposes,
and Judicial Interpretation*

Sections 1983, 1985 and 1986 were designed to address civil rights violations by both state actors and nonstate actors. Although the latter two are most directly relevant to this Essay's thesis, understanding the entire legislative package is necessary in order to understand the roles of §§ 1985 and 1986. This section therefore first briefly addresses § 1983 and then addresses §§ 1985 and 1986 in greater detail.

As discussed in Part I, the Reconstruction Congresses were well aware that the institution of slavery and corresponding system of racial subjugation were dependent upon interlocking, mutually reinforcing governmental and private action. Dismantling those institutions and systems would therefore require addressing both their governmental and nongovernmental aspects. The Reconstruction Congresses understood that the maintenance of slavery and white supremacy rested upon a system of mutual obligation and dependency: nonslaveholding whites were obligated to assist slaveholders in upholding the slave system and its attendant grotesqueries; governmental actors were required to enforce the slaveholders' rights and to suppress all challenges to the legitimacy of human bondage; and slaveholders were dependent upon both the government and private actors to protect their labor theft through the subjugation and dehumanization of Black people. The post-Civil War constitutional amendments and civil rights statutes as a whole therefore sought to invert these relationships in order to create and protect a state of freedom. These provisions created a web of mutual obligation between government and private persons, and — by virtue of § 1986 — among private persons themselves, forming a new social contract under which the fundamental civil rights of each member of the community would be respected by all members of the community.

The provisions now codified as § 1983 were intended to address the role of state actors in civil rights violations. Section 1983 provides in pertinent part that:

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 injured⁵⁸

A violation of § 1983, per its text, requires proof of three elements: (1) the deprivation of a federally protected right (2) caused by (3) a

⁵⁸ 42 U.S.C. § 1983.

governmental actor (by virtue of the statute's second clause, now commonly referred to as the "under color of law" requirement). Section 1983 was originally aimed at addressing the problem of state officials who were recalcitrant or outright hostile to Reconstruction and to Black civil rights following the end of slavery.⁵⁹

Section 1983 is regularly utilized and has spawned a vast body of jurisprudence.⁶⁰ Sections 1985 and 1986 are far less well known.⁶¹ Whereas § 1983 was designed to address state action violative of constitutional rights,⁶² §§ 1985 and 1986 were designed to address the other side of the coin. To be sure, private individuals often acted in collaboration with government officials to deprive civil rights,⁶³ but private individuals also often acted on their own initiative as agents of purely private racial terrorism both during and after the end of slavery.⁶⁴ Sections 1985 and 1986 respectively provide a federal civil remedy for such private conspiracies and impose liability upon persons who were aware of such conspiracies and had the power to intervene but failed to do so. Section 1986 in particular "fortifies constitutional anti-discrimination mandates and imposes societal responsibility for a societal problem."⁶⁵

As relevant to this Essay, § 1985 provides:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under

⁵⁹ See *Monroe v. Pape*, 365 U.S. 167, 174–75 (1961) (quoting J.G. RANDALL, *THE CIVIL WAR AND RECONSTRUCTION* 857 (1937)) (citing, e.g., S. REP. NO. 1 (1871); CONG. GLOBE, 42d Cong., 1st Sess. app. 166–67 (1871)).

⁶⁰ MARTIN A. SCHWARTZ, *SECTION 1983 LITIGATION* 4 (Kris Markarian ed., 3d ed. 2014) ("Each year the federal courts face dockets filled with huge numbers of § 1983 cases. The lower court decisional law is voluminous.")

⁶¹ See Fisher, *supra* note 13, at 471.

⁶² See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999) ("To state a claim for relief in an action brought under § 1983, respondents must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982))).

⁶³ As noted in section I.B, history is replete with examples of the entwinement of private and governmental actors in violating Black civil rights. The Supreme Court recounted one such case in *Brown v. Mississippi*, 297 U.S. 278 (1936). In *Brown*, three African American men had been convicted of murder based solely upon their coerced confessions. *Id.* at 279. After discovery of the murder, a police officer took one of the defendants to the victim's residence, where a group of angry white men were gathered. *Id.* at 281. The men accused that defendant of the murder; when he denied it, they — with the police officer's participation — repeatedly hung him from a tree and beat him until he confessed. *Id.* at 281–82. The same police officer, along with other officers and private white men whom the officers let into the jail, later also coerced confessions from the other two defendants through similarly brutal means. *Id.* at 282.

⁶⁴ See *Grant, Reconstruction and the KKK*, PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/grant-kkk> [<https://perma.cc/Q4HC-T2AA>].

⁶⁵ Fisher, *supra* note 13, at 483.

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 as an elector for President or Vice President, or as a Member of Congress of the United States . . . [then,] in any case of [such] conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.⁶⁶

Section 1985 therefore applies to *any* persons (not only state actors) who engage in a conspiracy to deprive another person of the federally protected civil rights enumerated therein.

Section 1986 goes further. It imposes civil liability upon any person who could have acted to prevent the accomplishment of a § 1985 conspiracy but failed to do so. In pertinent part, § 1986 provides that:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . . for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case . . .⁶⁷

Section 1986 thus contains five elements: (1) knowledge of a § 1985 conspiracy; (2) “power” to prevent or assist in preventing the conspiracy from being carried out; (3) failure or refusal to do so; and (4) a harm resulting from the conspiracy, which (5) could have been prevented by the defendant in the exercise of reasonable diligence.

One noteworthy aspect of § 1986’s text is that it requires neither that the defendant was an active participant in the conspiracy nor even that they were a passive supporter; rather, knowledge of the conspiracy alone suffices to meet the statute’s first requirement. Further, a particularly striking aspect of the statutory text is that it imposes liability for failure to prevent a harm; that is, it imposes bystander liability for failure to intervene to protect another person regardless of whether the § 1986 defendant themselves actively participated in planning or causing the harm.

As Fisher noted in her article, § 1986 thus “imposes perhaps the strongest affirmative duty of any piece of legislation arising from the Civil War”⁶⁸:

⁶⁶ 42 U.S.C. § 1985(3).

⁶⁷ *Id.* § 1986.

⁶⁸ Fisher, *supra* note 13, at 463.

Section 1986 imposes a “Good Samaritan” duty to protect upon police, bystanders, or others who have knowledge of impending execution of a racist conspiracy as defined by § 1985 . . . and [who] have the ability to prevent the conspirators from carrying out their objectives. . . . It is unique among American civil rights statutes in creating liability when a defendant has neither personally committed a discriminatory act, engaged in a conspiracy to do so, nor acted with discriminatory intent.⁶⁹

Neither § 1985 nor § 1986 has the same robust jurisprudential history as § 1983. The relative paucity of § 1986 litigation may be due in part to lack of awareness of §§ 1985 and 1986 as compared to their better-known § 1983 counterpart.⁷⁰ The relative lack of awareness regarding §§ 1985 and 1986 may be changing, however, as litigators seek new ways to address the rising tide of white-supremacist and other extremist violence aimed at depriving civil rights and disrupting the political process.⁷¹ Another factor contributing to the sparse use of § 1986 may also

⁶⁹ *Id.* at 463–64 (footnote omitted).

⁷⁰ *See, e.g., id.* at 463 (“Section 1986 claims are important tools for civil rights litigators attempting to deter and punish racial violence. Unfortunately, however, few civil rights litigators are aware of the statute’s existence and its utility in fighting racist conspiracies.”).

⁷¹ For example, the plaintiffs in *Sines v. Kessler*, 324 F. Supp. 3d 765 (W.D. Va. 2018), litigation arising from the racially motivated attacks at the “Unite the Right” rally in Charlottesville, Virginia, in 2017 included §§ 1985 and 1986 claims in their complaint. *See infra* notes 108–13 and accompanying text. Media coverage of *Sines* may well have increased advocates’ awareness of §§ 1985 and 1986, as several cases have invoked these statutes following *Sines* and its attendant publicity. *See, e.g.,* Plaintiffs’ Complaint ¶¶ 1, 5, 11, 27–30, *Williams v. Kafas*, No. 22-cv-01162 (N.D. Ohio June 30, 2022) (alleging, inter alia, a conspiracy under § 1985(3) between a white father and son to violate a Black plaintiff’s civil right to be free from racially motivated private violence by acting in concert to attack plaintiff while repeatedly using racial slurs toward him); Adam Ferrise, *Seeking a Remedy to a Weak State Law, A Black Man Sues Attacker Who Got 3 Days in Jail for a Racist Beating in Parma*, CLEVELAND.COM (Aug. 14, 2022, 5:30 AM), <https://www.cleveland.com/court-justice/2022/08/seeking-a-remedy-to-a-weak-state-law-a-black-man-sues-attacker-who-got-3-days-in-jail-for-racist-beating-in-parma.html> [<https://perma.cc/8R2L-MZWR>] (describing the facts of the *Williams* case in greater detail); Complaint ¶¶ 134–136, *Thompson v. Trump*, 590 F. Supp. 3d 46 (D.D.C. 2022) (asserting a § 1985(1) claim by members of Congress who were present in the U.S. Capitol during the attacks on January 6, 2021, alleging that a conspiracy existed among President Donald Trump, his advisors, and members of extremist groups to “plot[], coordinate[], and execute[] a common plan to prevent Congress from discharging its official duties in certifying the results of the presidential election,” *id.* ¶ 135, and to “misinform their supporters and the public, encouraging and promoting intimidation and violence in furtherance [thereof],” *id.* ¶ 136).

In *Thompson v. Trump*, 590 F. Supp. 3d 46, *appeal docketed*, No. 22-7031 (D.C. Cir. Mar. 24, 2022), one plaintiff, Representative Eric Swalwell, brought a § 1986 claim against President Donald Trump, asserting he “knew about the alleged § 1985 conspiracy, had the power to prevent it, and failed to [do so].” *Id.* at 84. However, the district court dismissed the claim on the ground that “the President cannot be held liable for his failure to exercise his presidential powers, at least under § 1986. Just as he is immune for acts that fall within the outer perimeter of his official responsibilities, so too must he be immune for alleged failures to exercise that official responsibility.” *Id.* The lower court’s reasoning is highly questionable, inasmuch as it seems to conflate the “presidential powers” question for purposes of presidential immunity with the “power to prevent or aid in preventing the commission of the [conspiracy]” for purposes of § 1986. *Id.* (quoting 42 U.S.C. § 1986). The latter, as discussed throughout this Essay, does not require that the defendant had any official or de jure power at all; rather, this element looks to whether the defendant was functionally in a

be the challenges of establishing the predicate § 1985 claim.⁷² Among other limitations, although § 1985 conspiracies can consist solely of private actors because the statute has no state action requirement, the Supreme Court has held that purely private conspiracies to deprive a person of civil rights are actionable only if said civil rights are themselves ones that are protected against infringement by private persons.⁷³

The Supreme Court addressed § 1985 in *Griffin v. Breckenridge*.⁷⁴ In *Griffin*, a group of Black plaintiffs sued under § 1985(3), alleging that the white defendants had attacked them because they believed (mistakenly) that plaintiffs were civil rights activists.⁷⁵ Specifically, the complaint alleged that:

[D]efendants, acting under a mistaken belief that [one of the plaintiffs] was a worker for Civil Rights for Negroes, wilfully [sic] and maliciously conspired, planned, and agreed to block the passage of said plaintiffs in said automobile upon the public highways, to stop and detain them and to assault, beat and injure them with deadly weapons. Their purpose was to prevent said plaintiffs and other Negro-Americans, through such force, violence and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Mississippi, including but not limited to their rights to freedom of speech, movement, association and assembly; their right to petition their government for redress of their grievances; their rights to be secure in their persons and their homes; and their rights not to be enslaved nor deprived of life and liberty other than by due process of law.⁷⁶

The Court held that a violation of § 1985(3) requires proof that the conspirators acted with a discriminatory purpose — that is, with “some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.”⁷⁷ The Court also held that § 1985(3) applies to private conspiracies to interfere with a person’s civil rights and that involvement of a government actor in the conspiracy is

position to prevent or aid in preventing the commission of the conspiracy, regardless of whether they were a state or private actor. To the extent that President Trump’s alleged power to have prevented or aided in preventing the January 6 attacks rests upon his role as then-President, the court’s presidential immunity reasoning may be sensible. It is far from clear, however, that his role as President was the sole or even primary source of his ability to have aided in preventing the attacks. He could, for example, have reported his alleged prior knowledge of the conspiracy to the proper authorities or have attempted to dissuade the conspiracy’s actors prior to January 6, neither of which would have hinged upon his role as then-President, given that both equally could have been done by purely private persons not clothed with the power of the President.

⁷² See Fisher, *supra* note 13, at 475 (“The standards for liability under § 1985 are quite stringent.”).

⁷³ *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 832–33 (1983).

⁷⁴ 403 U.S. 88 (1971).

⁷⁵ *Id.* at 89–90.

⁷⁶ *Id.* at 90.

⁷⁷ *Id.* at 102.

not required.⁷⁸ The Court, reviewing the text and history of the Civil Rights Act of 1871, found that “[i]t is thus evident that all indicators — text, companion provisions, and legislative history — point unwaveringly to § 1985(3)’s coverage of private conspiracies.”⁷⁹

As to purely private conspiracies, however, the Court subsequently held that such conspiracies are actionable only under § 1985 to the extent that they aim to deprive persons of civil rights that the Constitution protects against private infringement.⁸⁰ Thus, for example, private conspiracies to inflict racially motivated violence of the kind in *Griffin* are clearly covered by § 1985, inasmuch as the right to interstate travel and the right to be free from violence amounting to a “badge[]” or “incident[] of slavery”⁸¹ are protected against private as well as governmental infringement.⁸² By contrast, the Court held in *United Brotherhood of Carpenters, Local 610 v. Scott*⁸³ that a § 1985 conspiracy “to violate First Amendment [or Equal Protection Clause] rights is not made out without proof of state involvement,” because under the Court’s precedents, those rights are protected only as against the government.⁸⁴ Hence, litigants may be less inclined to invoke § 1985 because the scope of actionable § 1985 conspiracies that involve solely private individuals may appear to be limited to a relatively narrow set of circumstances.

Construed properly, however, §§ 1985 and 1986 claims may not be as constrained as it might initially appear from *Griffin* and *Carpenters*.

⁷⁸ *Id.* at 105. The Court noted that the provisions of the Civil Rights Act of 1871 that reached private action, including § 1985 (and by extension, § 1986) were constitutionally proper as a matter of Congress’s power to enforce the Thirteenth Amendment. The Court stated:

[T]here has never been any doubt of the power of Congress to impose liability on private persons under [the Thirteenth Amendment], ‘for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.’ Not only may Congress impose such liability, but the varieties of private conduct that it may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude.

Id. (citations omitted) (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)) (citing *The Civil Rights Cases*, 109 U.S. at 23; *Clyatt v. United States*, 197 U.S. 207, 216, 218 (1905); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437–40 (1968)).

⁷⁹ *Id.* at 101. Among other evidence, the Court noted:

On their face, the words of the statute fully encompass the conduct of private persons. The provision speaks simply of ‘two or more persons in any State or Territory’ who ‘conspire or go in disguise on the highway or on the premises of another.’ Going in disguise, in particular, is in this context an activity so little associated with official action and so commonly connected with private marauders that this clause [should be construed to apply to purely private action].

Id. at 96 (quoting 42 U.S.C. § 1985(3)).

⁸⁰ *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 832–33 (1983).

⁸¹ *Griffin*, 403 U.S. at 88 (quoting *Jones*, 392 U.S. at 440).

⁸² *Carpenters*, 463 U.S. at 832–33 (“[T]he conspiracy at issue [in *Griffin*] was actionable because it was aimed at depriving the plaintiffs of rights protected by the Thirteenth Amendment and the right to travel guaranteed by the Federal Constitution. Section 1985(3) constitutionally can and does protect those rights from interference by purely private conspiracies.”).

⁸³ 463 U.S. 825.

⁸⁴ *Id.* at 832.

Both cases recognize that conspiracies that inflict a badge or incident of slavery within the scope of the Thirteenth Amendment, which does not require state action, would be actionable under §§ 1985 and 1986.⁸⁵ Construing the purposes of the Thirteenth Amendment broadly in accordance with the stated goals of the Reconstruction Framers reveals that such badges and incidents can encompass a wide variety of racialized (and perhaps other) subordination, whether inflicted by government actors or private persons.⁸⁶

The case law interpreting § 1986 is even less robust than that regarding § 1985.⁸⁷ Although the Supreme Court has mentioned § 1986 in passing in the course of decisions involving other civil rights statutes,⁸⁸ research for this Essay reveals no Supreme Court cases interpreting the substantive provisions of § 1986. There are a few lower court cases discussing § 1986, which will be discussed in Part III below; but the relative paucity of § 1986 jurisprudence is both a challenge (inasmuch as there is not a robust pre-existing jurisprudential framework to apply to new frontiers, such as the use of online instrumentalities to plan racial terrorism) and an opportunity (inasmuch as courts reviewing § 1986 claims in these new contexts have more room to interpret the statute *de novo*).

III. ONLINE EXTREMISM AND THE WHITE-SUPREMACIST MOVEMENT

Prior to exploring the applicability of § 1986 to white-supremacist conspiracies, Part III first discusses the nature of the contemporary white-supremacist movement. Understanding how that movement utilizes online communications platforms to recruit, radicalize, and plot attacks helps to illuminate the potentially wide scope of § 1986 liability.

A. *The White-Supremacist Movement's Use of Online Spaces*

Internet platforms and online tools have changed the nature of white-supremacist organizing and radicalization. As a recent White House report noted:

⁸⁵ See *Griffin*, 403 U.S. at 105; *Carpenters*, 463 U.S. at 832–33.

⁸⁶ See generally Carter, *supra* note 24 (discussing the Thirteenth Amendment's Framers' views of the Amendment's broad scope). As Fisher notes, however, courts may require litigants to plead specifically that their § 1985 claim is based upon deprivation of a right protected by the Thirteenth Amendment in order to avoid dismissal for lack of state action. Fisher, *supra* note 13, at 478 n.91 (noting that "[s]ome lower courts have required careful pleading of violations of the Thirteenth Amendment, as opposed to the right to equal protection generally, before sustaining § 1985 claims against private actors," and describing such cases).

⁸⁷ For other cases interpreting § 1985(3), see, for example, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Lake v. Arnold*, 112 F.3d 682 (3d Cir. 1997); and *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982).

⁸⁸ See, e.g., *Burnett v. Grattan*, 468 U.S. 42, 48 (1984) (noting that of §§ 1981, 1983, 1985, and 1986, only § 1986 contains a statute of limitations).

Recruiting and mobilizing individuals to domestic terrorism occurs in many settings, both in-person and online. These activities are increasingly happening on Internet-based communications platforms, including social media, online gaming platforms, file-upload sites, and end-to-end encrypted chat platforms, even as those products and services frequently offer other important benefits. The widespread availability of domestic terrorist recruitment material online is a national security threat whose front lines are overwhelmingly private-sector online platforms⁸⁹

The scholarly literature supports this assessment. Sociologists have noted, for example, that “the anonymity of online movements . . . reduces the costs of participation, lowering the necessary sense of identification with the cause required for mobilization. The Internet also creates a forum for these movements to increase the level of extremism in participants’ opinions”⁹⁰ Although online platforms are far from the sole tool⁹¹ used by white-supremacist groups to recruit and radicalize members and to plot their activities, for decades “the white supremacist movement has been very active in using the Internet as a medium for disseminating propaganda and recruiting members.”⁹²

The white-supremacist movement is relatively closed to outsiders who do not share the movement’s ideology. Secrecy, the use of coded language, and selectively “packaging” their messaging to appear less radical all make it difficult for outsiders to identify and disrupt white-supremacist spaces and plots. For example, “[s]tarting in the 1990s, white supremacists were taught to live double lives: cover their racist tattoos, grow out their hair to avoid being identified as racist ‘skin-heads,’ hide extremist insignia, and outwardly project an image of non-extremism, especially to evade detection by law enforcement.”⁹³ In this regard, the modern white-supremacist movement harkens back to its predecessors like the Ku Klux Klan:

In the 1920s, for example, KKK groups adopted a mainstreaming strategy by running candidates for electoral office in multiple states and cities and asserting that they were no more than a club for white people; at the same

⁸⁹ NAT’L SEC. COUNCIL, *supra* note 8, at 21–22.

⁹⁰ Neal Caren, Kay Jowers & Sarah Gaby, *A Social Movement Online Community: Stormfront and the White Nationalist Movement*, in 33 RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE 163, 171 (Jennifer Earl & Deana A. Rohlinger eds., 2012) (citation omitted).

⁹¹ See Charlottesville Trial Expert Report, *supra* note 3, at 9 (“[White-supremacist] culture is carried through multiple communication venues and networks that have varied over time and across locales. In the modern [white-supremacist movement], these include a vast array of white supremacist and related Internet websites and discussion forums, social media platforms, and podcasts, as well as in-person connections at white supremacist events, groups, and gatherings.”).

⁹² Val Burris, Emery Smith & Ann Strahm, *White Supremacist Networks on the Internet*, 33 SOCIO. FOCUS 215, 216 (2000); see also Charlottesville Trial Expert Report, *supra* note 3, at 39 (noting “the practices of contemporary [white-supremacist culture]” to utilize “Twitter, Facebook, Instagram, YouTube, 4chan, 8chan, twitch, Gab, Telegram, Discord, and cell phone texting” in planning their activities and publicizing them within the white-supremacist movement).

⁹³ Charlottesville Trial Expert Report, *supra* note 3, at 13–14.

time, they adopted violent strategies to terrorize and expel Jews, Catholics, and African Americans from their communities and jobs.⁹⁴

And as the Klan used masks, the cover of darkness, and secret meetings to plan and engage in racial terror, modern white-supremacist groups similarly seek out and utilize online platforms that prioritize anonymity and secrecy: “White supremacist groups and platforms consistently operate to keep internal discussions and operations secret, restricted to back-stage places and to insiders and heavily guarded from outsiders.”⁹⁵ These features of white-supremacist groups mean that insiders are far more likely than outsiders to have advance knowledge of conspiracies that would violate § 1985(3). Section B below addresses whether those insiders and bystanders with such advance knowledge who fail to act to “prevent or aid in preventing”⁹⁶ white-supremacist conspiracies from being executed could face civil liability under § 1986.

B. Bystander Liability Under § 1986

Despite their secrecy and closed nature to outsiders, recent white-supremacist conspiracies have been widely known *within* online spaces frequented by white-supremacist sympathizers.⁹⁷ This section first briefly reviews the law and psychology literature regarding bystander motivations and liability and then provides concrete examples of the use of § 1986.

1. *Bystander Psychology and Motivations.* — Section 1986 is atypical in that it imposes liability upon bystanders who fail to take action to prevent harm to others. Traditional common law rules generally do not impose bystander liability. “With limited exceptions, there is no duty under Anglo-American law to lend personal assistance to or to obtain

⁹⁴ *Id.* at 15.

⁹⁵ *Id.* at 13.

⁹⁶ 42 U.S.C. § 1986.

⁹⁷ As discussed below, the deadly “Unite the Right” attacks in Charlottesville, Virginia, in 2017 were planned and discussed via online platforms that were widely read by white-supremacist sympathizers. Other planned racist attacks similarly had been widely known online before they were carried out. For example, in May of 2022, approximately thirty minutes before the racist murders of Black shoppers at a supermarket in Buffalo, New York, the shooter “invited a small group of people to join a chat room online [on Discord]” where he had posted pictures of himself with his weapons and openly discussed his plans to attack the supermarket, but “[n]one of the people he invited to review [these materials] appeared to have alerted law enforcement, and the massacre played out much as [the shooter] envisioned.” Jonah E. Bromwich, *Before Massacre Began, Suspect Invited Others to Review His Plan*, N.Y. TIMES (May 17, 2022), <https://www.nytimes.com/2022/05/17/nyregion/buffalo-shooting-discord-chat-plans.html> [<https://perma.cc/SG8E-U8KD>]. Similarly, as the Anti-Defamation League has noted, the anti-Semitic murders at the Tree of Life synagogue in Pittsburgh in 2018 and the anti-Muslim murders at two mosques in New Zealand months later may have “seemed to come out of nowhere. In hindsight, though, these killings should not have been surprising. Both attackers were enmeshed in online communities that exposed them to content designed to make them hateful and potentially violent.” *Gab and 8chan: Home to Terrorist Plots Hiding in Plain Sight*, ANTI-DEFAMATION LEAGUE (Apr. 5, 2019), <https://www.adl.org/resources/reports/gab-and-8chan-home-to-terrorist-plots-hiding-in-plain-sight> [<https://perma.cc/M8LB-L5M2>].

help for persons in distress, or to warn of imminent danger.”⁹⁸ Section 1986 is one such exception that Congress made purposefully: “[Congress’s] intent in drafting and passing [§ 1986] was to provide broad, effective protection to victims of racist conspiracies. The focus of . . . the [legislative] debates was the need to compel protective action from local citizens and municipalities. The statute as passed accomplishes that objective.”⁹⁹

Congress was well aware of the history recounted in Part I of this Essay, whereby private individuals were often incentivized or required to participate in violence against Blacks in order to further the systems of slavery and white supremacy. Congress via § 1986 similarly sought to conscript private action, but toward the goal of advancing rather than denying civil rights.

In the context of violent racist conspiracies planned or discussed online that would meet the requirements of § 1985(3), § 1986 implicates a large potential group of bystanders — that is, any person who encountered such planning and communication online and who, “having power to prevent or aid in preventing the commission” thereof, failed to do so when “reasonable diligence could have prevented” the conspiracies from being carried out.¹⁰⁰ Indeed, “[i]f witnessing crimes was once solely confined to the kinetic realm, requiring physical presence of the spectator, the emergence of [online criminality] challenges this notion.”¹⁰¹

Due to the closed nature of white-supremacist networks, § 1986 liability would thus most often fall upon “bad Samaritans”:

Literature divides Samaritan laws into two groups — often labeling the Samaritan as either being “good” or “bad.” Good Samaritan laws generally fall under the rubric of tort law, providing some form of civil immunity from liability to individuals who render aid to another person Bad Samaritan laws . . . are different in nature. Falling mainly under the rubric of criminal law and relying mainly on the moral duty of individuals to aid others in grave danger, bad Samaritan laws impose one of two legal duties: to report or to offer rescue in perilous situations — often cases of felony — while the burden of risk of such aid is low. Thus, unlike good Samaritan laws, bad Samaritan laws incorporate a duty to directly assist others — whether by reporting to authorities or offering aid — when another person is in immediate danger¹⁰²

Under § 1986, the “bad Samaritans” at issue would most often be those persons who are ideologically aligned with the white-supremacist movement and are therefore participating in online activities with such

⁹⁸ Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 424 (1985); cf. Zachary D. Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders amid Sexual Crimes*, 92 S. CAL. L. REV. 1317, 1344 (2019) (“[N]o general Bad Samaritan statute exists in U.S. federal law. ‘Action for neglect to prevent’ applies exclusively to enumerated civil rights [under § 1986].”).

⁹⁹ Fisher, *supra* note 13, at 474 (footnotes omitted).

¹⁰⁰ 42 U.S.C. § 1986.

¹⁰¹ Eldar Haber, *The Digital Samaritans*, 77 WASH. & LEE L. REV. 1559, 1561 (2020).

¹⁰² *Id.* at 1568–69 (footnotes omitted).

groups, even if they themselves have no role in the underlying § 1985(3) conspiracy.¹⁰³ Arguably, there is an even stronger justification for imposing affirmative duties under § 1986 for online bystanders than in the traditional physical context. “The normative aspects of imposing bad Samaritan duties . . . do not generally change in light of technology. . . . [D]uties to report perilous situations like crimes should even be enhanced when online, because unlike in the physical world, online bystanders are exposed to no immediate risk for aiding those in peril.”¹⁰⁴

Given the extremely violent tactics of white-supremacist groups and the embrace of violence as a core aspect of white-supremacist identity,¹⁰⁵ there is some reason to believe that members or sympathizers might face, or fear that they face, a heightened risk of retaliation for reporting § 1985(3) conspiracies than would be the case in other contexts. Even accepting this for the sake of argument, however, there is no reason to think that the risk of violent retaliation for reporting information about white-supremacist conspiracies is higher simply because the pertinent information was learned through online channels rather than in person. Indeed, the moral imperative to report — and the corresponding blameworthiness for failure to report¹⁰⁶ — embodied by § 1986 may well be higher with regard to information regarding white-supremacist conspiracies learned through online channels. Unlike with conspiracies planned via traditional physical means (telephone calls, in-person meetings, physical leaflets, and so forth), there is little chance of outsiders learning of such plots through inadvertent disclosure, since white-supremacist networks heavily scrutinize participants before admitting them to online forums and then heavily police ongoing participation in them.¹⁰⁷

2. *Application of § 1986.* — Section 1986 imposes the threat of substantial monetary damages upon “bad Samaritans” who are aware of

¹⁰³ See, e.g., Fisher, *supra* note 13, at 475 (“[A] § 1986 defendant need not have been a member of the § 1985 conspiracy, nor have been involved in it, as mere knowledge of the conspiracy and failure to exercise reasonable diligence to prevent it suffice to impose liability [under § 1986].”).

¹⁰⁴ Haber, *supra* note 101, at 1592 (footnote omitted).

¹⁰⁵ See, e.g., Charlottesville Trial Expert Report, *supra* note 3, at 14 (“Violence has been a core feature of the [white-supremacist movement] across its history Violence is also integral to the internal life of some sectors of the [movement] in which group bonds are formed in violent initiation rites and violent infighting among members. White supremacist culture is distinct from many other cultures in the omnipresence of violence associated with its ideologies, rituals, and messages.”).

¹⁰⁶ “Bad Samaritan” laws have several justifications:

[Such] laws could aid in minimizing needless deaths and injuries; provide an outlet for the public’s moral outrage on specific events; enable society to formally echo the message that bad Samaritanism is morally wrong and that our shared citizenship forms a social responsibility for each other; promote public safety; and provide deterrence for non-compliance. . . . Deontological justifications for bad Samaritan laws might rely on the proclaimed *malum in se* nature of the conduct, i.e., that simply not reporting a perilous situation . . . is morally wrong behavior and thus should be [punished].

Haber, *supra* note 101, at 1571–72 (footnotes omitted).

¹⁰⁷ See, e.g., Charlottesville Trial Expert Report, *supra* note 3, at 40 (noting how the organizers of the “Unite the Right” rally actively vetted would-be participants on the Discord channel used for planning the rally and actively banned and excluded certain users).

but fail to report racist conspiracies. As described above, the increased use of online platforms to plan such conspiracies likely means that there are a great many such “bad Samaritans” who have advance knowledge of such plots and who therefore per § 1986 have a prima facie duty to report. In the case of the civil lawsuit arising from the deadly “Unite the Right” rally in Charlottesville, Virginia, in 2017, for example, the evidence presented showed that the organizers and participants widely shared their violent intentions online.¹⁰⁸ Indeed, the defendants in the Charlottesville case “acknowledged that much of the planning for [Unite the Right] occurred on Discord.”¹⁰⁹ The nature of these online platforms is such that the organizers’ plan for the rally to culminate in violent confrontation would have been widely known among white supremacists and sympathizers who were not themselves part of the underlying conspiratorial effort. Accordingly, the plaintiffs in the Charlottesville case¹¹⁰ raised § 1986 claims as part of their case against the defendants. Plaintiffs’ § 1986 claims alleged that:

Defendants all possessed actual knowledge of the Section 1985(3) anti-civil rights conspiracy described in this complaint that was planned and then undertaken against the class of American citizens described — including a number of the Plaintiffs named herein.

Defendants, as organizers, planners, promoters, and leaders of the conspiracy, were each in a position and had the power to have stopped the anti-civil rights conspiracy or to aid in stopping it.

Each of the Defendants failed and refused to take any steps to attempt to stop this conspiracy or any of the overt acts committed in furtherance of the conspiracy so as to stop the injuries which occurred to Plaintiffs or to other members of the class of citizens targeted by the anti-civil rights conspiracy described.

The failure of Defendants to take any steps to aid in preventing the actions described herein, by informing the lawful authorities or otherwise, violated the command of 42 U.S.C. § 1986.

Plaintiffs suffered their injuries as a result of the individual Defendants’ failure to stop the described conspiracy.¹¹¹

Although the case was successful, with the jury awarding millions of dollars in damages on the plaintiffs’ state law claims, the jury ultimately reached no decision on the § 1986 claims.¹¹² Moreover, although the court largely denied a motion to dismiss the § 1986 claims prior to trial,

¹⁰⁸ See *id.* at 36–38 (noting, inter alia, text messages and posts by the defendants on Discord, social media, and other websites all generated “a sense that a confrontation with outsiders was the purpose of [the Unite the Right rally]” as opposed to a mere protest).

¹⁰⁹ *Id.* at 39.

¹¹⁰ See *Sines v. Kessler*, 324 F. Supp. 3d 765, 798 (W.D. Va. 2018).

¹¹¹ Second Amended Complaint ¶¶ 346–350, *Sines* (No. 17-cv-00072).

¹¹² See Press Release, NAACP Legal Def. & Educ. Fund, LDF Issues Statement on Verdict in Charlottesville Civil Trial (Nov. 23, 2021), <https://www.naacpldf.org/press-release/ldf-issues-statement-on-verdict-in-charlottesville-civil-trial> [<https://perma.cc/7VQN-LS5Q>].

it did so without discussing the merits of those claims.¹¹³ Hence, while the Charlottesville case provides a recent example of a scenario in which the assertion of a § 1986 claim was justified, it does not provide substantive precedential guidance for such claims.

Although no Supreme Court case has addressed the substantive provisions of § 1986, a few lower court cases provide guidance as to its elements and applicability. In *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*,¹¹⁴ for example, Klansmen and their allies engaged in various actions to intimidate and threaten Vietnamese fishermen as well as persons who worked with those fishermen in the Galveston Bay area.¹¹⁵ The trial court, having found that plaintiffs proved the existence of a § 1985(3) conspiracy, further found § 1986 liability to be proper because “the [relevant] defendants had knowledge of the wrongs conspired to be done, and neglected to aid in preventing the commission of these wrongs.”¹¹⁶ In particular, one defendant, who stated that he “admonished members of the Klan not to use violence,” was nonetheless found to have violated § 1986.¹¹⁷ Notwithstanding his purported admonishment against violence, the court reasoned, the defendant had been “informed that members of the Ku Klux Klan planned to participate in the ‘boat ride’” intended to drive away the Vietnamese fishermen and had “kn[own] these members planned to wear their [Klan] robes and carry semiautomatic weapons,” but he nonetheless “did not attempt to dissuade them from joining the boat ride.”¹¹⁸ Hence, the *Vietnamese Fishermen's Ass'n* case stands for the proposition that any person with advance knowledge of a § 1985(3) conspiracy who fails to intervene by not at minimum attempting to dissuade the conspirators from action faces § 1986 liability. The lesser proposition in this Essay — that failure to report knowledge of the conspiracy to lawful authorities would similarly violate § 1986 — would surely fall within the reasoning of *Vietnamese Fishermen's Ass'n*. If the failure to attempt in-person dissuasion can trigger § 1986 liability, then so too would the failure to report knowledge of online planning of a § 1985(3) conspiracy, since reporting is both less burdensome and less potentially dangerous than in-person intervention.¹¹⁹

¹¹³ See *Sines*, 324 F. Supp. 3d at 798 (finding without elaboration that the complaint plausibly alleged a § 1986 claim against most of the defendants, but also finding without elaboration as to one defendant that the complaint failed to allege that he “(1) was aware of a conspiracy to commit violence or (2) had ‘power to prevent or aid in preventing the commission of the same’” (quoting 42 U.S.C. § 1986)).

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

¹¹⁵ *Id.* at 1000–02.

¹¹⁶ *Id.* at 1007.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Cf. Fisher, *supra* note 13, at 490 n.144 (“For a private individual, reasonable diligence to prevent a conspiracy might involve no more than calling the police.”).

*Park v. City of Atlanta*¹²⁰ also addressed the scope and nature of bystander liability under § 1986. *Park* involved riots targeting businesses owned by Korean Americans that occurred after the Rodney King verdict. The issues in *Park* were whether a defendant in a § 1986 claim must also have been a participant in the underlying conspiracy in order to be found liable on the § 1986 claim, and what state of mind is required for “failure to act” liability to attach.¹²¹ As to the former, the Eleventh Circuit in *Park* held, consistent with other lower court cases, that:

While it is true that § 1986 only provides a cause of action in the existence of a § 1985(3) conspiracy, the statute does not require that the [§ 1986 defendants] themselves participated in the conspiracy or shared in the discriminatory animus with members of the conspiracy. Section 1986 requires only that [the defendants] knew of a § 1985 conspiracy and, having the power to prevent or aid in preventing the implementation of the conspiracy, neglected to do so.¹²²

Under the Eleventh Circuit’s reasoning, then, defendants may be liable for their failure to prevent or aid in preventing a § 1985(3) conspiracy of which they had actual knowledge even if they were pure bystanders — that is, even if they neither participated in the conspiracy nor shared in the conspiracy’s goals.

As to the second issue regarding the state of mind required in order for § 1986 liability to attach, the Eleventh Circuit held that “negligence is sufficient to maintain a § 1986 claim. . . . [I]f Appellees knew of a § 1985(3) conspiracy, were in a position to prevent the implementation of that conspiracy, and neglected or refused to prevent it, they are liable under § 1986.”¹²³

The text of § 1986 and the lower court cases interpreting it stand for several propositions. First, § 1986 applies to “any person”: the defendant need not have been a state actor nor have acted in concert with or at the behest of a state actor.¹²⁴ Second, § 1986 embraces pure bystander liability: a proper § 1986 claim may be made against a defendant who did not themselves participate in the underlying conspiracy to deny the rights protected by § 1985(3).¹²⁵ Third, the mens rea requirement for § 1986 liability is mere negligence: a person who has power to prevent or aid in preventing the commission of a § 1985(3) conspiracy but fails to do so, even if only negligently (such as by neglecting to report knowledge thereof), violates § 1986.¹²⁶ Fourth, even a person who is completely indifferent to or not aligned with the conspiracy’s goals may

¹²⁰ 120 F.3d 1157 (11th Cir. 1997).

¹²¹ See 42 U.S.C. § 1986.

¹²² *Park*, 120 F.3d at 1160.

¹²³ *Id.* (citation omitted) (citing, inter alia, *Clark v. Clabaugh*, 20 F.3d 1290, 1298 (3d Cir. 1994)).

¹²⁴ 42 U.S.C. § 1986.

¹²⁵ See *Park*, 120 F.3d at 1160; *Clark*, 20 F.3d at 1298.

¹²⁶ See *Park*, 120 F.3d at 1160; *Clark*, 20 F.3d at 1298.

face § 1986 liability for their failure to prevent or aid in preventing the accomplishment of the underlying conspiracy, if they could have prevented the resulting harm through reasonably diligent efforts.¹²⁷ Last, § 1986 requires that persons having knowledge of conspiracies intended to deny the civil rights protected by § 1985(3) take some affirmative steps to prevent the conspiracy from being carried into fruition, whether by attempting to intervene themselves, reporting the matter to lawful authorities, or other affirmative measures.¹²⁸

The manner in which these principles are translated to the online context will ultimately be developed incrementally through litigation. Two issues that will likely arise are: (1) what level of prior knowledge and interaction will satisfy § 1986's mens rea and "power to aid in preventing" elements, and how (if at all) might those elements apply differently depending upon the bystander's status in relation to the conspirators and to the platform; and (2) how (if at all) does § 1986 apply beyond natural persons, including the corporations that operate online platforms? Although these specific issues (and doubtless many others) regarding the application of § 1986 to the online context will require greater exploration and technical expertise than this Essay can provide, section B.3 below offers some preliminary analysis of these two issues.

3. *Section 1986 Liability of Online Bystanders: A Preliminary Inquiry.* — A person who becomes aware through their online activities of information regarding white-supremacist conspiracies is in some ways in a position no different from a person who becomes aware of such information through their in-person activities. Indeed, in terms of § 1986's text, they differ not at all: § 1986 itself makes no distinctions based upon the manner in which the defendant acquired "knowledge [of] any of the wrongs conspired to be done" in violation of § 1985.¹²⁹ One might conclude that § 1986's text does not condition liability upon the manner of knowledge acquisition simply because there was only one such manner at the time of its drafting — that is, through in-person interactions. This conclusion is highly contestable for at least three reasons. First, it is incorrect: at the time of the statute's drafting, there were in fact ways to become aware of information that did not require in-person interaction with the person who was the source of the information (for example, a bystander finding a misplaced letter describing the plot or seeing a flyer promoting a lynching). Second, in light of the foregoing, Congress in drafting § 1986 therefore presumably could have distinguished between persons who acquired the relevant knowledge via in-person means versus other means (if, for example, Congress believed

¹²⁷ See *Park*, 120 F.3d at 1160 (holding that § 1986 does not require that the defendants "shared in the discriminatory animus with members of the conspiracy").

¹²⁸ *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1007 (S.D. Tex. 1981).

¹²⁹ 42 U.S.C. § 1986.

that the former indicated a greater likelihood of membership or sympathy, and therefore a greater blameworthiness for failure to act, than the latter). Congress did not do so; and traditional canons of statutory interpretation would require presuming that Congress's decision was purposeful.¹³⁰ Third, from an antisubordination perspective, the manner of knowledge acquisition may make little difference. If the goal is to prevent racially subordinating conspiracies from achieving their aims (or, at minimum, to provide compensation to the victims thereof), then the question of blameworthiness — the “perpetrator perspective”¹³¹ — is not particularly apt. Whether or not the bystander learned of the information in person, an antisubordination approach would hold them liable if they could have prevented the harm had they acted.

Nevertheless, as courts grapple with applying an eighteenth-century statute to the twenty-first-century manifestations of the same problem that the statute was originally designed to address, they will almost surely take account of differences in circumstances. As just one example: courts will very likely treat a person who inadvertently came across an online forum discussing a white-supremacist plot by typing the wrong search term or URL and who viewed it only in passing before realizing their mistake differently than a person who spends hours per day on such a forum as an active participant. Given the closed-network nature of white-supremacist organizations' online activities as discussed in section A above, such inadvertent encounters may be rare; but they are surely possible.¹³² Aside from such possible outlier cases, more nuanced questions regarding the knowledge and “power to aid or prevent”¹³³ elements will also arise. These include what level of specificity of information is necessary to trigger § 1986's duty to act (that is, whether the information must be explicit, such as the date, time, and targets of the plot, or whether “storm warnings”¹³⁴ that raise red flags

¹³⁰ The word “knowledge” as used in § 1986 is not ambiguous regarding the means by which the information was acquired; hence, it should be given its usual meaning. *See, e.g., King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (“If the statutory language is plain, we must enforce it according to its terms.” (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010))); 1 WILLIAM BLACKSTONE, COMMENTARIES *59–60 (“Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use.”). Here, the usual meaning of “knowledge” does not depend upon how the information was gained but rather whether the person possesses it.

¹³¹ Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053 (1978).

¹³² Among many other possibilities, the administrator of the forum could err in setting the forum's login and password requirements, making the forum temporarily viewable by anyone who discovers it until the error is corrected.

¹³³ 42 U.S.C. § 1986.

¹³⁴ In the statute of limitations context, for example, many federal courts have held that “storm warnings” — that is, knowledge of facts sufficient to prompt further inquiry — typically are

to a reasonable viewer will suffice); whether the duty to act in light of one's knowledge is a subjective or objective standard; and how the application of these standards is affected by the widespread use of hyperbole on the internet generally and of coded language on white-supremacist forums specifically.¹³⁵

Similarly complex questions will arise in applying § 1986 to the persons and entities that own, operate, and maintain online platforms where white-supremacist conspiracies are discussed. These include, but are not limited to, whether and in what circumstances liability will attach for the inaction of the companies and individuals that own and operate the platforms (for example, Facebook, Twitter, Gab, and 8chan), their employee agents (such as the site moderators and forum administrators who are employed by such companies), the nonemployees who serve as volunteer moderators and forum administrators, and the service providers that provide the infrastructure for such platforms (such as internet and cellular-service providers, along with their agents).¹³⁶

sufficient to start the running of the limitations period. *See, e.g.*, Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L.J. 829, 883, 885 (1983). Statutes of limitations issues, of course, differ in many important ways from the issues regarding § 1986's duty to act; an analogous "storm warnings" standard is thus offered merely as one possible standard that may be applied under § 1986.

¹³⁵ As to the use of coded language by white-supremacist groups, see *supra* section III.A, pp. 269–71. As to the use of hyperbole online, see, for example, James Wilson Williams, *Freedom and Persuasion in the Attention Economy* (2017) (D. Phil thesis, University of Oxford), <https://ora.ox.ac.uk/objects/uuid:8065d7bo-4125-4b1f-9218-8623380e03d7> [<https://perma.cc/P42L-782R>] (“As the newly scarce resource, our attention is today the primary object of competition among our digital technologies. In the so-called ‘attention economy’ that has emerged, design wins when it captures as much of our attention as possible — and in order to win, it must increasingly exploit our non-rational psychological biases.”); Jessica Bennett, *OMG! The Hyperbole of Internet-Speak*, N.Y. TIMES (Nov. 28, 2015), <https://www.nytimes.com/2015/11/29/fashion/death-by-internet-hyperbole-literally-dying-over-this-column.html> [<https://perma.cc/DNT9-R4DG>] (noting the “overly dramatic, forcibly emotive, truncated, simplistic and frequently absurd ways chosen to express emotion in the Internet age”); and Mark Sableman, *Too Hyperbolic to Be Believed: How Social Media Is Transforming Libel Law*, THOMPSON COBURN LLP (Oct. 23, 2018), <https://www.thompsoncoburn.com/insights/blogs/internet-law-twists-turns/post/2018-10-23/too-hyperbolic-to-be-believed-how-social-media-is-transforming-libel-law> [<https://perma.cc/D6XH-NF38>] (noting how the widespread use of hyperbole in social media discourse may change courts' evaluation of libel claims).

¹³⁶ There is at least a colorable legal argument that the owners, operators, service providers, and agents of the platforms used for organizing white-supremacist conspiracies that would violate § 1985(3) could face liability under § 1986, at least in certain circumstances. *See, e.g.*, Kristen Clarke, *Facebook, Protect Civil Rights or You Could Face Lawsuits*, LAWS' COMM. FOR C.R. UNDER L. (Nov. 4, 2019), <https://www.lawyerscommittee.org/letter-to-facebook-regarding-failure-to-address-misinformation-online> [<https://perma.cc/Q38H-KSWL>] (“Facebook could be liable [under § 1986] if it knows of a conspiracy to interfere with voting rights, has the ability to prevent it, and neglects to act 42 U.S.C. § 1986 creates an affirmative duty for ‘every person’ to prevent Section 1985 violations if they have actual knowledge and the ability to do so. If Facebook has actual knowledge that its platform is being used to engage in a Section 1985 violation . . . Facebook can be liable under Section 1986 if it neglects to fulfill its affirmative duty to do something about

While this Essay purposefully refrains from offering specific answers to these questions, it does suggest two preliminary guideposts in seeking to address them. First, at a theoretical level, such questions should be examined with reference to first principles — that is, with regard to the history and goals that motivated the Reconstruction Amendments and associated civil rights statutes such as § 1986. For example, during the congressional debates regarding the Civil Rights Act of 1875,¹³⁷ Senator Charles Sumner (who had been one of the primary architects of the Reconstruction Amendments¹³⁸) provided an important frame of reference for interpreting the Reconstruction Amendments and civil rights statutes enacted under their authority. When the constitutionality of the proposed Act was questioned because it prohibited discrimination in places of public accommodation even absent state action, Sumner responded as follows:

I say [there is] a new rule of interpretation for the National Constitution, according to which, in every clause and every line and every word, it is to be interpreted uniformly and thoroughly for human rights. Before the [Civil War,] the rule was precisely opposite. The Constitution was interpreted always, in every clause and line and word, [in favor of] Human Slavery. Thank God, it is all changed now! There is [now] another rule, and the National Constitution [now], from beginning to end, speaks always for the Rights of Man.¹³⁹

Interpretation of § 1986 should similarly be guided by the overarching goals of our post-Civil War Constitution: to advance substantive equality and to ensure full representation in our polity for those persons who are subordinated and excluded.¹⁴⁰

it. . . . If white supremacists use Facebook to conspire to conduct illegal activities targeting people of color or religious minorities — such as using a Facebook Events page to organize an armed rally to intimidate worshippers at a church, mosque, or synagogue — this may qualify as a conspiracy to deprive civil rights under 42 U.S.C. § 1985. If Facebook knew about this activity but neglected to try to prevent it, it could be liable for failing to satisfy its affirmative duty under 42 U.S.C. § 1986.”)

Whether such claims would ultimately be successful, and whether they might be affected by Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230 (2018) (which provides internet providers and platforms with immunity for third-party content posted on such platforms), is unclear. Textually, however, it appears that the immunity granted by § 230 would not be applicable to a § 1986 claim against an internet provider or platform. Section 230 provides immunity for third-party content; it does not (at least textually) provide immunity for a provider’s or platform’s failure to act in light of its own awareness of an illegal conspiracy that is being discussed on its services or platform. In other words, § 230 provides that providers and platforms are not liable for third-party content; it does not directly speak to liability for their own failure to act as required by law, including § 1986.

¹³⁷ Ch. 114, 18 Stat. 335, *invalidated in part by* The Civil Rights Cases, 109 U.S. 3, 25 (1883).

¹³⁸ See Goodwin, *supra* note 16, at 924–25.

¹³⁹ 14 CHARLES SUMNER, THE WORKS OF CHARLES SUMNER 424 (Boston, Lee & Shepard 1883); see also Carter, *supra* note 24, at 1330–35 (discussing the broad abolitionist vision of the Reconstruction Framers).

¹⁴⁰ Construing Congress’s constitutional powers to advance racial equality as having a breadth consistent with their original purposes, however, will likely raise questions concerning the Supreme

Second, at a doctrinal level, many of the principles developed in the pre-internet § 1986 jurisprudence are readily capable of adaptation to the online context. In *Park v. City of Atlanta*, discussed in section B.2 above, for example, the Eleventh Circuit held that “if [the defendants] knew of a § 1985(3) conspiracy, were in a position to prevent the implementation of that conspiracy, and neglected or refused to prevent it, they are liable under § 1986,” even if they did not themselves participate in the conspiracy.¹⁴¹ In the case of knowledge of conspiracies gleaned through online activities, the principles articulated by *Park* remain applicable, although they may lead to different outcomes in some cases. For example, a person who acquires such knowledge by mistake, briefly, and/or at such a high level of generality that a reasonable person would not believe the information to be serious or actionable might: (1) be found not to have been in a “position” to prevent the conspiracy by reporting it to the proper authorities because the person did not have

Court’s relatively recent and deeply wrongheaded decisions regarding congressional power to enforce the Reconstruction Amendments. *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny, as well as *Shelby County v. Holder*, 570 U.S. 529 (2013), have undermined the ability of Congress to use its powers under the Fourteenth and Fifteenth Amendments’ Enforcement Clauses to prevent and remediate civil rights violations, at least unless the situation Congress wishes to address is very close to one the Supreme Court has previously held is prohibited by the Constitution and Congress has demonstrated to the Court’s satisfaction that preventative or remedial legislation is necessary to protect the right in question. In the case of § 1986, the issues are at least twofold. First, given that the Court has held that the Fourteenth Amendment does not embrace an affirmative duty of government officials to prevent Fourteenth Amendment harms, *see DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989), the question will be whether a federal statute that imposes liability upon private persons who fail to act affirmatively to prevent such harms is a proper exercise of Congress’s power to enforce the Fourteenth Amendment or whether it amounts to the creation of a “new” constitutional right, *see Boerne*, 521 U.S. at 519 (“Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”). Second, given that the exigency originally motivating the Ku Klux Klan Act of 1871 (of which § 1986 was a part) and the relevant congressional findings occurred over 150 years ago, the issue will be whether § 1986 remains “congruent and proportional” to a current problem pursuant to *Boerne* and whether under *Shelby County* it is still sufficiently justified by “current needs.” *See id.* at 520 (stating that to aid in policing the line between permissible congressional rights enforcement and impermissible congressional rights creation, the Court must be able to find that “[t]here [is] a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”); *Shelby County*, 570 U.S. at 550 (stating, in finding the preclearance formula of the Voting Rights Act to be unconstitutional, that “a statute’s ‘current burdens’ must be justified by ‘current needs’” and determining that no such current needs sufficiently justified the preclearance formula (quoting *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203 (2009))). The constitutional time bombs that the *Boerne* line of cases and *Shelby County* represent may be avoidable — for example, because the right to be free from racial violence amounting to a badge or incident of slavery is a Thirteenth Amendment right, not a Fourteenth Amendment right — but they present significant potential challenges, not only to § 1986 but also to a range of other civil rights legislation. *See Douglas Laycock, Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 747–58 (1998) (noting that “[f]rom 1866 to 1991, Congress repeatedly enacted enforcement legislation that went beyond judicial interpretations of the constitutional right being enforced,” *id.* at 747, but that it is difficult to reconcile *Boerne*’s reasoning with the decisions upholding these earlier statutes).

¹⁴¹ *Park v. City of Atlanta*, 120 F.3d 1157, 1160 (11th Cir. 1997).

enough information to reasonably report; and/or (2) be deemed not to have “neglected” to report information that was so vague or encountered so briefly that a reasonable person would not have reported it.¹⁴² By contrast, the principles articulated by the trial court in *Vietnamese Fishermen’s Ass’n* would dictate that where the defendant was in a position of authority in the organization and actively participated in its activities (albeit not the particular § 1985 conspiracy), then they are equally liable for failure to act, regardless of whether their knowledge of the conspiracy came from online or in-person encounters. Such a defendant would be in a special position to intervene due to their authority within the organization, and their cumulative knowledge of the organization enables them to better understand when the organization has crossed the line from “mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence [to] preparing a group for violent action and steeling it to such action,”¹⁴³ thereby triggering a heightened duty to act to prevent it. Neither of these characteristics depends upon whether the defendant learned of the information online or in person.

IV. FIRST AMENDMENT IMPLICATIONS

This Essay advocates that § 1986 be utilized to impose liability upon persons who have knowledge of but fail to take action to prevent conspiracies to deny civil rights that are planned or discussed in online forums and via other electronic communications. Such liability would incentivize the reporting of such online plots to the relevant legal authorities. To the extent that § 1986 is interpreted to require such reporting in order to avoid liability, it raises a potential First Amendment argument: specifically, a person who is aware of but not a participant in the planning or execution of such a conspiracy¹⁴⁴ could argue that § 1986 compels speech in violation of the First Amendment. This section briefly sketches the contours of a compelled speech challenge to § 1986. This section ultimately concludes that while such a challenge is indeed colorable under the Supreme Court’s current and

¹⁴² Such potential defenses should, however, be firmly rejected if it appears that the defendant did not act reasonably in light of the facts known or was an active and regular viewer of the online forum where the conspiracy was discussed, or there are other indicia that such defenses are being raised in bad faith. In cases where such factors are present, there is no justification for applying a civil version of the rule of lenity; rather, the statutory language should be strictly construed, particularly because it is unambiguous.

¹⁴³ *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (first alteration in original) (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

¹⁴⁴ Because this Essay focuses solely on white-supremacist sympathizers or bystanders who were not themselves involved in planning or executing a § 1985(3) conspiracy, this Essay does not address the Fifth Amendment right against self-incrimination issues that might arise for those persons who were involved in the underlying conspiracy.

extremely expansive definition of compelled speech, it should ultimately prove unavailing.¹⁴⁵

The Supreme Court has held that compelled speech is an especially pernicious First Amendment violation. In *West Virginia State Board of Education v. Barnette*,¹⁴⁶ the Court stated that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹⁴⁷ The Court has noted that it has ruled “time and again that freedom of speech ‘includes both the right to speak freely and

¹⁴⁵ A separate First Amendment argument could be made that § 1986 might raise issues regarding the right to expressive association, at least in some circumstances. *See, e.g.,* *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (“[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.” (second alteration in original) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958))); *Patterson*, 357 U.S. at 462 (“Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”). In many § 1986 cases, these concerns likely will not arise at all. For example, a nonmember of a white-supremacist group who fails to report a conspiracy of which he had prior knowledge from reading online message boards on which the conspiracy was discussed presumably would not, as a nonmember, have associational rights regarding the group. In other cases, such issues may well arise — for example, in cases where a person who is a member of such a group (or perhaps even an active sympathizer who is not formally a member) is sued under § 1986 for failure to report knowledge of a conspiracy. Even in such cases, however, freedom of expressive association issues will not necessarily arise. For example, in some cases, no reference whatsoever to the defendant’s membership or sympathies may be necessary in order to prove the elements of a § 1986 claim. Thus, answering the questions “When did you become aware of the plan to use racially motivated violence in Charlottesville?” and “Did you act to intervene or report these facts to law enforcement?” requires the defendant to disclose neither *how* they became aware (for example, because they are a member of the group and therefore had access to the members-only social media group) nor *why* they failed to report (for example, because they participated in the planning of the conspiracy or were sympathetic to its aims). Moreover, even if disclosure of membership is inextricably linked to proving the elements of a § 1986 claim on the facts of a particular case, the protection of expressive association is not absolute; indeed, restrictions upon expressive association are not even subject to strict scrutiny. Rather, the Supreme Court has held that the applicable standard is “exacting scrutiny,” *Ams. for Prosperity*, 141 S. Ct. at 2383 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam)), under which “there must be ‘a substantial relation between the disclosure requirement and a sufficiently important governmental interest,’” *id.* (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)), and the disclosure requirement must “be narrowly tailored to the government’s asserted interest,” *id.* This standard, while rigorous, leaves room for overcoming a First Amendment claim with proof of the strong federal interest in preventing the harms to the victim and the community caused by acts of racial violence; the necessity of private action in preventing such harm, given the nature of white-supremacist groups’ use of online spaces as discussed in Part III; and the fact that § 1986 in the vast majority of cases likely requires only the reporting of facts regarding the conspiracy or action taken to prevent the conspiracy, rather than disclosure of one’s affiliations or sympathies. Nonetheless, careful lawyering would clearly be needed in certain cases in order to shape the litigation in ways that are sensitive to First Amendment concerns.

¹⁴⁶ 319 U.S. 624 (1943).

¹⁴⁷ *Id.* at 642.

the right to refrain from speaking at all.”¹⁴⁸ Indeed, the Court has indicated that compelled speech is so disfavored that it may be subject to a First Amendment standard even higher than strict scrutiny: “Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, [*Barnette*] said that a law commanding ‘involuntary affirmation’ of objected-to beliefs would require ‘even more immediate and urgent grounds’ than a law demanding silence.”¹⁴⁹

Because the Supreme Court’s recent cases have so greatly expanded compelled speech doctrine, there is at least a colorable First Amendment defense to be made against § 1986 liability for the failure to disclose prior knowledge regarding white-supremacist conspiracies. In *National Institute of Family & Life Advocates v. Becerra*¹⁵⁰ (*NIFLA*), for example, groups opposed to abortion that operated “crisis pregnancy centers” were required by California law to post various notices on site.¹⁵¹ Crisis pregnancy centers that were licensed to provide medical care were required to post notices regarding the availability of public programs providing free or low-cost reproductive-planning services, including abortion.¹⁵² Centers that were not licensed to provide medical care were required to post a notice stating that “[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.”¹⁵³

While the Court ultimately found that both notice requirements amounted to unconstitutional compulsion of speech,¹⁵⁴ the Court, consistent with its earlier decision in *Zauderer v. Office of Disciplinary Counsel*,¹⁵⁵ analyzed the two requirements quite differently. In *Zauderer*, the Court had held that a deferential standard of review is applicable to laws requiring the disclosure of “purely factual and uncontroversial information about the terms under which . . . services will be available”;¹⁵⁶ in such cases, the law should be upheld unless the required disclosure is “unjustified or unduly burdensome.”¹⁵⁷ As to the notice requirement applicable to the licensed centers in *NIFLA*, the Court

¹⁴⁸ *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)) (citing *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985); *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 9 (1986) (plurality opinion)).

¹⁴⁹ *Id.* at 2464 (quoting *Barnette*, 319 U.S. at 633).

¹⁵⁰ 138 S. Ct. 2361 (2018).

¹⁵¹ *Id.* at 2368–69.

¹⁵² *Id.* at 2369–70.

¹⁵³ *Id.* at 2730 (alteration in original).

¹⁵⁴ *Id.* at 2376, 2378.

¹⁵⁵ 471 U.S. 626 (1985).

¹⁵⁶ *NIFLA*, 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651).

¹⁵⁷ *Id.* (quoting *Zauderer*, 471 U.S. at 651).

found that heightened scrutiny rather than the more deferential *Zauderer* standard was warranted, reasoning that this notice requirement was “not limited to ‘purely factual and uncontroversial information about the terms under which . . . services will be available.’ . . . Instead, it require[d] these clinics to disclose information about *state*-sponsored services — including abortion, anything but an ‘uncontroversial’ topic.”¹⁵⁸ The Court therefore held that intermediate scrutiny applied and found that this notice requirement failed intermediate scrutiny.¹⁵⁹ The Court, however, emphasized that its reasoning did not call into question “the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”¹⁶⁰ As to the requirement that unlicensed centers post notices disclosing that they were unlicensed to provide medical care, the Court assumed *arguendo* that the more deferential *Zauderer* standard of review was applicable.¹⁶¹ The Court nonetheless found this notice requirement to be unconstitutional because the state’s proffered justification was, in the Court’s view, “purely hypothetical.”¹⁶²

Even under the Supreme Court’s current extremely broad vision of compelled speech doctrine as exemplified by *NIFLA*, § 1986 should not raise significant compelled speech issues for several reasons. The primary reason that a compelled speech challenge to § 1986 should be unavailing is that the duty to report for which this Essay advocates does not implicate the free speech values underlying compelled speech doctrine. The harm of unconstitutionally compelled speech is, in the Court’s words, that it forces “individuals to *endorse ideas* they find objectionable.”¹⁶³ By contrast, disclosing purely factual information about a white-supremacist conspiracy — for example, who was engaged in the planning, what is the nature of the plan, when the conspirators intend to execute it, or who would be endangered by the conspiracy — does not entail an “idea.” Purely factual information is not an “idea” in the sense of, say, saluting the flag, as in *Barnette*;¹⁶⁴ nor even in the more

¹⁵⁸ *Id.* (first omission in original) (citations omitted) (quoting *Zauderer*, 471 U.S. at 651) (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995)).

¹⁵⁹ *Id.* at 2373–76.

¹⁶⁰ *Id.* at 2376.

¹⁶¹ *Id.* at 2377 (“Even under *Zauderer*, a disclosure requirement cannot be ‘unjustified or unduly burdensome.’ Our precedents require disclosures to remedy a harm that is ‘potentially real[,] not purely hypothetical,’ and to extend ‘no broader than reasonably necessary.’” (citations omitted) (quoting *Zauderer*, 471 U.S. at 651; *Ibanez v. Fla. Dep’t of Bus. & Pro. Regul.*, 512 U.S. 136, 146 (1994); *In re R.M.J.*, 455 U.S. 191, 203 (1982)) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977); *Zauderer*, 471 U.S. at 649)).

¹⁶² *Id.* (quoting *Ibanez*, 512 U.S. at 146).

¹⁶³ *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018) (emphasis added) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988)).

¹⁶⁴ *Barnette*, 319 U.S. at 632.

capacious sense of a union's expressive activity in furtherance of its collective bargaining duties, as in the Court's more recent decision in *Janus v. AFSCME*.¹⁶⁵ While facts may inform, shape, or indicate one's agreement with ideas, they are not themselves ideas. This is not to suggest that purely factual information is unprotected by the First Amendment or that it lacks any value;¹⁶⁶ rather, it merely recognizes that because facts are not themselves ideas, factual information that is uncoupled from First Amendment values receives lesser protection than factual information that does implicate First Amendment values. Hence, for example, being required to disclose one's identity for purposes of identification while driving a vehicle is quite different for First Amendment purposes than being required to disclose one's identity as the author of a controversial political article.

Secondly, and perhaps more importantly for purposes of compelled speech doctrine: even if purely factual information about white-supremacist conspiracies to violate civil rights were somehow deemed to be an "idea," disclosing those facts does not entail the "endorsement" thereof (or, for that matter, the nonendorsement thereof). Section 1986 is viewpoint neutral: it applies to any person possessing the requisite information. Such a viewpoint-neutral requirement to disclose information about white-supremacist plots does not "force citizens to confess by word or act"¹⁶⁷ their belief in the government's preferred message or ideology. Although the Supreme Court has held that viewpoint-based required disclosure of certain information that is arguably purely factual, such as compelled disclosure of one's membership in advocacy organizations¹⁶⁸ or one's authorship of a political publication,¹⁶⁹ can raise significant First Amendment concerns, those concerns arise precisely because the fact of one's membership in an organization or identity as an author is also indicative of one's endorsement of the organization's ideology or the publication's content.

¹⁶⁵ *Janus*, 138 S. Ct. at 2459–60.

¹⁶⁶ *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. . . . Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." (citations omitted) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (plurality opinion)); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."); *Va. State Bd. of Pharmacy*, 425 U.S. at 762 ("Purely factual matter of public interest may claim [First Amendment] protection." (citing *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940))).

¹⁶⁷ *Barnette*, 319 U.S. at 642.

¹⁶⁸ *See, e.g., Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

¹⁶⁹ *See, e.g., McIntyre*, 514 U.S. at 337.

Finally, a duty to report under § 1986 fits within the Court's reasoning in *NIFLA* regarding the circumstances in which a deferential standard of review should apply to certain required disclosures of factual information. The Court noted in *NIFLA* that its decision should not be read to call into question "the legality of health and safety warnings long considered permissible."¹⁷⁰ Section 1986's duty to report is essentially a safety warning: it requires (at minimum) disclosure to law enforcement authorities of information known in advance about an underlying illegal conspiracy to cause significant harm.

CONCLUSION

As white-supremacist groups increasingly use closed-network online spaces to plot violent racist conspiracies, it will become ever more difficult for law enforcement officials or antiracist private actors to become aware of such plots in time to prevent them from being carried out. While the solutions to this dilemma must be multifaceted, § 1986 provides one tool for addressing it.

Violence as an instrument of white supremacy, and the role of bystanders in allowing it, has a long and painful history. Section 1986 should, consistent with the philosophy of the Reconstruction Congresses, be construed broadly in order to exert an equal and opposite force upon bystanders to require their participation in preventing violent racist conspiracies. By raising the specter of significant monetary damages for bystanders who become aware of white-supremacist conspiracies that are planned or discussed online, § 1986 provides a significant but under-utilized tool to encourage these bystanders to take action to prevent such conspiracies before they claim yet more victims.

¹⁷⁰ *NIFLA*, 138 S. Ct. 2361, 2376 (2018).